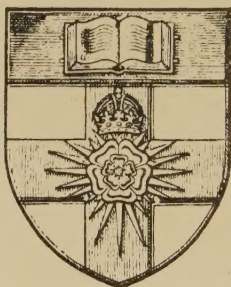


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CAMELL LAIRD & CO., LTD. *v.* MANGANESE BRONZE
AND BRASS CO., LTD.

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Russell, Lord Macmillan and Lord Wright), February 6, 8, 9, 12, 13, 15, March 27, 1934]

[Reported [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T.142; 50 T.L.R. 350; 39 Com. Cas. 194]

Sale of Goods—Condition—Reliance on skill and judgment of seller—Proof—Goods supplied in accordance with detailed specification given by buyer—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 14 (1), s. 14 (2).

Reliance by the buyer on the skill or judgment of the seller within s. 14 (1) of the Sale of Goods Act, 1893, may be inferred from the communication by the buyer to the seller of the purpose for which the goods are bought and need not be supported by positive evidence.

Dictum of LORD SUMNER in *Manchester Liners, Ltd. v. Rea, Ltd.* (1), [1922] 2 A.C. 74, applied.

There is no general rule that where a manufacturer agrees to make, in accordance with a detailed specification given him by the buyer, a machine of a description which it is in the course of his business to supply, the provisions of s. 14 (1) of the Act of 1893 must necessarily be excluded. There may be such room for the skill or judgment of the manufacturer as to admit of a finding that the buyer relied on that skill or judgment and so brought himself within the subsection. The reliance on the manufacturers' skill or judgment need not be total or exclusive, though it must be substantial and effective.

Dictum of LORD SUMNER in *Medway Oil and Storage Co., Ltd. v. Silica Gel Corpn.* (2) (1928), 33 Com. Cas. 195, applied.

The defendant company accepted an order to make propellers for two ships to a plan and dimensions specified by the plaintiffs. The contract contained the following clause: "[The propellers] to be to the entire satisfaction of the owners' [of the ships] representative and ourselves." One of the propellers when fitted to the ship made such a noise when the engines were working at certain revolutions that Lloyd's surveyor refused to class the ship. In an action by the plaintiffs claiming damages for breach of contract in respect of the supply of a propeller,

Held: the clause referred, not only to the quality of the material or workmanship of the propeller, but also to its working when in operation in the ship, and, therefore, the plaintiffs were entitled to succeed.

Per LORD WRIGHT: (i) the propeller not being a standard propeller, but having been ordered for a particular ship, the plaintiffs could not rely on the warranty of merchantable quality provided by s. 14 (2) of the Sale of Goods Act, 1893; (ii) a guarantee of the propeller in the contract "against defective material and work-

manship for a period of six calendar months" would not negative any implied condition available to the plaintiffs under s. 13, s. 14 (1), or s. 14 (2) of the Act. A

Wallis, Son and Wells v. Pratt and Haynes (3), [1911] A.C. 394, applied.

Notes. Considered: *Millar's Machinery Co. v. Way & Son* (1935), 40 Com. Cas. 204; *Stewart v. Reavell's Garage*, [1952] 1 All E.R. 1191. Referred to: *Grant v. Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. 209; *Minster Trust, Ltd. v. Traps Tractors, Ltd.*, [1954] 3 All E. R. 136. B

As to implied terms as to quality and fitness of goods in a contract for their sale, see 29 HALSBURY'S LAWS (2nd Edn.) 63 et seq., and for cases, see 39 DIGEST 440 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

- (1) *Manchester Liners, Ltd. and another v. Rea, Ltd.*, [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 38 T.L.R. 526; 66 Sol. Jo. 421; 27 Com. Cas. 274, H.L.; 39 Digest, 445, 744. C
- (2) *Medway Oil and Storage Co., Ltd. v. Silica Gel Corp'n.* (1928), 33 Com. Cas. 195, H.L.; Digest Supp.
- (3) *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 12 Digest (Repl.) 471, 3509. D
- (4) *Re Blyth Shipbuilding and Dry Docks Co., Ltd., Forster v. Blyth Shipbuilding and Dry Docks Co., Ltd.*, [1926] Ch. 494; 95 L.J.Ch. 350; 134 L.T. 643, C.A.; Digest Supp.
- (5) *Hall v. Burke* (1886), 3 T.L.R. 165, C.A.; 39 Digest 442, 709.
- (6) *Preist and Wife v. Last*, [1903] 2 K.B. 148; 72 L.J.K.B. 657; 89 L.T. 33; 51 W.R. 678; 19 T.L.R. 527; 47 Sol. Jo. 566, C.A.; 39 Digest 444, 727. E
- (7) *Bristol Tramways and Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest, 418, 512.
- (8) *Thorn v. Mayor and Commonalty of London* (1876), 1 App. Cas. 120; 45 L.J.Q.B. 487; 34 L.T. 545; 40 J.P. 468; 24 W.R. 932, H.L.; 12 Digest (Repl.) 416, 3231.
- (9) *Gillespie & Co. v. Howden & Co.* 1885, 12 R. (Ct. of Sess.) 800; 12 Digest (Repl.) 417, 1628. F
- (10) *Jones and another v. Just* (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.
- (11) *Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest 447, 753.
- (12) *Drummond v. Van Ingen* (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 36 W.R. 20; 3 T.L.R. 541, H.L.; 39 Digest 454, 813.
- (13) *Macfarlane v. Taylor* (1868), L.R. 1 Sc. & Div. 245; 18 L.T. 214, H.L.; 39 Digest 443, 719.
- (14) *Jones v. Bright* (1829), 5 Bing 533; Dan. & Ll. 304; 3 Moo. & P. 155; 7 L.J.O.S.C.P. 213; 130 E.R. 1167; 39 Digest 449, 766.
- (15) *Gardiner v. Gray* (1815), 4 Camp. 144; 17 E.R. 46; 39 Digest 451, 790.
- (16) *Asfar & Co. v. Blundell and others*, [1896] 1 Q.B. 123; 65 L.J.Q.B. 138; 73 L.T. 648; 44 W.R. 130; 12 T.L.R. 29; 40 Sol. Jo. 66; 8 Asp. M.L.C. 106; 1 Com. Cas. 185, C.A.; 29 Digest 257, 2082.
- (17) *Baldry v. Marshall*, [1925] 1 K.B. 260; 94 L.J.K.B. 208; 132 L.T. 326, C.A.; 39 Digest 448, 762. H

Appeal by the plaintiffs from a decision of the Court of Appeal (SCRUTTON and LAWRENCE, L.J.J.; GREER, L.J., dissenting ([1933] 2 K.B. 141). I

The plaintiffs, Cammell Laird & Co., Ltd., shipbuilders and engineers, claimed damages against the defendants, the Manganese Bronze and Brass Co., Ltd. for alleged breach of contract in connection with the supply of a ship's propeller for use in a ship which the plaintiffs were building.

The Court of Appeal held by a majority, reversing the decision of ROCHE, J., that the plaintiffs did not either expressly or by implication make known to the defendants the particular purpose for which the propeller was required within the meaning of s. 14 (1) of the Sale of Goods Act, 1893, nor did they show the defendants that they relied, nor

did they in fact rely, on the defendants' skill and judgment on the question whether the propeller of which the plaintiffs prescribed the leading dimensions would work suitably in combination with the engines, specification of which was prescribed by the plaintiffs and not made known to the defendants. There was, therefore, no implied condition that the propeller was reasonably fit for the purpose.

It was held, also, per curiam, that there was no evidence that the propeller had faults which made it unmerchantable within the meaning of s. 14 (2) of the Sale of Goods Act, 1893. The plaintiffs appealed.

Miller, K.C., and *F. A. Sellers* for the appellants.

Sir W. N. Raeburn, K.C., and *H. G. Robertson* for the respondents.

The House took time for consideration.

March 27, 1934. **LORD TOMLIN.**—The appellants are shipbuilders with a ship-building yard on the River Mersey. The respondents are makers of ship propellers and other articles made of manganese-bronze manufactured in accordance with a special process belonging to the respondents.

On Jan. 31, 1930, the appellants, by two separate contracts, contracted to build for and sell to United Molasses Co., Ltd. (hereinafter called the owners), two sister vessels, subsequently named the *Athelfoam* and the *Athelbeach*. Each contract provided for the building, fitting up, and completion by the appellants at their own expense of the vessel therein referred to in accordance with agreed specifications and plans and for the purchase by the owners of the vessel when completed. Each vessel was to be constructed to be classed at Lloyd's 100 A1 for carrying petroleum or molasses, and all things necessary to obtain the classification were to be done by the appellants. The *Athelfoam* was to be fitted with main propelling diesel engines of "North-Eastern" type, to be constructed by the North-Eastern Marine Engineering Co., Ltd. The maximum horse-power of these engines was 2,300 shaft horse-power at 110 revolutions per minute. The *Athelbeach* was to be fitted with main propelling diesel engines of Burmeister and Wain, Harland and Wolff type, to be constructed by Messrs. John G. Kincaid & Co., Ltd. The maximum horse-power of these engines was 2,150 shaft horse-power at 105 revolutions per minute. Except for the difference in the make of the engines there was to be substantially no difference between the two vessels. The *Athelfoam*, which in the appellants' yard was known as No. 972, was to be completed and handed to the owners not later than twelve-and-a-half calendar months from Dec. 1, 1929. The *Athelbeach*, which in the appellants' yard was known as No. 973, was to be completed and handed to the owners not later than thirteen-and-a-half calendar months from Dec. 1, 1929.

In February, 1930, the appellants, after some correspondence with the companies supplying the two sets of engines for the two twin vessels as to the most suitable form of propeller for such vessels, approached the respondents for a quotation for the supply of the necessary propellers. This approach led, on April 14, 1930, to the placing by the appellants with the respondents of a provisional order for the propellers expressed, omitting formal parts, in the following terms:

"Engines Nos. 972/3.—With reference to your quotation of March 4 last amended per your representative on the 8th instant, we now place provisional order with you for one four-bladed right-hand solid bronze propeller for each of the above engines. The propeller to be 16 ft. diameter with 11 ft. 3 in. pitch, and to have a total developed area of 80 square feet in four blades. To be supplied by you finished machined complete, polished all over in the highest class style with boss bored and keyway cut to our templates. Edges brought up to fine lines, true to pitch, ready for fitting on to shaft, for the sum of £638 each, delivered carriage paid to these works. Our official order will be forwarded to you in the course of a few days."

The provisional order was acknowledged by the respondents in a letter dated April 15, 1930, in which they said:

"We note your official order will follow in the course of a few days, and when

sending same we should be obliged if you would kindly mention the maximum indicated horse-power with corresponding revolutions to enable us to check sections for guarantee purposes."

The guarantee referred to in this letter was, apparently, the usual guarantee given by the respondents against defective material and workmanship for a period of six months after handing over of the vessel to the owners.

On May 1, 1930, the appellants wrote to the respondents enclosing a working print, No. 206,694, giving the information as to the horse-power and revolutions of the engine and asking whether the scantlings proposed (that is as shown on the working print) had their approval. On May 19, 1930, the respondents wrote to the appellants:

"We confirm that the scantlings shown on your working print are in order on the basis of i.h.p. [indicated horse-power] and revolutions you mention."

On the same day the appellants placed with the respondents an order for the propeller of each of the two vessels. The order for the propeller for the *Athelfoam* was, so far as material, in the following form:

"Messrs. Manganese Bronze and Brass Co., Ltd., London.—Order No. M. 84126.
—May 19, 1930.

"Please supply and deliver carriage paid to us, at the following address:—

"Cammell, Laird & Co., Ltd., Tranmere Engine Stores, Birkenhead.

"Job Engines No. 972. . .

"Propeller of special Parson's manganese-bronze.

"One four-bladed, right-hand solid propeller, to be 16 ft. diameter with a pitch of 11 ft. and to have a total developed area of 80 square feet in four blades. Maximum b.h.p.—2,150 at 105 r.p. minute.

"Propeller to be supplied finished machined complete and polished all over in highest class style, with boss bored, faced, and keyway cut to our template, edges brought up to fine lines, true to pitch, ready for fitting to shaft on delivery.

"Please notify us in good time when ready for templates. Copy of pitch readings to be sent to us for our information. Sweeps, boards, &c., to be supplied by you. For further particulars see print No. 206699 a copy of which you have. To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of vessel to owners. To be to the entire satisfaction of the owners' representative and ourselves. Price £638 lump sum."

The order for the propeller for the *Athelbeach* was in the same form mutatis mutandis, but with Aug. 1 substituted for July 14 as the date of delivery. It will be noted that in these orders the pitch had been altered from 11 ft. 3 in., as shown in the provisional order, to 11 ft. and that a different working print is referred to. The alteration in pitch appears to have been the result of further consultation between the appellants and the makers of the engines, and the new working plan gave effect to the alterations. Such new working plan was in fact sent by the appellants to the respondents in a letter dated May 21, 1930, in which they said, "We send you a copy of print No. 206,699, to which we require you to work." Some further correspondence took place as to price, which was ultimately agreed at £672 per propeller. The appellants also later proposed again to alter the pitch, but ultimately, on June 14, 1930, they wrote to the respondents to make the pitch 11 ft., as originally ordered, adding,

"It is, however, important that this figure should be a minimum, and we should prefer that any errors in manufacture should tend to coarsen the pitch."

The working drawing to which the respondents were required to work showed, according to the evidence of the respondents' experts, the information necessary to enable the order to be carried out. This information included particulars as to the thickness required along the medial lines of the propeller blades, but beyond these particulars and the direction in the order, "edges brought up to fine lines," there were no specific instructions as to the thickness of the blades. Mr. Mearns, the manager of the respondents' marine department, stated in his evidence that all the rest of the thickness of the blade, apart from the thickness of the medial line, was a matter for the

A respondents as propeller experts, and that if particular importance had been attached to the thickness of the edges a dimension would be expected to be given by the appellants. The two propellers were in fact constructed in all respects in accordance with the design and working drawings within the limits of permitted tolerance and were duly passed as satisfactory for tensile strength and other like matters by the surveyor of Lloyd's Register of Shipping. The blades of each propeller were brought to a fine edge in the usual way
B by chipping (sometimes referred to as machining) with the result that there were necessarily small variations in thickness at different points in the several blades.

The propellers were duly delivered and fitted to the two vessels, which then underwent trials. The propeller fitted to the *Athelbeach* proved on trial satisfactory, although there was some hum from it, and this ship was passed and classed at Lloyd's 100 A1 for carrying petroleum or molasses. On the trial of the *Athelfoam*, which took place on
C Nov. 20, 1930, a noise occurred when the engines were running at revolutions below 100 per minute of so serious a character that the vessel could not be passed and classed at Lloyd's as A1. At first it was not ascertained where the noise originated, but ultimately, after a number of trials and experiments, the source of the noise was ascertained to be in the propeller, though it remained a matter of controversy what characteristic of the propeller gave rise to the noise. The respondents then provided a first replace
D propeller without prejudice to the rights of the parties. This first replace was constructed according to the same design and working drawing and was duly passed for tensile strength and the like.

This first replace also proved unsatisfactory for the same reason as the first *Athelfoam* propeller, although the noise made was considerably less. A second replace was then provided by the respondents, again without prejudice to the rights of the parties. This
E second replace was constructed according to the same design and working drawing and was duly passed for tensile strength and the like. When fixed to the *Athelfoam* it proved satisfactory. In the course of the various trials which were made the *Athelbeach* propeller was tried on the *Athelfoam* and found to operate quite silently.

All four propellers provided by the respondents were constructed in all respects in accordance with the specification and a working plan. In each case the thickness of
F the blades in their medial lines corresponded, within permitted tolerances, with the thicknesses prescribed in the working plan. There were differences of thickness in the blades in other respects. Speaking generally, in the neighbourhood of the base of the several blades, the blades or some of the blades of the satisfactory propellers were slightly thicker than the blades of the unsatisfactory propellers, and the weight of each of the satisfactory propellers was slightly greater than the weight of either of the unsatisfactory propellers. The engines of neither vessel displayed any unusual characteristic. Each propeller was properly fitted to the propeller shaft. Of the four
G propellers two were satisfactory in operation and two were unsatisfactory.

In these circumstances the appellants sued the respondents for £6,277 5s. 1d. damages for breach of contract. The respondents counterclaimed for the price of the two replace propellers and for some expenses incurred by them. ROCHE, J., who tried the case,
H directed judgment to be entered in the action for the appellants for an amount of damages to be ascertained, failing agreement, by a special referee, and also gave judgment in the appellants' favour on the counterclaim. The learned judge took the view that the case fell within s. 14 (1) of the Sale of Goods Act, 1893, and that there had been a breach of the warranty there implied. He also decided some points of detail upon the amount of damages. He thought, however, that there had been no breach of the
I clause as to satisfying the owners' representative, having regard to the view which he took of the meaning of the clause.

On appeal the Court of Appeal by a majority (GREER, L.J., dissenting) allowed the appeal, holding in effect that the case did not fall within either sub-s. (1) or (2) of s. 14 of the Sale of Goods Act, 1893, and that the clause in the contract containing the words "to be to the entire satisfaction of the owners' representative and ourselves" had not, on its true construction, been breached.

GREER, L.J., on the other hand, took the view that the last-mentioned clause could not be read as meaning anything except that the propeller, in addition to being made

to the specified dimensions, should be to the entire satisfaction of the owners' representative and the buyers, and that the respondents undertook that the propeller they made in accordance with the appellants' requirements should satisfy a third party—namely, the owner for whom the appellants were building the ship—and that there had been a breach of this term of the contract. A

The case is one of considerable difficulty, but I have arrived at the conclusion that the view of GREER, L.J., as to the meaning of the clause as to satisfaction, is the correct one. B
It must be borne in mind that the owners were not parties to the contract between the appellants and respondents, that, undoubtedly, the contract left some matters undefined and to be determined according to the skill and judgment of the respondents, and that the propellers were being supplied to the knowledge of all parties for use as parts of ships which had to satisfy the owners' requirements. The owners knew nothing of the terms of the contract between the appellants and respondents, and it seems C
natural that the appellants should, in the circumstances of the case, require the makers of the propellers to satisfy the owners. In fact, it was not till each propeller was fitted to its ship and the ship was given its trial that the owners were in a position to express any satisfaction or dissatisfaction. In my judgment, the language of the clause in question is apt to provide for, and does provide for, just such a position. The owners D
admittedly after the trials were dissatisfied and expressed dissatisfaction. Further, in my opinion, it is the proper inference from all the facts that the source of the trouble lay in the region of the matters left to the skill and judgment of the respondents, and that even if the satisfaction clause was to operate only in respect of these matters the owners were still entitled to express dissatisfaction.

I think, therefore, that the conditions of the clause were not fulfilled and that the respondents are liable in damages to the appellants for breach of it. The narrower meaning attributed to the clause by ROCHE, J., and the majority of the Court of Appeal seems to me to deprive it of any real effect. Upon the view which I take of the satisfaction clause the case can be disposed of without considering the effect of s. 14 of the Sale of Goods Act, 1893, but, having had an opportunity of considering the opinion which is about to be read by my noble and learned friend LORD WRIGHT, I desire to say that I agree with the views which he expresses upon the meaning of that section and upon its E
application to the facts of this case. In my opinion, the appeal should be allowed, with costs, and as I agree with the learned trial judge upon the questions of detail in relation to damage I think his judgment should be restored. F

LORD WARRINGTON.—I have carefully read and considered the opinions prepared by my noble and learned friend on the Woolsack and my noble and learned friend LORD WRIGHT. With these opinions I entirely concur and can add nothing except that I G
wish to make it plain that, in common with LORD WRIGHT and with GREER, L.J., I am clearly of opinion that the appellants have brought themselves within the provisions of s. 14 (1) of the Sale of Goods Act, 1893. I rely particularly on *Manchester Liners, Ltd. and another v. Rea, Ltd.* (1). The point in that case was that reliance by the purchaser on the skill and judgment of the vendor may be inferred from the communication by the purchaser of the particular purpose for which the goods in question were purchased, H
and need not be supported by positive evidence as the Court of Appeal, in the judgment appealed from and reversed, had thought. LORD SUMNER ([1922] 2 A.C. at p. 90) lays stress on the fact that the words are "so as to show" not "and also shows," and that these words are satisfied if the reliance is a matter of reasonable inference.

On the face of the contract the purpose for which the offending propeller was ordered was for use with the engines of Job 972. There is evidence that the seller knew that these engines were to be diesel engines with, of course, the peculiarities inseparable from engines of that type, and ROCHE, J., so held. I agree that the buyer did sufficiently make known to the seller the purpose for which the goods were required. I am further of opinion that he did this "so as to show that he relied on the seller's skill and judgment." I agree with the conclusion of LORD WRIGHT that such reliance need not be exclusive. I
Here there was a substantial area outside the specification, which was not covered by its directions, and was, therefore, necessarily left to the skill and judgment of the seller. Without attempting to express an opinion on the actual cause of the trouble, I think it

A is clear that it arose from some defect in the sellers' area. Four propellers were made, each in accordance with the specification. Two were noisy, two were not. The good one made for engine 973 proved satisfactory when fitted to engine 972. Of the two "replace" propellers made for 972 the first was noisy, the second was not. Defects in fitting are out of the question. In each case the specification was accurately followed. I cannot escape from the conclusion that the trouble in the case of the two rejected propellers arose in that part of the manufacture which was left to the sellers' skill and judgment. I concur in the motion proposed from the Woolsack.

LORD RUSSELL.—We must approach this case upon the footing that the first two propellers which were made for the *Athelfoam* were the source of the excessive noise which prevented the *Athelfoam* from being classified by Lloyd's surveyor, but I do not feel that the evidence would justify us in holding that any particular feature or detail in the construction of these propellers had been proved to be responsible for the noise. In view, however, of the facts that the *Athelbeach* propeller worked satisfactorily on both ships, that the third propeller which was made for the *Athelfoam* worked satisfactorily on the *Athelfoam*, and that both those propellers complied with all the particulars and details which were stipulated for in the contract and the blueprint, we are entitled to say that none of those particulars or details can have been responsible for the defect. Each of the first two *Athelfoam* propellers had a serious defect, for which the appellants were in no way responsible, but which inevitably caused the representative of the owners of the *Athelfoam* to be dissatisfied therewith, and, indeed, to refuse to accept delivery of the ship on that account. Neither of those propellers was "to the entire satisfaction of the owners' representative."

E There was, therefore, according to the plain *prima facie* meaning of the words used in the contract, a breach of one of its express terms. I confess that I share GREER, L.J.'s difficulty in seeing what answer there can be to the claim for breach of this express term. Both ROCHE, J., and SCRUTTON, L.J., dispose of this part of the case by saying that, if the article is manufactured in accordance with the specification and is of good material and workmanship, the buyer has no right to express dissatisfaction about something else which is not in the contract, and thereby add a term to the contract. They both seem to overlook the fact that this contract requires the satisfaction of a third party who is a stranger to the contract, and who may know nothing of its terms. LAWRENCE, L.J., although he does at one point refer to the owners, deals with the clause upon substantially the same footing, for he says:

G "The satisfaction of the person ordering the article must . . . be limited to satisfaction with something which under the contract the manufacturer has bound himself to do."

Whether or not this view is correct as regards the buyer (as to which I express no opinion), I can see no ground for so limiting the clause as regards a stranger to the contract. In terms there is an obligation on the respondents to make a propeller which will satisfy a third person. No doubt, the third person must act in good faith and not capriciously. But that is only to say, in other words, that he must in fact be dissatisfied with the propeller before it can be alleged that the express term has been broken. I can find no justification for modifying the absolute nature of this term of the contract. Even if its operation were limited to satisfaction in respect of matters not specifically covered by the contract, the facts of this case fall within it, because, as indicated above, the cause of the noise must be some feature or property not covered by the specified particulars and details.

I Nor can I see any ground for limiting the operation of the clause to satisfaction with the propeller as a manufactured article, and saying that it does not include satisfaction with the propeller in operation. But even so limited, the clause would apply here. The owner is dissatisfied with the propeller, not with its propelling; the dissatisfaction is with the propeller because it contains some feature or property which results in excessive noise. The dissatisfaction is with the propeller because, as manufactured, it contains that undesirable feature or property.

In my opinion, the appellants are entitled to succeed on this ground alone. In this

view, it is unnecessary to consider the provisions of the Sale of Goods Act, 1893, but I may say that, having read the opinion about to be delivered by my noble and learned friend LORD WRIGHT, I agree with him that the appellants are also entitled to succeed upon the ground that the case is one which falls within s. 14 (1) of that Act.

LORD MACMILLAN.—Every aspect of this case is so fully discussed in the opinions of my noble and learned friends, which I have had the advantage of reading, that there is little left to say. In view, however, of the diversity of opinion in the courts below, and as we are differing from the majority of the learned judges of the Court of Appeal, I may perhaps fittingly add a brief contribution in my own words.

It may seem surprising that a problem apparently so simple should have given rise to so much controversy. The respondents are specialists in the manufacture of ships' propellers. The appellants, who are shipbuilders, placed an order with them for a propeller for a ship which the appellants were building. The order stated the dimensions and other particulars of the propeller required and referred for further particulars to a print containing detailed drawings. It was stipulated that the propeller should be to the entire satisfaction of the building owners' representative and of the appellants. The propeller, when supplied and fitted to the ship, was found on trial to be so noisy as to be quite unserviceable. The respondents supplied a second propeller, which proved little better. Finally they supplied a third propeller, which worked quite satisfactorily. The question is, Who is to bear the loss consequent upon the respondents having supplied to the appellants the two propellers which had to be discarded?

If there is one thing clear, it is that the two discarded propellers were certainly not to the entire satisfaction either of the appellants or of the building owners' representative. There is no suggestion that their dissatisfaction was unreasonable or expressed otherwise than in good faith. There would thus seem to have been a plain breach of a specific stipulation of the contract. The respondents do not dispute that they undertook to supply a propeller to the entire satisfaction of the appellants and of the building owners' representative, but they say that this requirement had reference, not to the working of the propeller, but only to its manufacture. The stipulation, they submit, was met if the propeller as delivered at the appellants' premises was satisfactory to them as regards material and workmanship and conformity with the order and if no dissatisfaction with it was then expressed.

So narrow an interpretation of the stipulation appears to me to rob it of all business efficacy. The appellants wanted a propeller that would work. How could they know whether it was satisfactory until they had tried it? It has been proved that the unsatisfactory operation of the two discarded propellers was not due to the terms of the specification or to the way in which they were fitted to the ship or to any peculiarity in the ship itself or its engines, for at the third attempt the respondents supplied a propeller made to the same specification which when similarly fitted to the ship worked satisfactorily, and a propeller made by the respondents to a practically identical specification for a sister ship also worked satisfactorily. The experts appear to have found great difficulty in ascertaining why the first two propellers worked unsatisfactorily, but it is, I think, demonstrated that the cause resided in the propellers themselves. I, accordingly, share the view of my noble and learned friends that the respondents are responsible for the loss occasioned by their failure at their first two attempts to supply a propeller to the satisfaction of the building owners' representative and the appellants.

The appellants also contended that they were entitled to succeed under s. 14 (1) of the Sale of Goods Act, 1893. That section contains what is left of the rule of caveat emptor, but the exceptions have made large inroads upon it. The rule does not apply

“where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are supplied, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply”;

in such a case “there is an implied condition that the goods shall be reasonably fit for such purpose.”

Now there is no question that it is in the course of the respondents' business to supply

A ships' propellers. But there is room for argument as to whether the appellants made known to the respondents "the particular purpose" for which the propeller was wanted. On the one hand, it was contended that no particular purpose was expressed or implied which the propeller was to serve, and that if any purpose was implied it was merely the ordinary and general purpose which all ships' propellers serve, namely, as the word itself connotes, the purpose of propulsion. On the other hand, it was contended that
B the contract disclosed that the propeller was wanted for a particular purpose, the purpose, namely, of being fitted to and working in association with the ship and engines No. 972 which the appellants were building. Having regard to the decision and the reasoning in the case of *Manchester Liners, Ltd. and another v. Rea, Ltd.* (1), I am of opinion that there was in the present instance sufficient disclosure of a particular purpose within the statutory meaning.

C But that is not enough. To get the benefit of s. 14 (1), the particular purpose must be so made known as to show that the buyer relies on the seller's skill or judgment. The respondents' argument was that the appellants by their detailed specification so tied the respondents' hands as to negative the idea that anything was left or intended to be left to their skill or judgment, except mere matters of material and workmanship, as to which there was no suggestion of failure on their part. That there was an important
D margin within which the respondents' skill and judgment had scope for exercise is best demonstrated by the fact, already mentioned, that while all the three propellers which they made for this ship were in conformity with the specification, it was only at the third attempt that the respondents succeeded in supplying a propeller that would work.

The defect, whatever it was, which existed in the first two propellers as well as the remedying of that defect achieved in the third propeller, thus lay in the region within
E which the respondents were free, so far as the specification went, to exercise their skill and judgment. I, therefore, reach the conclusion that there was room here for the exercise of the respondents' skill and judgment, and I hold that the particular purpose for which the propeller was wanted was so made known to the respondents as to show that the appellants relied on their skill and judgment.

The appellants are thus entitled, in my opinion, to succeed on both the grounds which
F I have discussed.

LORD WRIGHT.—The facts of this case and the terms of the contract to be considered have been so completely dealt with by the noble and learned Lord on the Wool-sack that I need not go over the ground again. As to the facts, I only observe that it seems to be the fair inference that nothing in the specification or plan can account for
G the trouble which showed itself in two of the four propellers; nor can the explanation be found in the critical periods of the engines, which, indeed, were only such as might be expected in any diesel engine of the stated horse-power and revolutions. Various theories were advanced. ROCHE, J., thought that the cause might well be traced to what was called the trimming or machining of the propellers in regard to final shape and thickness. Only the medial thicknesses of the blades were specified; it was left to the
H discretion and skill of the respondents and their experienced workmen to bring the blade out to fine edges; the blades which came from the foundry in the rough were trimmed by hand according to the discretion of the respondents' men. There were small differences of weight in the different propellers and differences in the distribution of the weight, especially at the parts of the blade near the boss; these might account for an undue vibration and that might cause the noise. However this may be, it was
I admitted that the finishing was left to the skill of the respondents as makers; they were also responsible for the material and for scaling actual contours from the plans; in these and in other ways there were matters outside the given plan and particulars left to their discretion, and it seems a reasonable inference that it is in such matters that the obscure cause of the trouble is to be found. No one anticipated this peculiar difficulty.

In this state of things it must be determined on the true effect of the contract whether the appellants are entitled or not to succeed in their claim. The contract is

"unquestionably a contract for the sale of future goods, within the meaning of the Sale of Goods Act, 1893, this expression being defined by s. 62 (1) as meaning

goods to be manufactured or acquired by the seller after the making of the contract of sale." A

I quote as applicable to a propeller the language used in connection with a contract to build a ship by ROMER, J., in *Re Blyth Shipbuilding and Dry Docks Co., Ltd., Forster v. The Company* (4) ([1926] 1 Ch. at p. 499). It is, accordingly, necessary to construe the contract in the light of the provisions of the Act.

On behalf of the respondents it has been contended that the opening words of s. 14 of the Act apply and that the contract was to make the propeller in accordance with the specified design and dimensions and of good workmanship and materials as guaranteed by the contract, but with no further responsibility. In effect that would be a contract for work and materials. In support of this contention there was quoted a dictum of LORD ESHER in *Hall v. Burke* (5) that where a plan is given or supplied for a machine to be made the contract is fulfilled if the machine is made according to the plan and in a workmanlike manner. In that case the Court of Appeal held that the actual contract was to make the machine for a particular purpose, the manufacturer being left to design it and make it for that purpose, and that he was not relieved from his obligation to deliver the article ordered because the party giving the order had suggested alterations which the manufacturer had accepted and so was held to have made his own. The dictum now relied on was not necessary to the decision of the case; the case was before the Act. I know of no English decision in which such a contract has been so construed. Thinking, as I do, that the contract now under consideration is a contract for the sale of goods, and, therefore, is subject to the Act, I find it difficult to bring it within the provisions of the Act, unless it is to be regarded either as coming within the opening words of s. 14—that is, as being a contract in which there is no implied warranty or condition as to quality or fitness—or unless it is to be regarded as coming within s. 13 or s. 14, (1) or (2). It seems to be at least a sale of future goods by description. I do not, however, further consider these contentions, as I think the contract is one falling within s. 14 (1) of the Act. B C D E

In the first place I am of opinion that the appellants as buyers expressly and by implication made known to the respondents as sellers the purpose for which the goods were required. The tendency of the decisions since the Act has been to give a liberal interpretation to these words; they were considered by this House in *Manchester Liners, Ltd. and another v. Rea, Ltd.* (1), a case in which there was a contract for the sale of bunker coal for a named steamer; the coal tendered was unfit for use on the steamer, which had natural draught furnaces; for these furnaces the coal was wholly unsuitable. It was held by this House that the coal was ordered for a particular purpose. LORD BUCKMASTER said: F G

"The order was expressed to be for the use of a particular steamer, and it must therefore be assumed that the respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply."

LORD DUNEDIN said that the contract clearly disclosed the purpose.

I cannot distinguish that case in principle from the present. In my opinion, the contract now being considered was a contract, not for a propeller in gross, but for a propeller as appurtenant to a vessel then being built by the appellants identified by the number they as builders had given to it; the respondents either knew all that was material to them as propeller makers to know about the vessel and her engines, or could have ascertained by inquiry. There is here no need to look beyond the actual terms of the contract to find the particular purpose. It is not necessary here to have recourse to writings or conversations between the parties outside the contract, or to other circumstances known to the parties involving the inference that at or before the date of the contract the particular purpose for which the buyers wanted the propeller was brought home to the minds of the respondents as contracting parties. All these matters it is permissible to consider if necessary in order to ascertain the parties' intention, and if here considered they go to support the view I have expressed; but here, I think, the contract is sufficient for this purpose in itself. Nor is it necessary here to hold as in *Preist and Wife v. Last* (6), that a particular purpose may be sufficiently established H I

even where the thing bought is intended only for its ordinary use, though I am far from differing from the opinions expressed by LORD COLLINS. The present case presents, it may be, a closer analogy to that of *Bristol Tramways and Carriage Co. v. Fiat Motors, Ltd.* (7), where, however, the particular purpose for which the motor chassis were ordered—namely, for use in the streets of Bristol—was not to be found in the contract but in extrinsic communications. I need not multiply citations. My conclusion is that the propeller was ordered not simply for use as a propeller on any ship, but specifically for use on ship No. 972, or more strictly perhaps, though I see no relevant difference, for use with engines No. 972.

But the more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the sellers' skill and judgment. Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation. The respondents have contended that there was no such reliance shown in this case, in particular on the ground that the appellants by the plan which accompanied the order and by specifying the dimensions, the pitch ratio, the total developed area, the maximum horse-power, and so forth, had tied the hands of the respondents as to matters most material to the fitness of the propeller; and furthermore had not given information essential if the respondents were being relied on in respect of fitness of the propeller for its purpose, as to the nature of the ship, such as its under-water construction, draught, and so forth, or as to the special features of the engines, such as their critical periods: the respondents accordingly contended that the appellants relied on their own judgment and not on that of the respondents. Alternatively, it was contended that if they relied at all on the appellants, they merely relied on them in the limited respects of material and workmanship, the obligations in respect of which were sufficiently covered by the six months' guarantee: the respondents further contended that on the true construction of s. 14 (1), the reliance must be total and absolute, a partial reliance being not within the section.

In dealing with these contentions the first thing to be considered is what is exactly the article which is the subject of the contract of sale and what is the particular purpose for which it is required in so far as relevant as between the contracting parties. In some cases the matter may be very simple: the purpose for which a hot-water bottle is required is easily determined and equally easy is it to determine the extent of reliance on the seller; similarly in the case of a piece of mechanism intended to fit into a complete machine, the relevant purpose as between the buyer and the maker will normally be simply that it should be of the specified plan and, when properly fitted, work in its place. There is no reliance on the maker for the general performance of the machine as a whole. Similarly in the *Manchester Liners Case* (1) the bunkers were to be fit to burn in the furnaces but not to raise any given head of steam. The definition in the particular purpose will vary according to the contract in question.

To apply these considerations to the present case, the propeller is, as I conceive it, to be fit for ship and engines No. 972, but only as a propeller—that is, it has to work efficiently when fitted properly on the vessel; for instance, the blades must not snap, there must not be corrosion, it must work without excessive noise, and must revolve reasonably smoothly with the actual engines, these being diesel engines. But the propeller makers are not concerned with matters relating to the ship and engines as a whole, such as matters of speed; for instance, if the propeller worked efficiently as a propeller it would not matter to the respondents if, owing to something in the design of ship or engines, it could only propel the ship at two miles an hour. I think the true position is that the respondents accept the plan and specification and agree, by using what appears on these pieces of paper, to produce by their skill and experience a material object in Parson's manganese-bronze capable of being properly described as a propeller and being, in addition to being of the prescribed design and dimensions, also fit to operate as a propeller with ship and engines No. 972. The appellants stated what sizes, shapes, and so forth they thought would suit their vessel and engines. No doubt, they

had in mind some ideas as to the speed and the power to be achieved with the help of the propeller; but what the respondents had to do was to follow the instructions given them as to design and so forth, and produce something which, being of that design and size, would function as a propeller. The conclusion I arrive at is that in all matters relevant as between these parties to the creation of a propeller for No. 972 there was reliance on the sellers' skill or judgment within the section. A

But it is said this conclusion would throw on the makers responsibility for defects in the plan and design—for instance, if a propeller of the specified plan and design could not be physically cast or would be too weak or otherwise could not be fitted to or worked on No. 972. I have pointed out that, on my view of the facts, none of these difficulties arise here. It has been laid down that where a manufacturer or builder undertakes to produce a finished result according to a design or plan he may be still bound by his bargain even though he can show an unanticipated difficulty, or even impossibility, in achieving the result desired with the plans or specification. Such a case was *Thorn v. Mayor and Commonalty of London* (8), where under a building contract the contractor sought to set up an implied warranty by the other contracting party that the bridge could be built (or built without undue expense) according to the plans and specification, but this House decided against any such warranty. Again, in *Gillespie & Co. v. Howden & Co.* (9) the Court of Session held it was no defence to a shipbuilder who had contracted to build a ship of a certain design and of a certain carrying capacity that it was impossible with the approved design to achieve the agreed capacity; the shipbuilder had to answer in damages. Though this is the general principle of law, its application in respect of any particular contract must vary with the terms and circumstances of that contract, but I see no reason why in regard to this contract the respondents should not be held to be subject, under the terms of s. 14 (1) of the Act, to the implied condition that the propeller they made should be reasonably fit for use on ship No. 972. Obviously it was their business to supply propellers. B C D E

I do not say that such a condition must necessarily be implied in every case where a manufacturer contracts to make a machine or article for a particular purpose; every case in which the issue is whether the terms of s. 14 (1) have been fulfilled must present its own questions of fact and degree. But, in my opinion, there is no general rule that where a maker agrees to make a machine of a description which it is in the course of his business to supply, in accordance with a design or specification given him by the buyer, s. 14 (1) must necessarily be excluded. There is no such proviso to s. 14 (1): the actual proviso relates to the case of the sale of a specified article under its patent or trade name; what is there included corresponds to the third category, given in the judgment of the Court of Queen's Bench in *Jones and another v. Just* (10) (L.R. 3 Q.B. at p. 202): F G

"Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

This statement is supported by a reference to *Chanter v. Hopkins* (11), where the article was sold either under a patent or a trade name. The section, however, has not laid down any further limitation beyond the proviso, but has left the Court to decide on the circumstances of each case whether or not s. 14 (1) is to be applied. H

However, the appellants are, in my opinion, entitled here to succeed on s. 14 (1) on a narrower ground. I do not agree with the construction sought to be put by the respondents on s. 14 (1). I do not agree that the reliance on the seller's skill or judgment must be total or exclusive. If it is conceded that in some cases under the section a distinction may be drawn where articles are ordered to be made between such part of the maker's obligation as is merely to following precisely what is specified and such part of his obligation as involves in its discharge the exercise of his skill and experience, then I think it follows that, to quote the language of LORD MACNAGHTEN in *Drummond v. Van Ingen* (12) (12 App. Cas. at p. 297): I

"In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill."

A LORD SUMNER, in an opinion with which the other members of this House agreed, in *Medway Oil and Storage Co., Ltd. v. Silica Gel Corpn.* (2) said of s. 14 (1) of the Act:

"The section does not say that the reliance on the seller's skill and judgment is to be exclusive of all reliance on anything else . . . the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity."

B LORD SUMNER was there considering the different case where there was no reliance on the seller because the buyer made his own investigations before deciding to order a new and experimental machine which it was claimed would successfully carry out a novel process, but his opinion that the reliance need not be exclusive in that sense throws light, I think, on the construction of the section. It is said that the words "relies on the seller's skill and judgment," cannot apply to a case where the reliance is not total or exclusive—where, for instance, the buyer specifies so much and leaves so much to the seller's skill and judgment. I have already pointed out that even in such a case the seller's skill in manufacture must be relied upon to embody the design in the material; but apart from that I do not find in the section anything inconsistent with a division of reliance, the buyer relying in part on himself and in part on the seller. There will then be the implied condition of fitness in regard to that latter part, so that the seller will be responsible for a breach of that condition. On my understanding of the facts as explained above the appellants are entitled to succeed, even on that narrower basis.

C The language of the section certainly does not expressly exclude such a view; the word "solely" is not expressed, and there is no need to imply it—indeed, the earlier words are elliptical and general "so as to show that the buyer relies on the seller's skill and judgment" without defining for what purpose or in what respect or to what extent or whether wholly or partially. On LORD SUMNER's interpretation that reliance need not be "exclusive," though it must be substantial and effective. It follows, I think, that a reliance partial but substantial and effective will bring the implied condition into play; it would then be a matter for construction of the particular contract whether the condition that "the goods shall be reasonably fit for such purpose" is to be read without qualification, or whether it is to be limited to the matters within the particular province entirely left to the seller's skill and judgment. There are, no doubt, in fact many such cases of limited reliance. A very common case in which the implied condition is invoked is where an article made to a design exhibits a defect originally latent, or where goods purchased on sample but for a particular purpose fail to answer though they correspond to the sample. I may refer to two cases before the Act. In *Macfarlane v. Taylor* (13) the buyers accepted a sample of spirits as satisfactory to them in strength, flavour, and price, but since the colour was too light required the sellers not only to deliver a bulk equal to sample, but also of a darker colour. The sample fixed everything but the colour, the process of changing which was left to the seller's judgment. The ingredient used by the seller for that purpose had, however, consequences alarming to the natives for whose consumption the spirits were intended, and, the spirits being, therefore, unfit for the particular purpose, the sellers were held liable to pay damages. In *Jones v. Bright* (14), as explained by LORD MACNAGHTEN in *Drummond v. Van Ingen* (12), the buyer's shipwright had himself selected at the seller's warehouse the copper sheathing for the ship he was repairing. When placed on the ship the sheathing decayed because of some intrinsic defect in the copper; no one, however, could tell what the cause of the defect was. LORD MACNAGHTEN, after stating that the Lord Chief Justice "based his judgment on the broad principle that manufacturers were bound to supply an article fit for the purpose for which they knew it was required," went on to say:

"I can see no distinction between a sale by sample where the sample gives incomplete and consequently misleading information and a case where the purchaser selects the goods in bulk and these goods have an intrinsic defect not discoverable on inspection."

I regard these as authorities for the proposition that the condition of fitness may in proper cases be implied where it was only in some respects that the buyer relied on the

seller's skill and judgment. It is true that if it could be shown that the language of s. 14 (1) is such that the reliance must be total in extent these cases are no longer in accordance with law; codification in formally defining the law may not only stop its growth, but also depart from the old law, but I see no reason to attribute these results to s. 14 (1), in which the generality of phrase may be deemed to be intentional. I need not repeat the truism that the section does not deal with peremptory law but merely gives a canon of construction in cases where the prescribed circumstances call for it, and there is no expressed agreement to the contrary.

In my opinion, the appellants are entitled to succeed on the basis of s. 14 (1) of the Act.

They have an alternative claim on s. 14 (2), which has been argued and must be considered. The implied condition under that subsection is merely that the goods should be of merchantable quality, subject to the proviso that, if the goods have been inspected by the buyer, the condition does not apply to defects which such examination ought to have revealed. This proviso is based on the theory that in the case of a latent defect the examination could not have revealed the defect, and, therefore, should be deemed pro tanto to be no examination at all. The circumstances under which the condition is to be implied involve a less onerous burden of proof on the buyer, since it arises *prima facie* in all cases of goods sold by description, but the remedy is less beneficial. It seems to have been the earliest form in which the common law declared the remedy of an implied warranty in sales of goods. In earlier times the rule of caveat emptor applied, save only where an action could be sustained in deceit on the ground that the seller knew of the defect, or for breach of express warranty (*warrantizando vendidit*). But with the growing complexity of trade dealings increased in what are now called "unascertained or future goods," and more generally goods sold by description. As early as 1815, in *Gardiner v. Gray* (15), LORD ELLENBOROUGH stated the rule. Goods had been sold as waste silk; a breach was held to have been committed on the ground that the goods were unfit for the purpose of waste silk and of such a quality, that they could not be sold under that denomination. What sub-s. (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description. To apply this principle to the present case, the question is whether the defective propeller could be used as a propeller not merely on No. 972 but on any vessel; it is immaterial to consider if it could be sold as scrap. Thus, in *Asfar & Co. v. Blundell and others* (16) dates were held to be unmerchantable as dates because they had been submerged in the Thames and became impregnated with sewage and were useless as dates, though they were of considerable value for distillation into vinegar.

ROOHE, J., found

"that this propeller was not suitable on this ship; the defendants have not tried it on any other ship, and I find that the propeller was not fit for use as a propeller at all."

GREER, L.J., was of opinion that there was no evidence that the propeller had faults that made it unsuitable as a propeller; it might have done fairly well for some other vessel. On the whole, I agree that the breach of this implied condition is not established. If I were able to draw inferences at large, I should be disposed to think that a propeller of this size and design, ordered for a particular ship, is not likely to be of use for any other ship unless a sister ship; it is not like a standardised propeller for a standardised ship. Hence if it was not usable on the *Athelfoam*, and no one thought it worth while to try it on the *Athelbeach* or any other vessel, the true inference may well be that it was of no use for anything but scrap. Still this is a matter of fact which it was for the appellants to establish by evidence, and I cannot find that they have done so. I think the appellants fail on this point, which it is fair to say they did not press.

An argument was adduced by the respondents based on the clause in the contract

"To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of the vessel to owners."

This clause was relied on as negating by its express terms any implied condition under

A the Act, whether under s. 14 (1) or (2), or under s. 13, which latter section deals with the implied condition that goods sold by description must correspond with the description. But on the view I have expressed as to the construction of the contract—that is, that it is a contract for the sale of future goods by description subject to the conditions under s. 14—the matter is concluded against the respondents by the decision of this House in *Wallis, Son and Wells v. Pratt and Haynes* (3), in which case it was held that, though
B the statutory conditions may be excluded or varied by the express agreement of the parties, yet such a clause as this, in which the word “condition” is not used, is effective to exclude the conditions implied under the Act. The same principle was applied in *Baldry v. Marshall* (17). The principle of these authorities is that though a condition is deemed to be and can be treated as a warranty, if it is not availed of to reject the goods, still it remains a condition; once a condition always a condition. Hence apt and
C precise words must be used to exclude it; the words guarantee or warranty are not sufficiently clear.

Finally there must be considered a third substantive ground on which the appellants claim to succeed—that is, on the clause in the contract “To be to the entire satisfaction of the owners’ representative and ourselves.” In fact the owners, by their representative, expressed dissatisfaction with the propeller when its defects became obvious on
D trial; no one could say that their dissatisfaction was not bona fide or reasonable. In the courts below, *ROCHE, J.*, and *SCRUTTON and LAWRENCE, L.JJ.*, held that this clause did not assist the appellants. *GREER, L.J.*, forcibly expressed his opinion that on the clause alone, apart from any other grounds, the appellants were entitled to judgment. The argument on behalf of the respondents on this point was that the clause referred in point of time to the moment at which under the contract the propeller was delivered at
E the appellants’ Tranmere Engine Stores, at which time it was said the satisfaction must be either expressed or negatived. The satisfaction contemplated had reference, it was further contended, not to the performance or operation of the propeller after being fitted and put into use, but merely to its construction and to the ordinary tests and inspection during construction and delivery. Though I do not feel able so to limit this clause, I find it difficult to define the exact scope of its application, for some limits it
F must have. It would clearly not extend to complaints, for example, which the owners might have because the ship failed to achieve the contract speed, even though that failure was in some way due to the design of the propeller. The respondents had no concern with such matters, nor could the owners express dissatisfaction with the plan and dimensions, to which the appellants had to work, or express dissatisfaction on the ground that owing to bad fitting the propeller operated badly. On the other hand,
G the contentions of the respondents seem to me unduly to narrow the operation of the clause. The clause follows the clause just preceding, which deals with certain defects developing within a period of six months after handing over the vessel to the owners, that is to say with the propeller fitted. I cannot think that the satisfaction contemplated was not meant to refer to a time at least when the owners had the opportunity of judging, after testing the propeller in operation, if they were satisfied, and that time
H must, I think, at least fall within the period of trials after the propeller had been fitted: otherwise the clause as to satisfaction would simply be nugatory. It is true that the clause cannot be intended to deal with matters outside the scope of the respondents’ obligations under the contract, or to enlarge these obligations except in so far as these are enlarged because there is superadded the judgment of a third party. But the defects complained of were defects of quality of the propeller, even if only apparent on
I trial and in operation, and were defects for which on any construction that I can give to the contract the respondents were responsible. It is not easy to define precisely the scope of a loosely expressed and very general clause like this, but on the whole I think it must be taken to cover such defects as the propeller actually exhibited, so that the owners were entitled to express dissatisfaction, as they did when the defects were disclosed. In my opinion, therefore, on the facts of the case, the clause, read, as it must be, in conjunction with the general scope of the contract, entitles the appellants to succeed on that ground alone.

I can shortly deal with the remaining question as to the measure of damages. The

appellants claimed that they were entitled by way of damages to the expenses incurred in all trials, other than the costs of the first trial, which in any event would have been incurred in the ordinary course, and also to all other expenses thrown away in experiments and attempts to ascertain and correct the cause of the trouble. ROCHE, J., and GREER, L.J., held that this claim was justified, and I agree with them in holding that all expenses reasonably incurred in consequence of the respondents' breach of contract should be recoverable. A special referee will determine what is reasonable. The appellants paid for the first defective propeller but refuse payment of the other two supplied as replace propellers, and I think are justified in so doing.

For these reasons I think the appeal should be allowed and the judgment of ROCHE, J., restored, with costs here and below.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe, & Co.*, for *Laces & Co.*, Liverpool; *Linklaters & Paines.*
[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

L'ESTRANGE v. F. GRAUCOB, LTD.

[KING'S BENCH DIVISION (Scrutton and Maugham, L.JJ., sitting as additional judges),
February 16, 19, 20, 1934]

[Reported [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164]

Warranty—Sale of goods—Exclusion—Clause in contract excluding warranty—Contract signed, but not read, by buyer.

Where a term or condition is contained in a railway ticket or other unsigned document it is necessary, to bind the recipient of the document, to prove that he was aware, or ought to have been aware, of the term or condition, but when a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether or not he has read the document.

On a sale of goods a written contract was signed by the buyer which contained a clause excluding all implied warranties and conditions, whether statutory or otherwise. The buyer did not read, or know of the existence of, this clause. The goods, when delivered, were in fact unfit for the purpose for which they were intended, and the buyer claimed damages for breach of the implied warranty of fitness contained in s. 14 of the Sale of Goods Act, 1893.

Held: the contract having been signed by the buyer, the implied warranty was excluded by the express condition in the contract, notwithstanding that the buyer did not know that the contract contained such a condition.

Notes. Extended: *Curtis v. Chemical Cleaning Co.* [1951] 1 All E.R. 631. Referred to: *Hutton v. Watling and another*, [1948] 1 All E.R. 803.

As to conditions and warranties in contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 194 et seq., and on a sale of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 66, 67, 201 et seq., and for cases, see 39 DIGEST 414 et seq.

Cases referred to:

- (1) *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A.C. 394; 80 L.J.K.B. 1058; 105 L.T. 146; 27 T.L.R. 431; 55 Sol. Jo. 496, H.L.; 12 Digest (Repl.) 471, 3509.
- (2) *Andrews Bros. (Bournemouth), Ltd. v. Singer & Co.*, [1934] 1 K.B. 17; 103 L.J.K.B. 90; 150 L.T. 172; 50 T.L.R. 33, C.A.; Digest Supp.
- (3) *Richardson, Spence & Co. v. Rowntree*, [1894] A.C. 217; 63 L.J.Q.B. 283; 70

L.T. 817; 58 J.P. 493; 10 T.L.R. 335; 7 Asp. M.L.C. 482; 6 R. 95, H.L.; 8 Digest (Repl.) 114, 737.

(4) *Parker v. South Eastern Rail. Co., Gabell v. South Eastern Rail. Co.* (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 25 W.R. 564, C.A.; 8 Digest (Repl.) 141, 909.

(5) *Roe v. Naylor* (No. 2), [1917] 1 K.B. 712; 116 L.T. 542.

Appeal from Llandudno County Court.

On Feb. 7, 1933, the plaintiff signed an agreement, called a "sales agreement," whereby she agreed to buy from the defendants an automatic cigarette machine and to pay for the same by an initial payment of £8 15s. and eighteen later instalments of £3 19s. 11d. It was a term of the agreement that, if the plaintiff fell into arrears with the instalments, all the remaining payments should immediately become due. The agreement contained the following clause:

"This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition statement or warranty, statutory or otherwise, not stated herein is hereby excluded."

This clause was in small print, and was not read by the plaintiff. On Feb. 9 the defendants sent to the plaintiff an "order confirmation" signed by them, and on March 28 they delivered the machine to her.

The machine did not work satisfactorily, and after the defendants had several times attempted, without success, to repair it, the plaintiff declined to go on with the contract, and on May 8 she wrote to the defendants that she had decided to forfeit the amounts already paid by her, and asked them to remove the machine. This they refused to do.

On May 25 the plaintiff brought this action, claiming £9 1s. the amount of instalments paid to date, as money paid for a consideration which had failed, by reason of the machine being unfit for the purpose for which it was intended. This was denied by the defendants in their defence. Later, the plaintiff delivered an amended claim alleging breach of an implied warranty that the machine was reasonably fit for the purpose for which it was intended. The defendants counterclaimed £71 18s. 6d., the balance of the agreed price of the machine.

At the trial the county court judge gave judgment for the plaintiff on her claim for £70 as damages for breach of warranty, and for the defendants on the counterclaim for £71 18s. 6d., the balance of the price. He found that when the plaintiff signed the sales agreement she had not read and did not know the contents of that document, except the amount of the price and the terms of payment. She did not know that the document contained conditions relating to the terms of the contract, and that the defendants had not done all that was reasonably sufficient to give the plaintiff notice of the conditions; and that the machine was defective; and he held that there was an implied warranty of fitness which had been broken. For these reasons he held that the defendants were not entitled to rely upon the clause which excluded implied warranties. The defendants appealed.

A. J. Denning and D. E. Evans for the defendants.

Gordon Alchin for the plaintiff.

SCRUTTON, L.J.—The plaintiff commenced proceedings against the defendants in the county court, her claim being for £9 1s. as money received by the defendants to the use of the plaintiff as part of the consideration for the delivery of an automatic slot machine pursuant to a contract in writing dated Feb. 7, 1933, which consideration was alleged wholly to have failed by reason of the fact that the machine was delivered in a condition unfit for the purpose for which it was intended. The only document which corresponds to the contract there mentioned is a long document headed "sales agreement." By their defence the defendants denied that the machine was delivered in a condition unfit for the purpose intended, and denied that the sum claimed was payable to the plaintiff, and they counterclaimed for the balance of the price of the machine. Just before the trial the plaintiff amended her claim by adding a count for breach of an implied warranty that the machine was reasonably fit for the purpose for which it was

sold, though she still claimed only £9 1s. There the pleadings stopped. At the trial, A
as the judge has stated in his judgment, the plaintiff's claim was put in three different
ways: total failure of consideration; breach of implied conditions going to the root of
the contract; and breach of warranty. The defendants pleaded: no total failure of
consideration; no implied conditions; and that no action would lie for breach of implied
warranty as the agreement expressly provided for the exclusion of all implied warranties.
On this last defence the plaintiff contended that she was induced to sign the contract B
by the misrepresentation that it was an order form, and that at the time when she
signed she knew nothing of the conditions.

The county court judge has given judgment for the plaintiff for £70, though there is
no claim by the plaintiff for that sum; and he has given judgment for the defendants on
the counterclaim for £71 18s. 6d., the balance of the price.

As to the defence that no action would lie for breach of implied warranty, the defend- C
ants relied upon the following clause in the contract:

"This agreement contains all the terms and conditions under which I agree to
purchase the machine specified above and any express or implied condition, state-
ment, or warranty, statutory or otherwise not stated herein is hereby excluded."

A clause of that sort has been before the courts for some time. The first reported case D
in which it made its appearance seems to be *Wallis, Son and Wells v. Pratt and Haynes*
(1), where the exclusion clause mentioned only "warranty," and it was held that it did
not exclude conditions. In the more recent case of *Andrews Bros. (Bournemouth), Ltd.*
v. Singer & Co. (2), where the draftsman had put into the contract of sale a clause which
excluded only implied conditions, warranties, and liabilities, it was held that the clause
did not apply to an express term describing the article, and did not exempt the seller E
from liability where he delivered an article of a different description. The clause here
in question would seem to have been intended to go further than any of the previous
clauses, and in order to avoid the result of these decisions, to include all terms denoting
collateral stipulations.

The main question raised is whether that clause formed part of the contract. If it
did, it clearly excluded any condition or warranty. In the course of the argument in
the county court reference was made to the railway passenger and cloak-room ticket
cases, such as *Richardson, Spence & Co. v. Rowntree* (3). In that case LORD HERSCHELL, F
L.C., laid down the law applicable to these cases and stated the three questions which
should be left to the jury. In the present case the learned judge asked himself the three
questions appropriate to these cases, and in answering them has found as facts: (i) that
the plaintiff knew that there was printed material on the document which she signed: G
(ii) that she did not know that the document contained conditions relating to the con-
tract; and (iii) that the defendants did not do what was reasonably sufficient to bring
these conditions to the notice of the plaintiff.

The present case is not a ticket case, and it is distinguishable from the ticket cases.
In *Parker v. South Eastern Rail. Co.* (4), MELLISH, L.J., laid down in a few sentences
the law which is applicable to this case. He there said (2 C.P.D. at p. 421): H

"In an ordinary case, where an action is brought on a written agreement which is
signed by the defendant, the agreement is proved by proving his signature, and, in
the absence of fraud, it is wholly immaterial that he has not read the agreement
and does not know its contents."

Having said that, he goes on to deal with the ticket cases, where there is no signature to
the contractual document, the document being simply handed by the one party to I
the other and continues:

"The parties may, however, reduce their agreement into writing, so that the
writing constitutes the sole evidence of the agreement, without signing it; but in
that case there must be evidence independently of the agreement itself to prove
that the defendant has assented to it. In that case, also, if it is proved that the
defendant has assented to the writing constituting the agreement between the
parties, it is, in the absence of fraud, immaterial that the defendant had not
read the agreement and did not know its contents."

In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The plaintiff contended at the trial that she was induced by misrepresentation to sign the contract without knowing its terms, and that on that ground they are not binding upon her. The learned judge in his judgment makes no mention of that contention of the plaintiff, and he pronounces no finding as to the alleged misrepresentation. There is a further difficulty. Fraud is not mentioned in the pleadings, and I strongly object to deal with allegations of fraud where fraud is not expressly pleaded. I have read the evidence with care, and it contains no material upon which fraud could be found. The plaintiff, no doubt, alleged that the defendants' agent represented to her that the document which was given her to be signed was an order form, but, according to the defendants' evidence, no such statement was made to her by the agent. Moreover, whether the plaintiff was or was not told that the document was an order form, it was, in fact, an order form, and an order form is a contractual document. It may be either an acceptance or a proposal which may be accepted, but it always contains some contractual terms. There is no evidence that the plaintiff was induced to sign the contract by misrepresentation.

In this case the plaintiff has signed a document headed "sales agreement," which she admits had to do with an intended purchase and contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.

The county court judge has given judgment for the defendants on the counterclaim for the balance of the price, £71 18s. 6d. I do not see how he could have done that unless he found that the contract included the clause in small print providing that, if any instalment of the price should not be duly paid, all the remaining instalments should fall due for immediate payment. That judgment on the counterclaim must stand. As to the claim, judgment was given for the plaintiff for £70 for breach of an implied warranty, though only £9 1s. was claimed. Such a judgment could not have been given even in the High Court without an amendment of the claim, but, even if there had been an amendment, the further difficulty would have remained that the signed document contained a clause excluding any implied condition or warranty. If the view which I have expressed as to the effect of a signed document is correct, the plaintiff has no ground of claim, and the judgment in her favour cannot stand. In my opinion, the judgment for the plaintiff on the claim should be set aside and judgment entered for the defendants on the claim, while the judgment for the defendants on the counterclaim should stand.

MAUGHAM, L.J.—I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations.

The material question is whether or not there was a contract in writing between the plaintiff and the defendants in the terms contained in the document which she signed. In the case of a formal contract between seller and buyer, such as a deed, there is a presumption which puts it beyond doubt that the parties intended that the document should contain the terms of their contract. This document is not a formal instrument of that character, yet, in my opinion, having been signed, it may well constitute a contract in writing. A reference to any of the textbooks dealing with the law of contract will provide many cases of the verbal acceptance of a written offer, in which the courts have held that the written offer and the acceptance, even though only verbal, together constituted a contract in writing, which could not be altered by extraneous evidence. The rule may not operate equitably in all cases, but it is unquestionably binding in law.

In the present case on Feb. 7, 1933, an order form, for such I consider the present

document to be, was signed by the plaintiff. It was an elaborate form containing a number of clauses, and among them certain terms and conditions in regrettably small print, but quite legible. The plaintiff, having signed that document, gave it to a canvasser of the defendants, who took it away. It had been filled up in ink by the canvasser before she signed it. Another document called an order confirmation dated Feb. 9, 1933, was sent to her by the defendants. In my opinion, the contract was concluded not when the brown order form was signed by the plaintiff, but when the order confirmation was signed by the defendants. If the document signed by the plaintiff was a part of a contract in writing, it is impossible to pick out certain clauses from it and ignore them as not binding on the plaintiff.

In a case of this nature it is possible that the document signed by a contracting party may be, not the contract, but merely a memorandum in writing of a preceding verbal contract between the parties, and, if in this case it appeared that the document in question was only a memorandum of a previous contract which had not contained the clause excluding all conditions and warranties, the plaintiff might have relied upon *Roe v. Naylor* (No. 2) (5), and contended successfully that, as the clause was not a part of the contract, she was not bound by it. In my judgment, however, such a view as that is excluded here, because on the facts there was no preceding verbal agreement between the parties.

I deal with this case on the footing that when the order confirmation was signed by the defendants confirming the order form which had been signed by the plaintiff, there was then a signed contract in writing between the parties. If that is so, then, subject to certain contingencies, there is no doubt that it was wholly immaterial whether the plaintiff read the small print or not. There can be no dispute as to the soundness in law of the statement of MELLISH, L.J., in *Parker v. South Eastern Rail. Co.* (4), which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.

There are, however, two possibilities to be kept in view. The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of "non est factum." I do not think it is necessary to add anything to what SCRUTTON, L.J., has already said about that. The written document admittedly related to the purchase of the machine by the plaintiff. Even if she was told that it was an order form, she could not be heard to say that it did not affect her because she did not know its contents.

Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation. She contended that she was so induced to sign the document inasmuch as (i) she was assured that it was an order form, (ii) that at the time when she signed it she knew nothing of the conditions which it contained. The second of these contentions is unavailing by reason of the fact that the document was in writing signed by the plaintiff. As to the first contention it is true that the document was an order form. But, further, if the statement that it was an order form could be treated as a representation that it contained no clause expressly excluding all conditions and warranties, the answer would be that there is no evidence to prove that that statement was made by or on behalf of the defendants.

In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: Herbert A. Phillips; Theo. Goddard & Co., for Chamberlain, Johnson, & Parke, Llandudno.

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

Re REEVE. REEVE v. REEVE

[CHANCERY DIVISION (Clauson, J.), October 17, 1934]

[Reported [1935] Ch. 110; 104 L.J.Ch. 101; 152 L.T. 254]

Intestacy Statutory trusts for issue—Property divisible into shares—Advancement—Advance by trustees in pursuance of appointment by intestate—Administration of Estates Act, 1925 (15 & 16 Geo. 5, c. 23), s. 47 (1) (iii).

An advance by trustees in pursuance of an appointment made by the intestate in exercise of a power is not "money or property paid by way of advancement" within s. 47 (1) (iii) of the Administration of Estates Act, 1925.

By a settlement made in 1889 upon the first marriage of C. S. W. R., a fund was settled, subject to successive life interests of the husband and wife, upon trusts for the issue of the husband and wife as he should by deed or will appoint, and, in default of and subject to any appointment, for the husband's children who should attain the age of twenty-one years in equal shares. In 1919 the husband appointed that the trustees should, from the death of himself and his wife, stand possessed of one moiety of the settled trust fund in trust for his elder son, J. T. W. R. The next day the husband and his wife requested the trustees to transfer one-half of the moiety of the fund so appointed to the said son for his advancement, and on the next day the son on his marriage settled the said half of the moiety on the trusts of his marriage settlement, his father at the same time covenanting with the son and trustees to transfer, and subsequently transferring, to them investments of such a value as would, with the value of the said half of the moiety, make up a total sum of £10,000. The wife died in February, 1925. In December, 1925, the husband surrendered to the son his life interest in the other half of the moiety, and also appointed the then unappointed moiety in trust for his daughters M. and H. in equal shares, and he also surrendered to them his life interest in such moiety. In pursuance of such surrender the trustees transferred to the son and to the trustees of the daughters' settlement certain investments in satisfaction of the appointed shares. The husband died intestate in September, 1933. The administrators of his estate took out a summons which asked whether in the distribution of the estate any of the interests taken by the son and the two daughters ought to be brought into account, in pursuance of s. 47 (1) (iii) of the Administration of Estates Act, 1925.

Held: the appointment in favour of the two daughters, apart from any surrender of the husband's life interest, was not covered by the words in s. 47 (1) (iii), "money or property which by way of advancement . . . has been paid to such child by the intestate," as the funds so appointed were not property which would have formed part of the husband's estate; the surrender of the husband's life interest did not make any difference, for it could not properly be held that the life interest was "money or property" within s. 47 (1) (iii) since, if the life interest had to be brought into account, it could only be at a valuation to be reckoned as at the time when the husband's interest ceased by his death; for the same reasons the moiety appointed in favour of the son was not caught by the section; but the investments transferred to the trustees of the son's settlement on the occasion of his marriage was money or property which was paid for the benefit of the son by way of advancement, and, accordingly, the value of those investments at the date of the death of the intestate must be brought into account.

Notes. Section 47 of the Act of 1925 is reprinted in the Intestates' Estates Act, 1952, Sched. I.

Restraints upon alienation or anticipation other than those which can be attached to the enjoyment of property by a man are abolished; see Married Women (Restraint upon Anticipation) Act, 1949, s. 1.

Considered: *Re Young's Will Trust*, *Young v. Young*, [1950] 2 All E.R. 1040.

As to statutory trusts for issue, see 16 HALSBURY'S LAWS (3rd Edn.) 402-404, and

for cases on advancement, see 20 DIGEST 457 et seq. For Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718. A

Adjourned Summons

The facts of the case appear from the judgment.

By the Administration of Estates Act, 1925, s. 47 (1) (iii):

"Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives."

G. D. Johnston for the plaintiff, the administratrix of the intestate's estate.

Gover, K.C., and *L. W. Byrne* for the appointees, the children of the first marriage of the intestate. D

Sir Gerald Hurst, K.C., and *Ian Campbell* for the infant children of the second marriage of the intestate.

CLAUSON, J.—The intestate, Charles Sydney Wentworth Reeve, died on Sept. 6, 1933, and the question arises, stating it in general terms, whether certain benefits obtained by a son and two daughters of his first marriage, in circumstances to which I will refer more particularly, must be treated as having been paid by way of advancement or settled by the intestate in or towards satisfaction of their shares and brought into account in accordance with the requirements of s. 47 (1) (iii), of the Administration of Estates Act, 1925. E

I take first, for the sake of simplicity, the case of the two daughters, Margery and Helen. The position of those daughters was this. The intestate had, on his first marriage, by a settlement of May 9, 1889, settled a very considerable sum on trusts for himself for life, with an interest in certain events of a limited character for his first wife after his death. The first wife died on Feb. 20, 1925, and I need not refer to her further. Subject to those life interests the fund was settled on the usual marriage trusts, but for "his children," not for the children of the marriage, with the usual provision enabling him to appoint. He had made certain advances in favour of his son, with which for the moment I do not deal, but on Dec. 31, 1925, one-half of the fund had not been appointed, and he was still in a position to appoint, and he did in fact appoint, one-half of that half, or a quarter of the total fund, to his daughter Margery, and a quarter to his daughter Helen. At the same time he released in favour of those daughters his own life interest in the shares of the fund which were so appointed to them. For the moment I will disregard the surrender of his life interest, and I will treat the matter as though he had merely, on that date, appointed a quarter of the fund to each of those two ladies. F G H

The first question that I have to determine is whether in those circumstances those ladies would have to bring the funds so appointed into account by reason of the provisions of cl. (iii) to which I have referred, upon the distribution of the estate of the intestate? I am not able to find in cl. (iii) any words which compel them to bring into account those funds appointed to them in the circumstances I have stated. The words of the clause are these: I

"Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as

being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives."

I need not trouble with the words "on the marriage of a child of the intestate," because with regard to these two ladies they were at that time, and I think I am right in saying that they still are, spinsters.

Can it be said that the shares of the settled fund appointed to them in the way that I have indicated, and on the supposition of their not becoming payable until the termination of the intestate's life interest under the settlement, are caught by the words "money or property which, by way of advancement . . . has been paid to such child by the intestate"? Those words do not appear to me to cover at all the case with which I am dealing. The transfers of these funds are not payments by the intestate: they are payments made by the trustees by virtue of the exercise of a power of appointment which must be read into the original settlement. They come to these ladies by reason of a settlement made before they were born, and before the marriage was solemnised of which they are the issue, and it seems to me to be impossible so to construe those words as to catch those funds.

I have been dealing with the matter for the moment on the supposition that there has been no surrender of the life interest, and I now turn to consider whether the circumstance that at the date when the father appointed to these two daughters he surrendered to them his life interest, makes any difference. I think it may well be argued that it makes a difference to this extent, that the life interest which he so surrendered is "money or property which by way of advancement . . . has been paid to such child." The language is not apt, but I can conceive that the words might cover the life interest so surrendered. I think it is recognised that, if it be that only (namely, the surrendered life interest) upon which the clause operates, the result is nil, because that which is paid is to be brought into account at a valuation to be reckoned at the time of the death of the intestate, and it is obvious that at the death of the intestate the life interest surrendered by him five years before, which, of course, comes to an end on his death, if it is reckoned as at the death of the intestate, is of the value of nil, and, accordingly, nothing is to be brought into account.

I cannot see what other difference the surrender of the life interest could make. I do not see how the surrender of the life interest can turn something which comes to these ladies by reason of the provisions of a settlement made before the marriage of which they are the issue into something which could possibly be treated as being paid to them by the intestate. I think there was a good deal of force in the argument of counsel for the appointees that *primâ facie* one would expect this clause to be dealing with property which would form part of the estate of the intestate had it not been paid by way of advancement—had he retained it instead of advancing it; and it is quite clear that, if that be the side from which the clause is to be approached, the clause can have no possible relevance to a fund settled before the intestate's marriage, over which the intestate had no control, except so far as he could allocate the shares among the limited class of children. So far, I have dealt with the case of the two daughters.

The case of the son is more complicated. The son was about to be married, and on May 19, 1919, the father appointed to him one-half of the settled funds. On the following day he, with the concurrence of his wife, requested the trustees to advance one-half of that one-half, that is to say, one-fourth of the whole fund, to the son immediately, which had the effect of the father releasing for the benefit of the son his life interest in one-quarter of the fund. On Dec. 31, 1925, on the occasion on which the father made the appointment in favour of the two daughters, he, while surrendering his life interest in the fund appointed for that purpose, similarly surrendered his life interest in the remaining half of the moiety which had been appointed to the son in 1919, but in respect of which his life interest was at that time still existing.

For the reasons which I have given when I was dealing with the simpler case of the daughters, it appears to me that no part of this fund is in any way affected by cl. (iii).

I do not see any words there which can catch these funds at all, save in so far as conceivably the life interest which the father surrendered might be caught by the clause; but, as I have pointed out, if it is the life interest only which is caught, the result for the purpose of the operation of the section is nil.

As regards the capital of the fund appointed, the same considerations seem to me to apply in the case of the son as in the case of the daughters. This fund cannot in any way be said to be aptly described as a fund "paid to such child by the intestate." It is true that in the son's case there was his marriage, and it was on the occasion of the marriage that there was an appointment to him, but all that that means is that on the occasion of the marriage he was given by his father's appointment a specific interest in funds in which before the appointment he had only an interest which was subject to be divested by the exercise of a power of appointment, and which was dependent, if there was no appointment, on the number of children who ultimately qualified to take under the terms of the settlement. These funds were not funds which would, had these appointments not been made, have been part of the intestate's estate. In my view, accordingly, none of the funds with which I have dealt so far has to be brought into account under the terms of the clause.

There remains, therefore, only this other point, and I think as to this learned counsel appearing for the son agreed with the view, or was not prepared to argue against the view, that I am about to state. There is one fund which is caught. In the settlement which the son executed on the occasion of his marriage, there was contained a covenant by the father that he would make up the fund so settled to the sum of £10,000. The father covenanted so to do within three months, and in fact carried out his covenant and placed in the hands of the trustees of the marriage settlement of the son's marriage a sum which can now be valued at something in excess of £4,000. That sum does seem to me to be caught by the clause, because it was money or property which by way of advancement was paid to the child, and paid to the child none the less because by the arrangement made with him on his marriage it was paid to the trustees of his marriage settlement. The other funds do not seem to me to be caught.

Solicitors: *C. R. Sawyer & Withall; Tarry, Sherlock, & King.*

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

TODRICK v. WESTERN NATIONAL OMNIBUS CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Römer and Maugham, L.J.J.), April 10, 11, 1934]

[Reported [1924] Ch. 561; 103 L.J.Ch. 224; 151 L.T. 163; 78 Sol. Jo. 318]

Easement—Right of way—Need for dominant tenement to be contiguous to servient tenement—Need for right to be for benefit and enjoyment of dominant tenement—Interference with enjoyment of servient tenement—Permissible development of user of way.

For the purpose of there being a right of way it is not necessary that the dominant land should be contiguous to the servient land over which the right of way is to be enjoyed. The true test is that which is broadly stated in *GALE ON EASEMENTS*, 11th Edn., p. 19, that an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit.

The construction by the owners of the dominant tenement of a ramp which interfered with the user of his land by the owner of the servient tenement,

Held: not to be a permissible development of the user of the way.

Notes. Considered: *Re Salvin's Indenture, Pitt v. Durham County Water Board*, [1938] 2 All E.R. 498. Distinguished: *Robinson v. Bailey*, [1948] 2 All E.R. 791.

As to rights of way, see 12 *HALSBURY'S LAWS* (3rd Edn.) 569 et seq., and for cases, see 19 *DIGEST* 93 et seq.

Cases referred to:

- (1) *Ackroyd v. Smith* (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 14 Jur. 1047; 138 E.R. 68; 19 Digest 12, 20.
- (2) *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650; 37 J.P. 742, L.J.J.; 19 Digest 118, 787.
- (3) *Bailey v. Stephens* (1862), 12 C.B.N.S. 91; 31 L.J.C.P. 226; 6 L.T. 356; 8 Jur. N.S. 1063; 10 W.R. 868; 142 E.R. 1077; 19 Digest 201, 1528.
- (4) *Attorney-General v. Horner (No. 2)*, [1913] 2 Ch. 140; 82 L.J.Ch. 339; 108 L.T. 609; 77 J.P. 257; 29 T.L.R. 451; 57 Sol. Jo. 498; 11 L.G.R. 784, C.A.; 22 Digest (Repl.) 374, 4033.
- (5) *Dand v. Kingscote* (1840), 6 M. & W. 174; 2 Ry. & Can. Cas. 27; 9 L.J.Ex. 279; 151 E.R. 370; 19 Digest 111, 710.
- (6) *Abson v. Fenton* (1823), 1 B. & C. 195; 1 L.J.O.S.K.B. 94; 107 E.R. 73; 19 Digest 115, 754.
- (7) *Moody v. Steggles* (1879), 12 Ch.D. 261; 48 L.J.Ch. 639; 41 L.T. 25; 19 Digest 66, 381.
- (8) *Newcomen v. Coulson* (1877), 5 Ch.D. 133; 46 L.J.Ch. 459; 36 L.T. 385; 25 W.R. 469, C.A.; 19 Digest 114, 740.

Appeal by defendants from a decision of FARWELL, J., [1934] 1 Ch. 190.

The facts are stated by the MASTER OF THE ROLLS.

Spens, K.C., and *P. J. Sykes* for the defendants.

Evershed, K.C., and *H. F. F. Greenland* for the plaintiff.

LORD HANWORTH, M.R.—The plaintiff brought his action to restrain the defendants in the user which they had made of a right of way. He complained that the defendants in fact had not a right of way at all; secondly, that they had constructed a ramp upon the land over which the right of way, if any, passed; a ramp which they were not entitled to construct or to maintain; and, thirdly, that the defendants used the right of way for the purpose of heavy buses, or, as put by them in their defence, in connection with the transport service owned and operated by them—which meant that that service was conducted by means of heavy vehicles, buses and the like.

The action was brought before FARWELL, J., and in his judgment FARWELL, J., came to the conclusion that there was no right of way possessed by the defendants. That was sufficient to decide the action in favour of the plaintiff. The learned judge gave his

opinion upon the other points, and, in particular, upon the point that the structure which had been set up by the defendants upon the land over which the right of way passed was not within the power given to the defendants, and was in itself a trespass—that is to say, he would have so found if it had been necessary for him to do so. He granted an injunction and from that decision the appeal is brought to the court by the defendants. A

It is brought, first of all, to establish that the defendants have a right of way, and that FARWELL, J., misinterpreted the law, and next that the defendants had the right to make use of their right of way by building up this structure upon the surface over which the right of way extended, but their counsel has not pressed the right to make use of the right of way for heavy motor vehicles in connection with the defendants' motor transport service. B

FARWELL, J., at the opening of his judgment, states: C

"The plaintiff is the owner in fee simple of a house known as 'Skidden House' in St. Ives, in the county of Cornwall, and of certain land adjoining that house. Included in the land so owned to the south of the house there is a roadway over which the defendants claim to have a right of way, and this action is concerned with the defendants' alleged rights over it. The roadway is some 35 or 40 yards in length; it leads at the western end out of a highway in St. Ives, where there is a gateway with stone pillars on each side and gates which open. The width of the opening at the gateway itself when the gates are opened is 7 ft. 9 in., but the roadway is wider, being 9 ft. in width for the most part." D

I leave that statement of the configuration of the ground for the purpose of turning to the documents under which the right was given to the defendants. It appears by two documents, the first made on Oct. 15, 1921, that there was a reservation of a right of way in that indenture by the vendor who sold certain land to Elizabeth Ralfe, Dr. Nicholls, the vendor on that deed, being the predecessor in title of the present defendants. The reservation there made is E

"excepting and reserving in fee simple unto the vendor his heirs and assigns owner or owners from time to time of all or any part of the vendor's said adjoining property on the east of the said hereditaments (coloured blue on the said plan attached to these presents) and all persons going to or from any part of the last-mentioned property a perpetual right of way in common with the purchaser her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the said plan between the points marked A and B on the said plan, and the right to construct an extension of such road or way between the points marked B and C on the said plan." F

I ought to add that the plaintiff is the representative now of Mrs. Elizabeth Ralfe. It will be observed that that reservation is for "all persons going to or from any part of the last-mentioned property"—that is, "the property coloured blue on the plan attached to these presents." Afterwards there was a modification of that right, because the actual points over which it passed were modified, and the first right that I referred to was surrendered by a deed of March 22, 1926, G

"Elizabeth Ralfe as beneficial owner hereby grants unto the said John Michael Nicholls his heirs and assigns owner or owners from time to time of all or any part of his said adjoining property on the East of Penwyn (coloured blue on the said plan number 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan number 1) over and along the piece of land coloured green on the plan number 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way thereby surrendered." H

That is to say, the course of that right of way was slightly modified, and instead of I

A being, as it originally was, a right which passed straight along from west to east, and after the point B slightly southward, it was the same right of way over the points A to B, but after B it passed in a westerly direction and somewhat in a more northerly direction. It should be, however, observed that the right is reserved in connection with and for the purpose of, to use the exact words of the grant,

B "the owner or owners from time to time of all or any part of the said adjoining property coloured blue on the said plan."

C It is said that, owing to the measurements upon the maps which have been before us, which are by no means easy to understand, there is no piece of land coloured blue which is contiguous to the land over which the right of way has been granted, with the result that the right of way in passing eastwards does not debouch on any part of the Blue Land—in other words, that there is a complete severance between the Blue Land and the land over which the grant of the right of way has been made. On the other hand, it is right to point out that by certain measurements which may have a sound foundation it is possible that a small portion of the Blue Land is contiguous to the land over which the right of way has been granted. I think that FARWELL, J., did not intend to make a definite decision as to what was the precise position of the Blue Land in relation to the land over which the right of way was granted, because he says ([1934] Ch. at p. 197):

E "According to the defendants the roadway does impinge upon the Blue Land to the extent of some three feet; on the other hand, according to the plaintiff's evidence, it does not impinge upon the Blue Land at all. But whichever may be the true view (and that must depend upon the evidence which has been given as to the measurements to be found on these various plans) this is perfectly plain, that the roadway as provided for in the deed of March 22, 1926, for all practical purposes leads on to the land north of the Blue Land and not on to the Blue Land. If the defendants are right in saying that to the extent of some few feet it impinges upon the Blue Land, then it may be possible for a person on foot, or even possibly on a bicycle, exercising great care, to avoid getting on to any other land than the Blue Land when he leaves the roadway. But for all practical purposes, the only land to which the roadway leads is the land north of the Blue Land, and it is not necessary for me to decide which of the various witnesses who have given their views as to these measurements is right."

In other words he holds that, in effect, for practical passage of carts and horses and persons there is no contiguity between the Blue Land and the land over which the grant of the right of way is made, and for that reason he held that there was no right of way.

G I am unable to go as far as that. It is not suggested that there is any authority which lays down the proposition that for the purpose of there being a right of way the dominant land which is to enjoy the right of way must be contiguous to the land over which the right of way is to be enjoyed. I do not find that that proposition is established by *Ackroyd v. Smith* (1), a case which it is not easy to understand, but which, I think, is properly and fully explained in the terms which are used by MELLISH, L.J., in *Thorpe v. Brumfitt* (2) (8 Ch. App., at pp. 657, 658), in which he said, quoting from CRESSWELL, J., that the words "for all purposes" were incorrect in the judgment of the court then delivered by CRESSWELL, J., and were so wide as to include purposes that had no connection with the piece of ground to which the right of way was attached. CRESSWELL, J., had said (10 C.B. at p. 188):

I "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it; nor can the owner of land render it subject to a new species of burden, so as to bind it in the hands of an assignee."

I do not think it is necessary to examine that case further, because it does not really assist us in the question we have to determine. *Thorpe v. Brumfitt* (2) is a case which is interesting because JAMES, L.J., in considering whether or not a right of way had been obtained, allowed himself to consider the grant of a right of way as reasonably meaning

"a right of way between the highway and the yard of the inn of which the grantees were the owners, the triangular piece of ground not being intended to be held as a

separate property, but being granted only for the purpose of being thrown into the yard, so as to make a more convenient boundary line between the properties of the grantor and the grantees."

In other words, he puts a construction on the terms used in the grant there which could be reasonable, or in other words, effective for the purpose of establishing the right of way which is intended to be granted. However, I do not consider it is necessary to consider, or to found my judgment upon, either of those two cases.

Dealing with the point upon which FARWELL, J., founded himself, namely, whether there must be contiguity between the dominant and the servient tenements for the purpose of a right of way, I find no such principle established in any of the cases. I think it would be unfortunate if I endeavoured to lay down a rule which might cause much difficulty, particularly in the multifarious ways in which rights of way are found in the country. I think the true test which we have to apply is that which is broadly stated in GALE ON EASEMENTS (11th Edn.), p. 19:

"So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit."

That proposition is established by an examination of three cases which can be referred to. The first is *Bailey v. Stephens* (3), in which, in his judgment WILLES, J., says (12 C.B.N.S. at p. 112):

"I mean the case of a conveyance by which a certain incident is granted which, though beneficial to the grantee of the land so long as he remains the owner of it and beneficial in respect of his ownership of the land, can be of no benefit to any other person. And the authorities are to this effect, that, at common law, a benefit of that description went into whose ever hands the land might pass."

Equally BYLES, J., says (*ibid.* at p. 115), after referring to *Ackroyd v. Smith*:

"[A right of way] must, in addition to that, have some natural connection with the estate, as being for its benefit, or, as has been expressed, it must inhere in the estate."

Those passages that I have just quoted were referred to with approval by HAMILTON, L.J., as he then was, in *Attorney-General v. Horner* (No. 2) (4). The learned Lord Justice says this ([1913] 2 Ch. at p. 196):

"Now it is well settled that an easement appurtenant must be for the benefit of the inheritance to which it is appurtenant. It must be 'beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person': per WILLES, J., *Bailey v. Stephens* (3): 'It must have some natural connection with the estate as being for its benefit.'"

He quotes those two passages from WILLES, J., and BYLES, J. That seems to give a real test; it does not require physical contiguity, the only consideration is whether or not there can be a better enjoyment of the Blue Land by this right of way which is to be attached to it, whether it is beneficial in respect of the ownership of the land.

As ROMER, L.J., has pointed out, supposing there is not physical contiguity, yet, if the owner of the Blue Land can exercise the right of way that he has secured by this reservation, why should he not be entitled to exercise it? The fact that he may have some difficulty in obtaining access to some intervening portion ought not to militate against his enjoyment of a right which is of such a nature that it is beneficial to his land, the Blue Land, which he occupies, and which would have a natural connection with the estate as being for its benefit in the sense that it provides a speedier and easier access to another part to which the owner of the Blue Land may wish to pass, in the present case such a street as Skidden Hill. Upon those authorities, therefore, I come to the conclusion that FARWELL, J., has not advised himself correctly in holding that by reason of the absence of physical contiguity there cannot be the grant of the right of way, and I come to the conclusion that the words in the two deeds which I have referred to are such as do reserve to the predecessor in title a right of way and that he is able to exercise it over the land which is a part of the tenement belonging to the plaintiff.

Then comes the next question: Are the defendants entitled to do what they have done with this right of way? It is suggested that they ought not to be tied down to the original user of a right of way, such as by walking over the land over which they exercise the right, or by passing with a horse or with a carriage, but there should be a development allowed, a development such as was given effect to with limitations in the case of *Dand v. Kingscote* (5). I desire, however, to point out that with regard to that case, while it was held that there could be what is called a railway—I should prefer to call it a tramway—on which tubs could pass, there was also given a right of compensation to the plaintiff in respect of the excessive user of the land which was unnecessary for the purpose of the tramway, such as, for instance, putting ditches and fences to the railway which do not appear to have been found necessary. Therefore, *Dand v. Kingscote* (5) does not justify any and every user of the right of way. Nor is that to be found in *Abson v. Fenton* (6). As it was pointed out by LORD TENTERDEN, as he afterwards was (1 B. & C. at p. 203), the question will be,

“Whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another.”

The test he applies is this,

“to exclude all wanton, capricious, and causeless injury to the owners of the allotments; and, on the other hand, will admit of an exercise of the right reserved by the statute in such a manner as may make the right beneficial to the lord.”

In the present case having to balance the rights of both parties, the owner of the dominant and the owners of the servient tenements, it would appear that the owner of the servient tenement has had a structure, a ramp, put up on the surface of the land which belonged to him which circumscribed the area available to him for the purpose of washing his car, or getting his car out of the garage, so that it has now so shortened the area in front of the garage as to make it difficult for him to use the garage freely. In another sense there has been a distinct limitation imposed upon the plaintiff of his rights in respect of the garage and land which he owns. Equally with regard to the right exercised by the defendants they have for their own purposes put up upon the land belonging to the plaintiff this ramp in order to use the gradient which leads on to the garage upon their own ground. If the gradient had been steeper it would have been possible to commence the ramp at the point where the wall intersects the two properties of the plaintiff and the defendants, but rather than do that they have put up this structure—useful it may be to the defendants, but certainly not bearing in mind the rights of the plaintiff over the land and the use of his garage. Under those circumstances it is an exercise of the right of way which is not merely a development such as occurred in *Dand v. Kingscote* (5), but it is an intrusion on the rights and property of the plaintiff. Under those circumstances there ought to be a mandatory injunction to restrain the defendants from doing what they have done and to enforce them to remove what they have superimposed upon the plaintiff's land to their own advantage and the disadvantage of the plaintiff.

Then comes the last question that counsel for the defendants does not press, namely, that the right of way included a right to take the omnibuses through the gateway and along the right of way. Having regard to the fact that the omnibuses when they pass through the gateway would only have a margin of one and a half inches on either side, it is quite plain that the right of way was never intended for such vehicles, and I think that counsel was right in not pressing a claim by his clients to a right to exercise it in such a manner as to introduce these heavy motor vehicles for the purpose of the defendants' transport services.

We differ from FARWELL, J., as to the question of there being a right of way, but we agree with him on the second point, to which he would have given effect in favour of the plaintiff, namely, the imposition of this ramp upon the right of way. The result is that the appeal fails in preventing the plaintiff from succeeding in the action, and he will be entitled to an injunction which we will state to-morrow.

ROMER, L.J.—I have nothing to add to what was said by the Master of the Rolls upon the question of the excessive user by the defendants of their right of way by running motor omnibuses over the road. Nor have I anything to add to what he said upon the excessive exercise by the defendants in constructing the ramp, of their right of continuing the roadway from the point marked B on the plan. FARWELL, J., decided both of those questions in favour of the plaintiff, and, in my opinion, he rightly so decided them. But the learned judge also decided in favour of the plaintiff the question whether the defendants had any right of way at all over the plaintiff's land, and, as we are differing from the learned judge upon that question, I should like, out of the respect that I entertain for his opinion, especially upon questions of real property law, to state as shortly as may be my reasons for so differing.

The question turns in the first place upon the conveyance of March 22, 1926, and it is necessary to construe that document. It is made between Elizabeth Ralfe of the first part and Mr. Nicholls, who was the predecessor in title of the defendants, of the other part. It begins by a recital of an indenture of conveyance of Oct. 15, 1921, made between Mr. Nicholls, of the one part, and Elizabeth Ralfe, of the other part, by virtue of which the premises now belonging to the plaintiff were conveyed by Mr. Nicholls to Mrs. Ralfe in fee simple, excepting and reserving to Mr. Nicholls,

"his heirs and assigns, owner or owners, from time to time of all or any part of his adjoining property on the east of 'Penwyn' (coloured blue on the plan No. 1) and all persons going to or from any part of the last-mentioned property a perpetual right of way for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over, across and along the private road or way coloured yellow on the plan No. 1 between the points marked thereon A and B, and the right to construct an extension of the said road or way between the points marked thereon B and C."

Pausing there, it cannot be, and is not intended, that that did not except in favour of Mr. Nicholls a right of way appurtenant to his land coloured blue. Then the deed goes on to recite that the extension of the private road or way between the points B and C on the plan No. 1 had not yet been made by Mr. Nicholls. The next recital is this:

"and whereas the said John Michael Nicholls has agreed with the said Elizabeth Ralfe to surrender and release the right to construct such extended roadway between the points marked B and C on the said plan No. 1 on the said Elizabeth Ralfe granting to him the substituted right of way hereinafter contained and for the consideration hereinafter expressed."

The witnessing part of the deed consists of three clauses. By the first clause Mr. Nicholls, as beneficial owner, surrendered and released to Mrs. Ralfe the excepted and reserved right to construct an extension of the road and the easement of way thereover between the points marked B and C. That right is described in the clause as being "appurtenant to his said adjoining property on the east of 'Penwyn.'" By the second operative clause, in pursuance of the agreement, Mrs. Ralfe, as beneficial owner, granted to Mr. Nicholls,

"his heirs and assigns, owner or owners from time to time of all or any part of his said adjoining property on the east of 'Penwyn' (coloured blue on the said plan No. 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan No. 1) over, across and along the piece of land coloured green on the plan No. 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereby surrendered and released."

The right of way so conferred must be a right of way either for purposes solely connected with and for the benefit of the land coloured blue, or for the purposes of and connected with all the land of Mr. Nicholls to the east of "Penwyn"; or thirdly, for all purposes whether connected or not with the land coloured blue.

In my opinion, on the true construction of this deed, what it purports to grant to Mr. Nicholls is a right of way for all purposes over the land of the plaintiff between the points to be mentioned for the purposes and for the benefit of the land coloured blue, and no other land. My reasons for arriving at that conclusion are these. To start with, there is no other property of Mr. Nicholls referred to in the agreement than the land coloured blue. In the next place, the right of way given him is expressly given in substitution for the pre-existing right of way which, undoubtedly, was a right of way appurtenant to the land coloured blue. In the third place, it is in terms granted to Mr. Nicholls,

"his heirs and assigns, owner or owners from time to time of all or any part of the said adjoining property on the east of 'Penwyn' coloured blue on the plan."

That being, in my opinion, the proper construction of the deed, the question arises whether the right of way so granted was a right of way appurtenant to the land coloured blue so as to pass with that land to the defendants when the land coloured blue was conveyed to them. It is said on the part of the plaintiff, that it was not appurtenant to that land, and, therefore, could not pass to the defendants, because the road over which the right had been granted does not directly lead, except to an immaterial extent, on to the land coloured blue, but anyone using the road for the purpose of going to the land coloured blue must pass over some other land that belonged to Mr. Nicholls and now belongs to the defendants. It is said in other words that there cannot be an easement of a way appurtenant to land unless the way ends upon the alleged dominant tenement—in other words, that the dominant tenement must be one of the termini of the roads in question.

I know of no authority in support of that proposition. The essential qualities of an easement are stated, and, in my opinion, stated accurately, in GALE ON EASEMENTS (11th Edn.), p. 19, and I will read the passage that is there to be found:

"According to the civil law it was necessary that a servitude should be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid if unaccompanied by any benefit to the dominant owner or if such benefit were one merely personal to him. For the same reason no servitude could exist unless the dominant and servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other. So in English law an easement must be connected with the enjoyment of a dominant tenement and must be for its benefit. Thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland."

No such qualification as is contended for here on the part of the plaintiff is to be found in that passage. The reason why the right of way over land in Kent cannot be appurtenant to an estate in Northumberland is not because the way in question in Kent does not and cannot end on the estate in Northumberland, but because such a right of way in Kent cannot be any benefit to the owner of the estate in Northumberland as owner of his estate. For myself I can see no reason why there should not be a good easement of land to do acts on or over the servient tenement when and so often as the owner of the dominant tenement can get there to perform them.

I do not know whether on the part of the plaintiff it is suggested that this qualification is one that attaches only to an easement in the case of a right of way. Certainly a man as owner of a servient tenement may have a right, and frequently does have a right, by way of easement, to do an act upon land of another person which is situated some little distance away from the dominant tenement. Supposing that that right be a right to maintain some erection such as a sign upon a servient tenement, I see no reason why that should not be a good easement merely because to get to the servient tenement the owner of the dominant tenement has to go over land which does not belong to him, if and so long as he can get a right or permission to go to the servient tenement. Take the case again of a way. I see no reason why the owner of a tenement abutting on a highway should not have a good easement of way over the land on the opposite side, or indeed, on the same side of the highway, merely because in order to get there the owner of the dominant tenement has to walk over the highway. He has a right to walk along

the highway, and, therefore, is in a position to get to the servient tenement and there conduct the act in question. A

The learned judge thought that he found authority to support the proposition for which the plaintiff was contending in two cases. One was *Ackroyd v. Smith* (1) and the other was *Thorpe v. Brumfitt* (2). In those circumstances it becomes necessary, I think, to consider in some little detail what it was exactly that those cases decided. *Ackroyd v. Smith* (1) was an action for trespass and the defendants were accused of trespassing on some plot of land that was set out as a road. Whether it was a made-up road or not, I do not know. The defendants sought to justify the alleged trespass by the existence of a right of way over the piece of land in question, which, they said, was vested in them as the successors in title to one John Smith. The right of way was created on the occasion of a conveyance to John Smith of a piece of land of which, at the time of the alleged trespass, the defendants were owners and in occupation, and the right of way was created in these terms. There was granted to John Smith B C

"his heirs and assigns that he and they respectively, being owner and occupiers for the time being"—[of the said close of land that was being conveyed to John Smith] —"and all other persons having occasion to resort thereto, should have the right and privilege of passing and re-passing with or without horses, cattle, carts and carriages, for all purposes in, over, along and through" D

the said road. The defendants pleaded this right of way in justification, and there was a demurrer to the plea. It was alleged in the first place that the right of way which was granted in the terms that I have just read was a right of way for all purposes and was not confined to purposes connected with the land which had been conveyed to John Smith at the time the right of way purports to have been granted. That was a question of construction of the deed. The defendants, unfortunately, in their plea of justification had stated that at the time of the alleged trespass they were using the road for their own purposes and did not say that those purposes were connected with the close of land which had been conveyed to John Smith and which they held as successors in title to him. They were, therefore, in this dilemma. If, according to the true construction of the deed, the way was granted for purposes solely connected with the close of land, they had not stated that they were using the piece of land for those purposes. If, on the other hand, according to its true construction the right of way granted was a right to use the road for all purposes, whether connected or unconnected with the particular close, then it was contended on the part of the plaintiff that that was an easement unknown to the law, that is to say, it was what is sometimes called an easement in gross and was not, therefore, an easement appurtenant to the close of land in question and had not passed to the defendants. Those were the questions that arose and were decided in that case, made perfectly plain in the judgment of CRESSWELL, J., who said (10 C.B. at p. 186): E F G

"The plaintiff then demurred, assigning for causes, amongst others, that the plea did not show that the trespasses justified were committed in going to or from the premises conveyed, or that they were in any way connected with the enjoyment of those premises. In support of the demurrer it was contended—first that the road granted was only for purposes connected with the occupation of the land conveyed, and therefore was not sufficient to support the justification pleaded—and, secondly, that, if the grant was more ample, and gave to the grantee a right of using the road for all purposes although they might not be in any way connected with the enjoyment of the land, it would not pass to an assignee of the land, and therefore the defendants could not claim it under a conveyance of the land *with the appurtenances*. On the other hand, it was contended that the right created by deed might be assigned *by deed*, together with the land, and was large enough to maintain the justification pleaded. Upon consideration, we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer. If the right conferred by the deed set out was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea. But, if the grant was more ample, and extended to using H I

the road for purposes unconnected with the enjoyment of the land"—[and here he added some words which have given rise to some considerable difficulty afterwards]—"—and this, we think, is the true construction of it—it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it."

He then goes on to decide that such a way as that cannot be made appurtenant to land. *Ackroyd v. Smith* (1) is the leading authority in support of that contention. In that case the court decided that the grant of a right of way in terms which, I think, any learned judge would hold was a right of way granted for purposes connected and connected solely with the piece of land conveyed, was a grant of a right of way for all purposes, whether connected or unconnected with the land in question.

In *Thorpe v. Brumfitt* (2) the plaintiff, the lessee of a certain inn and yard attached to the inn in Bristol, claimed a right of way over a way on the land of the defendant which connected the yard with the highway, and he brought an action against the defendant for obstructing that way and so interfering with his right. The right of way had been created on the occasion of a conveyance to the plaintiff's lessors by the owner of the land over which the way ran of a piece of land which later on was thrown into, and at the time of the conveyance was intended to be thrown into, the yard, but there was no reference to the purposes for which the right of way was granted except that it was to be used "for all purposes." There was a grant of

"rights of way and passage at all times hereafter and for all purposes through, over and along a certain road, passage or gateway"—[and that is described and is said to be delineated on the plan]—"and also the right, power, licence and privilege of granting similar rights of roadway and passage over the same road, passage or gateway to any other person or persons whomsoever."

There was no reference in the grant of the right of way to any particular land for the benefit of which the right was to be exercised, and, that being so, the defendants sought to justify themselves by calling in aid *Ackroyd v. Smith* (1) as an authority for the proposition that, wherever you find a grant of a way for all purposes, that is too large to enable the right of way to be appurtenant to a particular piece of land. The court, consisting of JAMES, L.J., and MELLISH, L.J., rejected that contention. JAMES, L.J., as a matter of construction, held that it was a grant of a way to the yard, inasmuch as the piece of land which had been conveyed on the occasion when the right of way was granted had been thrown into the yard and was all along intended by the parties to be thrown into the yard. MELLISH, L.J., as a question of construction, held that it was a right of way for purposes connected solely with the enjoyment of the triangular piece of land which was at the end of the way in question. It was unnecessary, of course, for them to decide which of those two constructions should prevail. That is to say, the fact that they did not did not affect the decision in the case, because it was not a question of extent of user of the way to which the plaintiff might have been entitled, but a question whether the defendants were entitled to obstruct the plaintiff in the use of his way, whether he was using the way for the purpose of getting only to the triangular piece or whether he was using it to go beyond the triangular piece to the rest of the yard. So that has nothing to do with the point that we have to decide here. It is true that JAMES, L.J., in dealing with *Ackroyd v. Smith* (1), said this (8 Ch. App. at p. 655):

"In the present case the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed; it is therefore a grant of a right of way to and from that triangular piece of ground."

MELLISH, L.J., said:

"In *Ackroyd v. Smith* (1), though it was not absolutely necessary to the decision to give any opinion whether the right of way was in gross or not, the court gave an opinion that it was in gross. But in that case the close to which it was sought to make the way appurtenant was not at the end of the road."

He then quotes from the judgment of CRESSWELL, J., and that passage was laid hold of, I think, by counsel for the plaintiff in his argument in the present case as being an

authority for the proposition that, if the way over which it is sought to establish a right is not at the end of the road in question, there cannot be an easement over the road appurtenant to the land. What MELLISH, L.J., was doing, and what JAMES, L.J., had done was really to point out what it was that *Ackroyd v. Smith* (1) had decided and why it was that they were not going to adopt the same construction of the grant of the way in *Thorpe v. Brumfitt* (2) as had been adopted in the grant in *Ackroyd v. Smith* (1). It is merely for the purposes of distinguishing the decision in *Ackroyd v. Smith* (1) from the decision that they arrived at in the case of *Thorpe v. Brumfitt* (2) on the mere question of construction of the deed which created the right of way. Therefore, with all deference to the learned judge, I cannot regard either of those authorities as in any way justifying the proposition of law which was accepted by him—that one cannot have a right of way over a road appurtenant to a dominant tenement unless the dominant tenement is one of the termini of that road.

For these reasons I agree that, although the appeal fails, yet the order of FARWELL, J., should be discharged, and another order made which will deal solely with the rights of the plaintiff on the plea of excessive user.

MAUGHAM, L.J.—I am of the same opinion and having regard to the fact that the point on which the court differs from FARWELL, J., is one of considerable importance as well as to my respect for his opinion on such a matter, I think it well to state the reasons in some detail.

The first material deed is the one of Oct. 15, 1921, a conveyance between John Michael Nicholls, of the one part and Mrs. Elizabeth Ralfe, of the other part. Certain premises were conveyed to Mrs. Ralfe with the exception and reservation of a right of way expressed in these terms:

"Excepting and reserving in fee simple unto the vendor his heirs and assigns, owner or owners from time to time of all or any part of the vendor's said adjoining property on the east of the said hereditaments (coloured blue on the said plan attached to these presents) and all persons going to or from any part of the last mentioned property a perpetual right of way in common with the purchaser" [that is Elizabeth Ralfe] "her heirs and assigns at all times and for all purposes with or without vehicles and animals from and to the public highway called Skidden Hill over across and along the private road or way coloured yellow on the said plan between the points marked A and B on the said plan and the right to construct an extension of such road or way between the points marked B and C on the said plan"

—subject to a certain provision as to payment of the expenses of maintaining and keeping up the road.

It is in dispute that that was a good reservation to the vendor, which operated by way of grant to the vendor of a right of way over the site in question coloured yellow on the plan between the points marked A and B and the right to construct a further extension between the points marked B and C, and to enjoy the right of way over the whole piece of land A, B, and C. On March 22, 1926, a document was executed between the same Mrs. Ralfe and John Michael Nicholls intended to divert, among other things, the piece of land upon which the extension of the right of way was to be given, namely, to divert the part between the points marked B and C on the plan, to which I have already referred. Accordingly Mr. Nicholls released the right to construct the extension of the private road or way between the points B and C so as to extinguish that right, and in consideration of the release Mrs. Ralfe granted to Mr. Nicholls,

"his heirs and assigns, owner or owners from time to time of all or any part of his said adjoining property on the east of Penwyn (coloured blue on the said plan No. 1) full and free right and liberty to construct an extension of the said private road (beyond the points A and B on the said plan No. 1) over across and along the piece of land coloured green on the plan No. 2 hereto annexed between the points marked thereon D and E and the perpetual right of way thereover in common with the said Elizabeth Ralfe her heirs and assigns at all times and for all purposes with or without vehicles and animals in substitution for the said right of way."

It is expressed in the widest possible form, including the words

"at all times and for all purposes with or without vehicles and animals in substitution for the said right of way hereby surrendered."

I do not think it is necessary to state the reasons which lead to the conclusion that this substituted right of way, including the right of way between A and B which I suppose, is technically arrived at under the earlier conveyance, is appurtenant to what I have called for shortness the Blue Land, that is, the land coloured blue in the indenture of 1921. ROMER, L.J., has expressed reasons for that with which I entirely agree. But assuming that that is so, the plaintiff's contention is that this deed had what I cannot help thinking is the surprising result of destroying Mr. Nicholls's right of way altogether, for the reason that the site of the extended right of way, or the extension of the right of way which was to go along the piece of land coloured green, does not connect directly with the Blue Land.

To appreciate the nature of that contention, it is necessary to state one further deed which was executed before the deed of March 22, 1926. The old intended extension of the right of way, that is to say, that conferred in October, 1921, led directly on to the Blue Land. The person entitled to the right, Mr. Nicholls, on May 29, 1925, acquired from a Mr. George Care a piece of land to the north of the Blue Land, which I will call for convenience the connecting strip. It was a small piece of land bought for the sum of £45 and is 25 ft. long north to south and 18 ft. wide—an irregular strip. The position, therefore, after the deed of March 22, 1926, was that Mr. Nicholls could come along the land coloured green on the plan annexed to that deed to his own property, most of it, no doubt, the connecting strip, over which he could go to the Blue Land. Here comes the contention on behalf of the plaintiff which met with favour in the court below: The alleged easement is appurtenant to the Blue Land; you cannot drive a car or an omnibus along the green side of the right of way so as to reach the Blue Land without going for a considerable part of your journey over the connecting strip. It is said that there is a proposition of law that no right of way can be granted as appurtenant to a tenement unless it leads right up to the dominant tenement. In my opinion, there are two answers to that contention.

The first one is an answer on the facts. It is not, in my opinion, correct to say that no part of the site of the right of way or its extension is contiguous with the land coloured blue. The facts as to the precise position where the piece of land coloured green reaches the wall which was the boundary between the two premises are difficult to ascertain with accuracy. The defendants contend that there is an overlap of some three feet, and the plaintiff does not, I think, deny, or, at any rate, his counsel did not before us deny, that there might be an overlap of nine inches. Having carefully listened to the evidence read before us on this question, I am of opinion that there is an overlap of at least nine inches, that is to say, the side of the right of way does join on to the Blue Land to the extent of nine inches. If that is so, I ask myself why that is not amply sufficient to support an easement of way leading up to the dominant tenement. There could be a right of way thirty feet wide to a dominant tenement where there is, we will say, a narrow door or a window or a fence with a gap in it through which goods may be passed, and such a right is obviously advantageous to the dominant tenement. It seems to me a complete mistake to suppose that the strip coloured green over which the way was to be made and vehicles were to pass must, at the end of the strip, coincide to the extent of the whole width of the piece of land coloured green, with the dominant tenement.

In my opinion, even assuming that it is necessary for a way granted in circumstances such as we have here in connection with a dominant tenement to reach the tenement, it is quite sufficient if it reaches it to the extent of an inch or two, and the easement is quite valid, because you can use the right of way for getting to the premises in question, you can take a cart on your own land and not the less because you cannot drive the cart through the wall at the end of the right of way. So far as regards the portion of the right of way which is not coterminous with the Blue Land, there is nothing to prevent a person with a right of way from walking or driving in a zig-zag direction or

at right angles at the end of the right of way. In other words, he may get quite properly to the end of the green strip and when he gets there he can cross the green strip if the land on the other side is his, and none the less because that is not part of the dominant tenement. Accordingly, I think on the facts the plaintiff is unable to succeed in showing that there was no right of way subsisting after the deed of 1926.

I should, however, be very unwilling to leave the matter simply to be determined on this ground, especially as I agree that the facts with regard to that precise overlap, if any, of the right of way on the land coloured blue are somewhat obscure. I proceed to consider the matter on the footing that there was no overlap, that is to say that the green strip is not, for even an inch or two, contiguous with the Blue Land. Supposing that is so, is the easement necessarily bad? The proposition is that a private right of way subject to the grant of prescription must lead directly up to the land of the dominant tenement. I do not myself think it can be stated in any terms less wide than that. Excluding the two cases of *Ackroyd v. Smith* (1) and *Thorpe v. Brumfitt* (2) with regard to which I will say a word in a minute, no authority whatever has been cited in support of that proposition. No dictum has been found in the judgment of any judge, no statement to that effect in any work of authority, and as ROMER, L.J., has pointed out, the proposition must be confined to easements of way, for it certainly is not a true proposition as regards other easements. I think it was admitted that it must be confined to rights of way, but apart from such easements, the various examples of easements which are not contiguous contained in the judgment of FRY, J., in *Moody v. Steggles* (7) are sufficient to establish that it is not a general proposition with regard to easements. Why should we be asked to say that it is correct in relation to easements of way in the absence of being constrained so to hold by authority? For my part, I am unable to see any ground for such a decision. In my opinion, it is quite contrary to the common understanding of the provision with regard to rights of way. Take a house with its front door on the highway and a field opposite not belonging to the owner of the house. Can the owner of the house not acquire by grant a right of way across the field opposite to, say, a highway or a railway station? I believe the universal opinion is that such a way can be granted. Many other instances could be given, and I will give one more. Can an owner of land not acquire a right of way leading to his tenement over two fields belonging to different owners? I should imagine that such a right of way is constantly being acquired, and I can see no reason in common law why such an easement should not be acquired. I am, however, unable to see how, if the proposition is to be accepted to its full extent, such a right could be properly granted, because the way over the further field would not lead to the dominant tenement, but to another right of way which might be, of course, of a precarious character.

I was going to deal at some length with *Ackroyd v. Smith* (1) and *Thorpe v. Brumfitt* (2) but I find that ROMER, L.J., has said nearly all that I should have desired to say with regard to those two cases. I confess that I think *Ackroyd v. Smith* (1) does require very careful attention before it can properly be appreciated, and it certainly is not, as my brother pointed out, a proposition for the view that a grant of a right of way for all purposes is necessarily bad as being a grant in gross. I do think that, in order to appreciate it to the full, it is necessary to bear in mind what MELLISH, L.J., said in *Thorpe v. Brumfitt* (2) (8 Ch. App. at p. 657), that in *Ackroyd v. Smith* (1) the close to which it was sought to make the way appendant was not at the end of the road. I think that does appear from a careful consideration of the very prolix pleadings on which *Ackroyd v. Smith* (1) is decided. I propose to say no more about either of those cases beyond saying that I agree with what has been said with regard to them, and for myself I will add that I am unable to see how there is anything in either of those two cases which supports the general proposition that a right of way can only be granted if the way leads right up to the dominant tenement.

I do find, however, a qualification with regard to the rights of way which can be granted in connection with a dominant tenement, not, however, limited to rights of way, but relating to all easements. The proposition is to be found in GALE ON EASEMENTS (11th Edn.), p. 19. It has been referred to by both my brethren, and it is that the easement must be connected with the enjoyment of the dominant tenement. A similar

A proposition is to be found in a work which was first published over sixty years ago, namely GODDARD ON EASEMENTS, and (at p. 18) will be found the proposition substantially in the same terms as that which I have mentioned. On page 19, after referring to *Ackroyd v. Smith* (1) and a number of other cases, the learned author says:

B "The principle must therefore be accepted that there must not only be a dominant and a servient tenement to support an easement, but that the easement must be beneficial to the dominant tenement."

C I see no reason whatever for expanding that qualification to the characteristics of an easement in the way suggested. I think it would be a great pity if the powers of owners of land to grant rights of way to their neighbours were limited in the way suggested. The easement must not, of course, be an easement in gross—it must be appurtenant to the dominant tenement, but if it is connected with the enjoyment of that tenement, that is sufficient to make it a legal easement which will pass upon a conveyance of the dominant tenement as being appurtenant to it.

D For those reasons, which are only reasons given in addition for expressing in my own language my views on this point, I cannot agree with the judgment of the learned judge that the right of way here was destroyed as the result of the deed of March 22, 1926. The form of the order in that respect, therefore, requires some qualification.

E There were two other points on which the learned judge expressed an opinion, and with regard to those I need say very little. The first point was in reference to the driving of motor omnibuses and other heavy motor cars such as lorries along the right of way. Counsel for the defendants decided, in my opinion, rightly, that he would not contend that the view of FARWELL, J., in that respect was wrong. I think, therefore, I need say no more upon that.

Finally, there came the question whether the ramp constructed by the defendants along the extension of the right of way granted by the deed of March 22, 1926, was a reasonable exercise of the power conferred by that deed. The facts are stated at p. 199 of the report ([1934] Ch.). The learned judge says:

F "They built a roadway which rises sharply so that it goes over the wall which was the boundary between the land north of the Blue Land and the plaintiff's land. That roadway is built up on a cemented ramp and is a solid construction, and it is no doubt from the point of view of the defendants a useful and desirable way of getting access to their own land for motor omnibuses."

G It may be added to that that the ramp rises some five feet before it reaches the land of the defendants, with a vertical concrete side to it which makes the turning of a motor car by the plaintiff a matter of considerable difficulty and very likely a matter of danger. FARWELL, J., found, upon the evidence, that it was not the fact that there was no other method of exercising the right of extending the way. He said:

H "I am satisfied on the evidence before me that a way could have been made, not necessarily suitable for motor omnibuses, but suitable for ordinary vehicles which would not have entailed the erection of a permanent structure on the plaintiff's land. It might have been an expensive matter, and one involving considerable alterations to the defendants' land to provide a way by which a vehicle, having got to the boundary, could get safely down to the land of the defendants, but there is no evidence which would justify me in coming to the conclusion that the method adopted by the defendants was the only practical method of extending the roadway."

I I see no reason whatever to doubt that the learned judge was right in that conclusion. A deed between parties such as we have to deal with here in construing the extent of the right conferred by the deed of March 22, 1926, is very different from the construction of an enclosure award and I merely observe in passing that *Newcomen v. Coulson* (8) is, I think, distinguishable, or rather is not really in point in considering the construction of the extent and power conferred by the deed which we have to consider. The erection

of the ramp, in my opinion, was not justified and was a trespass. For those reasons I agree with the judgment that the Master of the Rolls will now state. A

Appeal allowed.

Solicitors: *Robbins, Olivey, & Lake*, for *Boase & Bennetts*, Penzance; *Clifford-Turner, Hopton, & Lawrence*.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.] B

VANCOUVER MALT AND SAKE BREWING CO., LTD. v. VANCOUVER BREWERIES, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Russell, Lord Macmillan, Lord Wright, and Sir Lancelot Sanderson), December 1, 4, 5, 7, 1933, February 2, 1934] C

[Reported [1934] A.C. 181; 103 L.J.P.C. 58; 150 L.T. 503; 50 T.L.R.
253; 78 Sol. Jo. 173] D

Contract—Illegality—Public policy—Restraint of trade—Bare agreement not to compete—Unreasonable scope—Burden of justifying restrictive covenant.

The scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter, but the law against contracts in restraint of trade, whatever may be its precise scope at any given time, is a doctrine of full force and validity at the present day. When a covenant in restraint of trade is called in question the burden of justifying it lies on the person seeking to uphold it. E

The appellants were incorporated under the Companies Act of British Columbia as a private limited company. The objects of the company included the carrying on of "the business of brewsters and maltsters in all their branches," under a licence authorising them to manufacture beer, ale, porter, lager beer, and all other fermented liquor made in whole or in part from malt, grain or any saccharine matter. In fact they had never brewed any liquor other than sake, a Japanese liquor made from rice. In 1927 they entered into an agreement with the respondents, who were incorporated in 1912 and under a brewer's licence brewed beer only. The agreement provided that in consideration of a sum of \$15,000 paid by the respondents the appellants would not during a period of fifteen years "engage in nor carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer, and will not brew, manufacture or sell any article or articles made in imitation thereof other than sake. . . ." F

Held: the agreement was nothing more than an undertaking by the appellants, in consideration of a sum of money paid to them by the respondents, that for fifteen years they would not carry on a particular business: it was not necessary to render effective a sale, as there was no sale of anything unless it be a sale by the appellants of their liberty to brew beer during the stated period, nor was it an arrangement between the parties to protect their common interests; it was merely a bare agreement not to compete, and, in addition, its terms were so wide involving, as they did, world-wide restriction, as to be unreasonable; and, therefore, the agreement was invalid and unenforceable. G

Notes. Referred to: *Connors Bros., Ltd. v. Connors*, [1940] 4 All E.R. 179. H

As to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., and for cases, see 43 DIGEST 19 et seq. I

Cases referred to:

- (1) *McEllistrim v. Ballymacelligot Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; 88 L.J.P.C. 59; 120 L.T. 613; 35 T.L.R. 354, H.L.; 28 Digest 125, 57.

A (2) *Stewart v. Stewart* 1899, 1 F. (Ct. of Sess.) 1158.

(3) *Ballachulish Slate Quarries, Ltd. v. Grant* 1903, 5 F. (Ct. of Sess.) 1105; 40 Sc.L.R. 791; 11 S.L.T. 230; 43 Digest 65, n.l.

Appeal from a judgment of the Court of Appeal of British Columbia.

B Both the appellants and the respondents, which were limited companies incorporated in British Columbia, had power under their respective memoranda of association to carry on the business of brewers. The respondents brought an action in the Supreme Court of Columbia claiming a declaration that an agreement entered into between the parties on Dec. 5, 1927, was valid and subsisting and enforceable by them against the appellants, and an injunction restraining the appellants from acting in contravention of its terms.

C There were two principal questions involved in the appeal. The first was whether the agreement was void, as being an unreasonable restraint of trade or directed to the establishment of a monopoly or as constituting an offence under s. 498 of the Canadian Criminal Code (R. S. Can., 1927, c. 36), which prohibited combinations or agreements to restrain or injure trade or commerce. The other question was whether the agreement was executed in such circumstances as to be binding upon the appellants at all.

D The trial judge (McDONALD, J.) held that the agreement was not in restraint of trade and that it was intra vires of the two companies and gave judgment for the respondents. That judgment was affirmed by the Court of Appeal (MACDONALD, C.J., B.C., and MARTIN, GALLIHER and M. A. MACDONALD, JJ.A., McPHILLIPS, J.A. dissenting). The appellants appealed.

Wilfrid Greene, K.C., and *Cyril Radcliffe* for the appellants.

E *J. W. de B. Farris, K.C.*, and *Wilfrid Barton* for the respondents.

F Feb. 2, 1934. **LORD MACMILLAN.** The appellants challenge in these proceedings the validity of an agreement in writing which they made with the respondents on Dec. 5, 1927. Having been advised that the agreement was not binding upon them, they intimated to the respondents that they proposed to act in disregard of it, whereupon the respondents brought the present action in the Supreme Court of British Columbia claiming a declaration that the agreement was valid and subsisting and enforceable by them against the appellants and an injunction restraining the appellants from acting in contravention of its terms. The appellants in their statement of defence pleaded that the agreement was

G "contrary to public policy, illegal, void and unenforceable as being [inter alia] an unreasonable and unnecessary restraint of trade in respect of the manufacture and sale of articles of commerce."

H This defence, and others which were stated by the appellants but which need not be detailed here, failed before D. A. McDONALD, J., who granted the declaration sought and also an injunction, though in less wide terms than claimed. His judgment was affirmed by a majority of the Court of Appeal. Hence the present appeal to His Majesty in Council.

I The material facts are not in dispute. In 1923 the appellants were incorporated under the Companies Act of British Columbia as a private limited company under the name of the Vancouver Malt and Sake Brewing Co., Ltd. The objects of the company as set out in the memorandum included the carrying on of "the business of brewers and maltsters in all their branches." At the date of the agreement in question the appellants held a licence under the Dominion Excise Act authorising them "to carry on the trade or business of a brewer of malt liquors" in their premises in Vancouver. By virtue of the definitions contained in s. 5 of the Excise Act this licence authorised them to manufacture beer, ale, porter, lager beer and all other fermented liquor made in whole or in part from malt, grain or any saccharine matter. In point of fact, however, they had never brewed any liquor other than sake, a Japanese liquor made from rice, and their plant was adapted to the manufacture of this liquor only. Their business was, apparently, confined to the province of British Columbia, where the only permitted customer within the province was the government Liquor Control Board. Export trade

was unrestricted, but the appellants did not engage in it. The respondents, Vancouver Breweries, Ltd., who were incorporated in 1912 under the British Columbia Companies Act, also held a brewer's licence and carried on the business of brewers in Vancouver, but they brewed beer only. They had some, but not much, export business with China, and the beer which they manufactured was for the most part disposed of within the province to the government Liquor Control Board. According to the evidence the only breweries in operation in the city of Vancouver in 1927 were those of the appellants and the respondents. There were a few breweries operating in other parts of the province.

In 1927 negotiations were entered into between the respondents and the appellants, who were then apparently not very prosperous, the outcome of which was the agreement now in question. In the agreement the appellants are called "the vendor" and the respondents "the purchaser." The terms of it, which it is necessary to set out at length, are as follows:

"Whereas the vendor is the holder of a brewer's licence under the Excise Act and is engaged in the manufacture of sake in the province of British Columbia. And whereas the purchaser is desirous of purchasing from the vendor the goodwill of the said brewer's licence and any renewal or renewals thereof so far as the same relates to the manufacture and sale of beer, ale, porter, or lager beer. Now therefore this agreement witnesseth that in consideration of the premises and of the sum of \$15,000 now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged) the vendor has bargained, sold, transferred and assigned unto the purchaser, and does hereby bargain, sell, transfer and assign to the said purchaser all its right, title, interest, claim and demand in, to or out of the goodwill of the said brewer's licence or any renewal or renewals thereof (except in so far as the same relates to the manufacture, sale and distribution of sake). And the vendor for itself, its successors and assigns covenants and agrees with the purchaser that during a period of fifteen (15) years from the date hereof it will not engage in nor carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer, and will not brew, manufacture or sell any article or articles made in imitation thereof other than sake, either by itself or through its servants or agents or otherwise. And the vendor further covenants that if at any time it shall sell its licence to brew or any renewal or renewals thereof any such sale shall be made subject to the foregoing conditions. And the vendor further covenants that at no time during the said period of fifteen (15) years will it be concerned directly or indirectly either as principal, agent, manufacturer, servant, financier or otherwise in any brewing business other than that of sake, and in event of any breach of the covenants herein contained will pay to the purchaser the sum of \$15,000 to be recoverable upon every breach of this covenant as agreed in liquidated damages."

The terms of this document are certainly peculiar. It purports to be an agreement for the sale and purchase of the goodwill of the appellants' brewers' licence except in so far as it relates to the manufacture, sale, and distribution of sake. As it is expressed in the narrative, the desire of the respondents was to purchase the goodwill of the appellants' brewers' licence so far as relating to the manufacture and sale of beer, ale, porter, and lager beer. What exactly is meant by the goodwill of a licence or part of a licence it is difficult to conceive. The subject-matter of the sale was not the goodwill of the appellants' business. The only business in which they were engaged was the brewing of sake, and the goodwill of their licence so far as relating to sake was expressly excluded from the sale. They had no goodwill to sell so far as regards the brewing of beer. Nor was the appellants' licence itself, even in part, the subject-matter of the sale. Presumably it could not be, for a licence is personal and not transferable by sale. There was, in fact, no sale of anything.

As counsel for the respondents, in his admirable argument, very frankly put it, the primary object of the agreement is to be found, not in the sale, but in the restrictive covenants. It was a case, he said, not of restrictive covenants in aid of a sale, but of a sale in aid of restrictive covenants. It may be shrewdly suspected that the draftsman had read certain well-known cases on contracts in restraint of trade and was aware of

A the difficulty of supporting a bare agreement not to compete unrelated to any other contract, and he, consequently, invented the imposing façade of a sale, which sold nothing, in order to conceal the nakedness of the restrictive covenants which were the real object of the transaction. Stripped of its adventitious trappings, the agreement is nothing more nor less than a contract whereby in consideration of a sum of money the appellants undertake for a period of fifteen years not to engage in the business of brewing beer and to confine themselves solely to the business of brewing sake. Indeed, Mr. Reifel, the president of the respondents, when asked in cross-examination: "You were paying \$15,000 for the purpose of preventing that company [the appellants] from competing with you?" replied "Yes." The question is whether such a contract is legally binding and enforceable.

C Their Lordships had the benefit of a full discussion of the law relating to contracts in restraint of trade, and many decisions and dicta were quoted. It is, no doubt, true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy—in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit. But that the law against contracts in restraint of trade, whatever be its precise scope at any given time, is a doctrine of full force and vitality at the present day cannot be gainsaid. The law does not condemn every covenant which is in restraint of trade, for it recognises that in certain cases it may be legitimate, and, indeed, beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by LORD BERKENHEAD, L.C., in these words:

F "A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public . . . Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive":

(*McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.* (1) [1919] A.C. at p. 562).

G The restrictive covenants in the present agreement, when submitted to these tests, are at once seen to present unusual features. They are not inserted as being reasonably necessary to render a sale effectual in the interests of both parties, for there is no transaction of sale to be protected. Nothing has been sold. Nor is it a case of an arrangement among traders to submit themselves to mutual restrictions on their activities in the common interest of all the parties. It is simply a case of the appellants undertaking to the respondents in consideration of a sum of money paid to them that they will not for fifteen years carry on a particular branch of business. That is the whole substance of the agreement. If there was any sale, it was a sale by the appellants of their liberty to brew beer and a purchase by the respondents of protection against the possible competition of the appellants in the brewing of beer. In the case just quoted, the Lord Chancellor stated ([1919] A.C. at p. 563) that "the respondents were not entitled to be protected against mere competition," and so far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the Bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective. Counsel for the respondents, however, invoked and relied on the Scottish case of *Stewart v. Stewart* (2). In that case a photographer in Elgin obtained from his brother, who had been his assistant, an agreement whereby his brother, in consideration of a loan of £5, bound himself not to

carry on the business of a photographer, or to enter into the employment of any photographer, in Elgin or within twenty miles thereof. The Second Division of the Court of Session, by a majority, held this to be a legal and enforceable obligation. LORD YOUNG dissented with characteristic vigour. The circumstance that the restraint was locally limited was obviously a material element in the decision that the contract was reasonable in the circumstances. Their Lordships are not prepared to express approval of this decision; but it is perhaps enough to say that the contract there differed in the material respect of its local limitations from the agreement now under consideration. In another Scottish case referred to by Mr. Farris, namely, *Ballachulish Slate Quarries Co., Ltd. v. Grant* (3), there was the important distinction that the restrictive obligation was ancillary to a contract of employment.

In their Lordships' opinion not only are the restrictive covenants of the present agreement open to the objection that they constitute a purchase of protection "against mere competition," but the terms themselves of the covenants are in any event so wide that they cannot pass the test of reasonableness as between the parties. The restrictions are not confined to Vancouver, or even to the province of British Columbia; they prevent the appellants from manufacturing beer anywhere in the world. This, in their Lordships' view, is in itself a sufficient ground on which to condemn them. World-wide restrictions have passed muster in the courts, but only where the restrictions to be reasonably effectual had to be world-wide. Here, even if it was legitimate for the respondents to buy protection for their Vancouver business, which their Lordships are far from accepting, it was out of all reason to place an embargo on the appellants brewing beer anywhere. Counsel for the respondents maintained that the restrictions limited themselves by practical considerations to the province, and that this limitation should be held to be implied as a matter of construction. But it is not so nominated in the bond, and their Lordships see no reason to import a limitation which the parties have not seen fit to express, in order to aid so unprecedented a contract. Nor did it help the respondents' case to point out that the appellants were badly in need of the \$15,000 to enable them to improve their plant and carry on their business, and so to argue that the contract was to their benefit and even to the public benefit by enabling them to avoid closing down or insolvency. The receipt of a sum of money can generally be shown to be advantageous to a business man, but his liberty to trade is not an asset which the law will permit him to barter for money except in special circumstances and within well-recognised limitations.

The agreement being thus, in their Lordships' view, invalid and unenforceable for the reasons stated, it is unnecessary to say anything about certain other objections to it which were referred to by the appellants and dealt with in the courts below. Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Supreme Court and the Appeal Court of British Columbia be recalled, and the action be dismissed. The appellants will have their costs here and below.

Appeal allowed.

Solicitors: *Blake & Redden; Gard, Lyell, & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

PARKFIELD TRUST, LTD. v. CURTIS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), January 31, 1934]

[Reported [1934] 1 K.B. 685; 103 L.J.K.B. 609; 150 L.T. 436]

Moneylender—Memorandum—Rate of interest—Statement—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6 (2).

The defendant signed a promissory note dated May 25, 1933, promising to pay to the plaintiffs, who were registered moneylenders, £500, the amount of a loan made to him, together with interest at £240 per cent. per annum, "such sum of £500 to be paid together with interest then due by consecutive monthly instalments of £325 each" on June 25 and July 25, 1933. The promissory note was attached to a note or memorandum of the contract dated May 25, 1933, as required by the Moneylenders Act, 1927, and the memorandum stated that the loan was payable with interest at the rate of £240 per cent. per annum, and to be made upon the terms of the promissory note of the same date, a copy of which was attached. Default was made by the defendant in repayment and the plaintiffs brought actions, which were consolidated, to recover the £650.

By s. 6 (2) of the Moneylenders Act, 1927: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

Held: the memorandum did not show accurately the interest charged on the loan, and, therefore, the provisions of s. 6 (2) had not been complied with and the action failed.

Notes. Extended and applied: *Mason and Wood, Ltd. v. Greene*, [1936] 2 All E. R. 509. As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190-192, and for Moneylenders Act, 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 377.

Appeal from a decision of ROCHE, J.

The terms of the promissory note and memorandum to which it was attached are sufficiently set out in the headnote, and the facts are fully stated in the judgment of the Master of the Rolls. On Sept. 1, 1933, an order was made consolidating the two actions, each for the payment of the instalment of £325, and interest, and directing that the consolidated actions should be entered in the short cause list.

Evidence on the trial before ROCHE, J., was given by the chairman of the plaintiff company that he agreed to lend the defendant £500, repayable with the addition of £150 by two monthly instalments of £325. He had himself worked out the rate of interest, and it came to £240 per cent. per annum. A chartered accountant gave evidence for the defendant, that, if interest was calculated in accordance with Sched. I to the Moneylenders Act, 1927, it represented interest at £240 per cent. per annum, but that if interest was payable at that rate, it did not fit with the provisions for payment "together with interest then due" by the two monthly instalments of £325. On that footing the first instalment would, as to £100, represent interest on £225 capital, and the remaining capital of £275 with interest for a further month at £240 per cent. per annum would amount to £330 not £325.

ROCHE, J., held that the terms of s. 6 (2) of the Act of 1927 had not been complied with.

Laski, K.C., and *R. F. Levy* for the appellants.

Wallington, K.C., for the respondent was not called on.

LORD HANWORTH, M.R.—This appeal fails. What the court has to determine is whether this action brought to recover the two instalments of £325 payable under the

promissory note which followed on the memorandum of the terms of the loan, dated May 25, 1933, is entitled to succeed. A

The sum of £500 was borrowed by the defendant on May 25, 1933. We are told that the parties orally agreed to the loan, and that in order to comply with the Moneylenders Act the terms were embodied in the memorandum to which the promissory note was attached. That promissory note provided that a sum of £325 should be repaid on June 25, 1933, and a further sum of £325 on July 25, 1933, and also that, if the first instalment was not paid on the due date, then at the election of the lender the full amount of the two instalments should be recoverable. As a matter of fact default was made in respect of the first sum of £325, and a writ was issued on July 17 to recover that amount. Default was also made on July 25, 1933, in regard to the second instalment, and a writ was issued on Aug. 15 to recover payment of that sum. On Aug. 8, 1933, an order was made in the first action giving the defendant leave to defend in respect of the whole amount claimed, and in September, 1933, an order was made for the consolidation of the two actions. The case then came before ROCHE, J., who gave judgment for the defendant, having regard to the terms of the memorandum and to the Moneylenders Act, 1927. From that decision the present appeal is brought to this court. B C

The Moneylenders Act, 1927, is a very stringent Act, and it invades the freedom of contract between lenders and borrowers, and prevents such a contract from being made otherwise than in accordance with that Act. The part of the Act of 1927 with which we are concerned in this case deals with the form of contract and the terms to be introduced in it, while the earlier part of the Act deals with the registration of moneylenders and restrictions on moneylending advertisements. It is s. 6 and the following sections that deal with the matters essential to contracts made by moneylenders, and it is plain that their object is to ensure that there should be material available to enable the court, if the contract comes before it, to presume under s. 10 in a proper case that the interest is excessive because it exceeds 48 per cent. per annum. Thus, it is plainly indicated that importance is attached to the actual rate of interest charged, which ought to be plain to the borrower and to the court for the purpose of enabling the provisions in s. 10 to be applied. D E

The system adopted in moneylending transactions for many years was one under which a lump sum was added to the loan, and the total sum made repayable in instalments at certain intervals, and it was difficult in those circumstances for the borrower to understand whether the bargain was of a perilous nature and to know what were the true terms of the bargain and the rate of interest which he was being charged. F

Under s. 6 (2) there is an alternative provided in regard to the statement of the rate of interest, namely, either to put down the interest charged on the loan expressed as a rate per cent. per annum or to discover the rate of interest, if necessary, because it is not otherwise made plain, by the use of the provisions in Sched. I to the Act. Whichever road is followed the end is the same. It is to arrive at the rate of interest being charged for the loan. It is, to my mind, plain that this part of s. 6 (2) furnishes two alternative methods, and, in my opinion, there is no room for a resort to the mode of calculation stated in Sched. I in a case where there is a clear statement of the rate of interest being charged to the borrower. Section 15 (2) bears out this view, for it says: G H

"Where by a contract for the loan of money by a moneylender the interest charged on the loan is not expressed in terms of a rate, any amount paid or payable to the moneylender under the contract . . . shall be appropriated to principal and interest in the proportion that the principal bears to the total amount of the interest, and the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act shall be deemed to be the rate of interest charged on the loan." I

I turn with these plain indications in mind to the terms of the promissory note. It is a promise to pay the loan of £500 made on May 25, 1933, with interest at the rate of £240 per cent. per annum. That is so plain and simple a statement of the rate of interest that it eliminates any resort to the alternative provision in s. 6 (2), which is only needed when no rate of interest is stated so that it is necessary to adopt the method laid

A down in the schedule to arrive at the rate of interest. Then the promissory note provides:

"Such sum of £500, to be paid together with the interest then due by consecutive monthly instalments of £325 each, commencing on June 25 next and the sum of £325 on July 25, 1933."

B The sanction to enforce that contract is stated to be that on default being made in the payment of any instalment then, if the moneylender elects, the whole amount remaining due becomes immediately payable.

C It seems to me impossible on the terms of that document for the borrower to say that he is entitled to pay less than the loan made to him with interest at the rate of £240 per cent. per annum, and yet payment of the two instalments of £325 is less than the amount of the loan with interest at £240 per cent. per annum over the period of two months. The answer then to any attempt to pay by equal instalments of £325 would be that the borrower had made a contract to repay the loan of £500 with interest at £240 per cent. per annum. When it is remembered that the contract says that each instalment is to include the interest then due, it becomes plain that the interest contained in the two payments of £325 is less than interest at the full rate of £240 per cent. per annum, for out of payment of £325 at the end of the first month £100 must be attributed to interest then due and £225 to capital, leaving £275 out of the original loan still owing, which, with interest at £240 per cent. per annum for another month, requires a final payment of £330 and not £325.

D That being so, I turn back to the provision in s. 6 (2) of the Act that the note or memorandum shall show

E "either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

F We are asked to amalgamate those alternative provisions and by some such method to arrive at the view that £240 per cent. per annum is really the rate of interest. That is, in my view, impossible. As I have pointed out already, the Act is intended to be exacting, and this compels us to read s. 6 (2) precisely as it stands. When we do that it is clear that the memorandum with the promissory note attached does not contain what is required, with the result that the contract cannot be enforced.

G I would add that, if the alternative method in sub-s. (2) is used and the computation of the rate per cent. of interest is to be made under Sched. I, I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they contained interest at whatever rate of interest per annum was ascertained from Sched. I, and that this rate of interest has been found under that schedule.

I have come to the conclusion that ROCHE, J., was right and that his decision should be affirmed and the appeal dismissed with costs.

H SLESSER, L.J.—I agree that the appeal should be dismissed for the reasons stated by the Master of the Rolls, and I propose to confine what I say to the consideration of s. 6 (2) of the Moneylenders Act, 1927. That subsection has the effect of making a contract unenforceable unless the conditions there laid down are complied with, and, as I have had occasion to state in other cases relating to the Moneylenders Act, I do not think that the fact that its provisions invade the common law freedom to contract can be relied on.

I Section 6 (2) of the Act contemplates two methods whereby the amount to be repaid in addition to the sum actually advanced can be shown as a rate of interest. The first alternative deals with interest on loans which can be readily expressed as a rate per cent. per annum, and then the subsection goes on to deal with something which is not expressed as interest, and in that case the rate per cent. per annum has to be calculated in the manner provided in Sched. I to the Act. In other words, there may be either a true rate of interest or a notional rate per cent. per annum arrived at under the schedule.

I do not think that the requirements of the section are complied with unless it is stated in terms whether the rate of interest mentioned in the memorandum is a true rate of

interest or a rate per cent. per annum calculated in manner provided in the schedule. **A**
 The object of the subsection is to provide for the borrower and the court a true note of the transaction, and, to my mind, it is not stating the true terms of the contract, and so complying with the requirements of the subsection, to speak of a rate of interest simpliciter when the rate stated is not part of the agreement between the parties but only a rate which has been ascertained notionally.

I mention this because in the present case the rate of interest has been stated simpliciter, although the contract was for repayment of the loan with a lump sum added to it in instalments. On that ground alone, in addition to that stated by my Lord, I am of opinion that the memorandum in this case is defective seeing that it does not state, as is now alleged, that the rate of interest was arrived at under Sched. I. **B**

ROMER, L.J.—I agree with the judgments that have just been delivered. Unfortunately for the plaintiffs they have mixed up the two methods contemplated by s. 6 (2) for arriving at the rate per cent. per annum of the interest charged. The confusion which may result from so doing has been well illustrated in this case. By the memorandum it is stated that the plaintiffs made to the defendant on May 25, 1933, a loan of £500 repayable with interest at the rate of £240 per cent. per annum. In the promissory note attached to the memorandum the loan is made repayable by two instalments of £325 payable at the end of the first and second months after the date of the loan. Applying the rate of interest previously stated, the sum of £325 to be paid when June 25, 1933, arrived must include £100 interest, and, therefore, only £225 capital, leaving £275 out of the capital still to be paid, which with interest at the same rate for another month would amount to £330. It follows that the instalments of £325 are not sufficient to include interest at the rate of £240 per cent. per annum. If, on the other hand, s. 15 (2) of the Act is applied and the first instalment of £325 is treated as being made up of £250 capital and £75 interest, the interest for that month would have been paid at the rate of £180 per cent. per annum only. How in such circumstances is the unfortunate borrower to find out how much principal and interest remains owing? **C**
D
E

Appeal dismissed.

Solicitors: *Philip Goodenday & Co.; P. W. H. Speed & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*] **F**

A

WEST HAM CORPORATION v. CHARLES BENABO & SONS

[KING'S BENCH DIVISION (Atkinson, J.), March 26, 28, 1934]

[Reported [1934] 2 K.B. 253; 103 L.J.K.B. 452; 151 L. T. 119; 98 J.P.

287; 50 T.L.R. 392; 78 Sol. Jo. 298; 32 L.G.R. 202]

B

Housing—Houses repaired by local authority—Demand for recovery of expenses—Need to specify amount expended on each house—Signature by clerk to authority or his deputy—Failure by person having control to appeal to county court—Housing Act, 1925, (15 & 16 Geo. 5, c. 14), s. 120 (2)—Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 18 (3), s. 22 (1) (b).

C

A demand by a local authority, acting under s. 18 (3) of the Housing Act, 1930, for repayment by the person having control of premises of expenses incurred in repairing the premises must specify the amount expended on each house, and, under s. 120 (2) of the Housing Act, 1925, must be signed by the clerk to the local authority or his deputy.

D

Failure to appeal to the county court under s. 22 (1) (b) of the Act does not preclude the person having control from averring that the demand made on him was invalid and not in accordance with the statutory requirements.

Notes. Enactments relating to housing generally have now been consolidated in the Housing Act, 1957. The provisions formerly contained in the Housing Act, 1925, s. 120 (2) (which was repealed by the Housing Act, 1936, and re-enacted by s. 164 thereof) are now contained in s. 166 of the Housing Act, 1957. The provisions of the Housing Act, 1930, ss. 18 and 22 (which were repealed by the 1936 Act, and re-enacted by ss. 10 and 15 thereof) are now contained in ss. 10 and 11 of the Housing Act, 1957.

E

Distinguished: *Benabo v. Wood Green Corpn.*, [1945] 2 All E.R. 162.

As to repair of insanitary houses, see 26 HALSBURY'S LAWS (2nd Edn.) 550 et seq., and for cases, see 38 DIGEST 214 et seq.

F

Cases referred to:

(1) *Labalmondiere v. Addison* (1858), 1 E. & E. 41; 28 L.J.M.C. 25; 23 J.P. 261; 5 Jur. N.S. 431; 120 E.R. 823; 26 Digest 518, 2203.

(2) *Grece v. Hunt* (1877), 2 Q.B.D. 389; 46 L.J.M.C. 202; 36 L.T. 404; 41 J.P. 356; 25 W.R. 543, D.C.; 26 Digest 532, 2316.

G

Action in which the plaintiffs claimed from the defendants £165 3s., expenses incurred by the plaintiffs in executing repairs to a number of dwelling-houses in Wade-road and Grange-road, Plaistow. The plaintiffs alleged that those expenses were payable by the defendants as persons having the control of the houses, pursuant to ss. 17 and 18 of the Housing Act, 1930.

The relevant sections of that Act are as follows:

H

Section 17 (1). "Where a local authority . . . are satisfied that any dwelling-house which is occupied or is of a type suitable for occupation by persons of the working classes is in any respect unfit for human habitation, they shall . . . serve upon [the person in control of the house] a notice requiring him . . . to execute the works specified in the notice."

I

Section 18 (1) provides that, if the person in control fails to comply with the notice, the local authority may themselves carry out the repairs. Subsection (3) provides that, after a demand for the expenses has been made, the amount thereof may be recovered from the person in control as a civil debt.

Section 22 (1) (b) provides that any person aggrieved by a demand for the recovery of such expenses may appeal to the county court.

The Housing Act, 1925, s. 120 (2) provides:

"A notice, demand, or other written document proceeding from the local authority under this Act shall be signed by their clerk or his lawful deputy."

After the plaintiffs had entered and executed works pursuant to s. 18 (1) they sent to

the defendants, in January, 1933, two accounts—one for £96 7s. relating to the houses in Wade-road, and one for £68 16s. relating to the houses in Grange-road. Both were signed by an official who was not the town clerk or his deputy (as required by s. 120 (2) of the Housing Act, 1925), and contained no words of demand. In July, 1933, the town clerk wrote to the defendants demanding payment of the total sum claimed. In none of the three communications was there anything to show how much had been spent on each separate house, the items being charged for labour, material, and so forth for the whole group of houses. A B

The accounts were not paid, and this action was begun. The defendants contended that the demands were invalid because (i) as to the two first, they were not signed by the town clerk or his deputy and did not contain any words of demand, and (ii) as to all of them, they did not show the amount expended on each house.

The plaintiffs contended that the demands were valid, and they further said that, if the defendants were aggrieved, their only remedy was by way of appeal to the county court; that the time for such appeal had expired; and, therefore, that s. 22 (5) precluded the defendants from contending that no valid demand had been made. C

S. Edgar Macassey for the plaintiffs.

Phineas Quass for the defendants. D

ATKINSON, J.—In this case the mayor, aldermen, and burgesses of the county borough of West Ham are suing Messrs. Charles Benabo & Sons for £165 3s. 0d., alleged to be expenses incurred by them in executing certain works of repair on dwelling-houses in the control of the defendants under their powers contained in the Housing Acts. The claim concerns two lots of houses—nos. 1 to 9 in Wade-road, and a number of houses in Grange-road. The houses, in the opinion of the local authority, were not fit for habitation, and on Oct. 22, 1931, notices were served under s. 17 of the Housing Act of 1930 in respect of each of the houses in Wade-road. There was a separate notice for each house, and each notice indicated with sufficient detail the work that, in the opinion of the council, was required to be done to render the house fit for habitation. Similar notices were served in respect of Grange-road on Dec. 17, a separate notice for each house again being given. All these notices were obviously formal notices on printed forms, as supplied by the Minister, and they were all signed by the town clerk. They came from the Town Hall, West Ham, and, of course, nobody receiving those notices could have any doubt whatever that they were receiving formal notices under s. 17 of that Act. I do not know who is right as to the contention that the defendants in fact complied with these notices. I am told that they carried out a lot of work, and that, in their view, they complied sufficiently with the notices. However that may be, the local authority was not satisfied, and on July 11 as to Grange-road, and on July 21 as to Wade-road, notices were served indicating that the council intended to enter upon the premises and execute the work required. Again there was a separate notice for each house, the form was a printed form signed by the clerk of the authority, and again it obviously was a formal notice, obviously given in pursuance of the powers under the Act. Following on those notices the local authority instructed certain contractors to go and do some work, and, some work having been done, the borough engineer on Jan. 23, 1933, wrote a letter to the defendants which came from the borough treasurer's department, Municipal Offices, The Grove, Stratford. It was headed "Re Housing Act, 1930, ss. 17 and 18; re 1 to 9, Wade-road and 174 to 188, Grange-road," and it read: E F G H

"In reply to your letter of the 11th inst., I have the pleasure to enclose details of accounts as rendered by the contractors to this corporation in respect of the above. You will notice the accounts have been revised owing to a slight difference from the original amounts due to the firm having made an error in their details. Yours faithfully, (Signed) E. J. Johnson." I

There was nothing to indicate who E. J. Johnson was, except that he probably had something to do with the borough treasurer's department. I assume that my copy is correct, and that this was just a letter and not a printed form. Enclosed with the letter were two statements, one referring to nos. 1 to 9, Wade-road:

A "To cost of work carried out at the above property, as per details herewith, £96 7s. 1d.
Notice served Oct. 22, 1931,"

B and a similar statement in respect of Grange-road for £68 16s. 5d., notice served Dec. 17, 1931. Then there were two documents headed "Details of Account Rendered (Housing Act, 1930, s. 18). Work executed at 1 to 9, Wade-road, Custom House, E. 16," and there follow details, not of the work done or the amount charged in respect of each house, but saying, to illustrate what is in the document, under the first heading, "Wages: labourer, 237 hours at 1s. 2½d.", so much; "Bricklayer, 141 hours at 1s. 7½d.", so much; "Slater, 109 hours at 1s. 7½d.", and so on. Then "Material: stocks, slates, cement, air-bricks," so much. A similar account related to Grange-road. The correspondence shows that the defendants had been pressing for details, not of that kind at all, because those two accounts told them what any person of intelligence would know already—that the account would consist of time, wages and material. What they wanted to know was how much had been spent on each house, and these accounts failed to give any indication of how the expenses claimed were to be apportioned over the houses. Those revised demands were acknowledged by letter which asked for the cost, nature and extent of the repairs alleged to have been carried out. The defendants believed they had done all the work they had been called upon to do, and they wanted to know what was the work done with regard to each house. There were two letters, one on Jan 25, 1933, and the other on Feb. 14, 1933, when the request was repeated, and the only answer they got was a second application signed by Mr. E. J. Johnson, stating that the defendants had not had payment of the accounts amounting to £173 8s. 0d., and asking for the amount to be remitted.

E The defendants kept pressing for further information, and did not pay, and finally there came a letter signed by Mr. Charles E. Cranfield. This letter came from the Town Hall, West Ham, and it was headed "Account outstanding £173 8s. 0d.", and read

F "The borough treasurer informs me that you have failed to pay the sum of £173 8s. 0d. in respect of drainage work at 73, Croydon-road, E. 13, £8 4s. 6d.; work at 174-188, Grange-road, E. 13, £68 16s. 5d.; work at 1-9, Wade-road, E. 16, £96 7s. 1d. Total £173 8s. 0d. I must, therefore, request you to forward the same to me on or before the 31st inst., failing which instructions will be given for proceedings to be taken against you for the recovery thereof. I am, dear sirs, Yours faithfully (Signed), Charles E. Cranfield."

G This letter again was not on a printed form and was of a totally different character from the four different sets of notices which had been served, which had all been obviously formal documents served in pursuance of statutory requirements, but I dare say that the defendants would remember that Mr. Cranfield was in fact the clerk to the above-named local authority.

H The defendants did not pay, and ultimately this writ was issued. The writ, which contains the statement of claim, was originally based only on the demand served on Jan. 24, 1933, but early in the hearing, once it had been pointed out that by s. 65 of the Housing Act, 1930, that Act had to be read with the earlier Act of 1925, and to be construed as one with that Act, which contained a provision that all notices and demands served or made under the Act had to be signed by the clerk or deputy clerk, the plaintiffs applied for leave to add an alternative demand, and the claim was amended by pleading alternatively the demand served on July 17, 1933—that is, by pleading the letter I have read which was in fact signed by the clerk to the borough council.

I Various preliminary points have been raised by the defendants. It was agreed that I had merely to determine these preliminary points, and that, if the result of my decision on them was that the defendants were entitled to go behind the demands and challenge the claim, that inquiry should be held elsewhere, but the defendants in substance raise the following points. They say that there is no enforceable claim for expenses of this kind until a demand has been made, that there is no legal liability until a demand has been made, and they say there has been no demand in this case within the provisions of the Housing Act. They say a demand to be in accordance with that Act, first, must come from the proper quarter, in other words, must be signed by the clerk or deputy



clerk, and secondly, that a demand to be valid under the Act must be a demand in respect of each particular house and have reference to a particular notice. They say that neither of these demands complied with that requirement, and the first demand obviously did not comply with the requirement as to signature. Therefore, they say there is no demand at all. Indeed, they go further and say that a demand ought to indicate the work that has been done so that an owner can determine whether the claim is a fair one and a proper one. On the other hand, the plaintiffs, while challenging all these points, say that there is a method provided by the Act for determining any objection that an owner may have; that, if that method is not adopted, he becomes bound by the demands; and that it is now too late for them to raise any objection and claim they are entitled to judgment for the amount claimed without the defendant having any opportunity whatever of challenging the justice or accuracy of the claim. A
B

I am not going to read ss. 17, 18, and 22, but under s. 17, if a local authority is of opinion that repairs are necessary to make a house fit for human habitation they can serve a notice specifying the work to be done, and call upon the owner or the person in control to do it. Subsection (3) provides that in addition to serving a notice on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in that house whether as freeholder, mortgagee, lessee, or otherwise. All through this section I think it is clear that a dwelling-house is referred to, and it seems to me to contemplate dwelling-houses being dealt with separately and individually. Section 18, again referring every time to a dwelling-house, provides what is to be done if the person called upon to do the work does not do it. He again has got to be served with a notice, and, if the notice is not complied with, they will do the work themselves. Subsection (2) provides that they must not be interfered with; and sub-s. (3) says: C
D
E

"Any expenses incurred by the local authority under this section, together with interest, at such rate as the Minister may with the approval of the Treasury from time to time by order fix, from the date when a demand for the expenses is served until payment, may, subject as hereinafter provided, be recovered by them, by action or summarily as a civil debt, from the person having control of the dwelling-house," F

and so on. There is a proviso which is not without its importance that

"if the person having control of the dwelling-house proves that he (i) is receiving the rent merely as agent or trustee for some other person; and (ii) has not, and since the date of the service on him of the demand has not had, in his hands on behalf of that other person sufficient money to discharge the whole demand of the authority, his liability shall be limited to the total amount of the money which he has, or has had, in his hands as aforesaid." G

Subsection (4) provides:

"In all summary proceedings by the local authority for the recovery of any such expenses, the time within which the proceedings may be taken shall be reckoned from the date of the service of the demand, or if an appeal is made against that demand, from the date on which the demand becomes operative." H

Then there is power for the local authority to declare these expenses to be payable by weekly or other instalments, and sub-s. (6) declares that:

"The amount of any expenses and interest thereon due to a local authority under this section shall be a charge on the premises in respect of which the expenses were incurred." I

Passing to s. 22 (1) it is there provided that:

"Any person aggrieved by . . . (b) a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice,"

may appeal to the county court within twenty-one days. Later there is a provision that the judge may make an order confirming or quashing or varying the demand, and sub-s. (5) provides that:

A "Any notice, demand or order against which an appeal might be brought to a county court under this section shall, if no such appeal is brought, become operative on the expiration of the period of twenty-one days mentioned in sub-s. (1) of this section, and shall be final and conclusive as to any matters which could have been raised on such an appeal."

B The first contention of the defendants is that there is no right of action unless and until a demand has been served which satisfies the statutory requirements, and they say that there is no demand in this case that fulfils the statutory requirements. As to the first demand they say it is not signed by the proper person, and it does not come from the proper quarter, and also that there are no words of demand in it, and as to both demands they say that they are not demands in respect of each house showing the expenses incurred in executing the work specified in regard to that house. They say a demand for a lump sum in respect of a number of houses does not comply with the statutory requirements, and is not a demand within the meaning of this Act. As I have said, they go further and say that in their view the notice ought to indicate the work that has been done. I am not going to decide that point. I think it is unnecessary for the decision of this case, and I will say no more about it.

D Their next point of importance I think was that in any case they say an action can only lie for a particular sum in respect of a particular house. I am satisfied that there is no money due, that there is no enforceable claim, and that no action can lie, until a demand is made. I think that is implied throughout these sections. I do not think it is very strenuously contested, but I am perfectly satisfied in my own mind that no local authority having spent the money could issue a writ for the money they say they have spent unless and until there has been a demand. There cannot be default in law in not paying a sum the amount of which you are completely ignorant and which you never have been asked to pay. There are two cases which were decided on analogous sections. The first is *Labalmondiere v. Addison* (1), where it was held that the matter of complaint really was the non-compliance with a demand and the period of limitation only ran from the demand. LORD CAMPBELL said:

F "It seems contrary to all reason to say that there was any liability or default in the respondent before application had been made to him, stating what the amount of expenses were and demanding payment, although a demand is not expressly required by the statute."

Here there is no demand expressly required, but I think every word that the Chief Justice said there applies here. WIGHTMAN, J., said:

G "The default of the respondent alleged in the summons is, the non-payment of the amount of expenses after having been applied to for them."

H Then there is the case of *Grece v. Hunt* (2), which dealt with certain sewerage and paving expenses. There the work had been executed for the improvement of a street under two totally different statutes, and the expenses were charged upon the owners of the premises fronting the street. It was held that it was necessary

"before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him,"

I and the statutory period of six months did not begin to run until that had been done. I think every word of reasoning in the judgment given in that case applies to this case, and there is no legal liability until a demand has been served.

Logically I think it must follow that, if liability under the statute is created by a demand, the demand must be a proper demand, one that complies with the statutory requirements. It is not so easy to determine what are essential requirements, but I have no doubt as to two requirements. I am satisfied that a demand must come from the proper quarter; that means that it must be signed by the clerk or his deputy. There seems to me to be very good reasons why that express statutory provision should be adhered to. Under sub-s. (5) of s. 18 the local authority have power to declare the expenses payable by instalments, and I suppose it must be their duty at some time to

address their mind to that question. If the notice comes from their recognised agent, the clerk, I think a person in control, or an owner, must be bound to assume that the demand is made with authority, that the conditions of payment have been considered by the local authority, and that he must recognise he is under an obligation to obey the demand. But if it comes from anyone else there is no reason why he should assume that the matter has been considered by the council. The demand may have been made on the writer's own initiative without any instruction from the council, without the council having considered the terms of payment, and if you are once going to depart from the provision that the demand has got to be signed by the clerk or the deputy, where are you going to draw the line? If the demand comes from some junior clerk, could anyone argue that that was a demand which had got to be taken seriously as a demand within the Act? It seems to me that one would get into all sorts of difficulties if one took the view that it was not an essential part of the statutory demand that it should come from the proper quarter and be signed by the clerk or his deputy. At any rate, I hold that the proper signature is an essential part of a proper demand. My view as to that rules out the first notice which was merely signed by Mr. Johnson without any description whatever as to what he was and who he was.

The second requirement, of which I have no doubt, is that a demand must be a demand in respect of the expenses incurred on each separate house for a definite and certain sum alleged to have been spent on that house. I do not, of course, mean there is to be a separate document for each house, but that the demand must be in respect of the expenses alleged to have been incurred on each house. I think ss. 17 and 18 indicate this again and again, but there are three matters in particular which seem to me to put this question beyond doubt. The first one is the proviso to s. 18 (3) which limits the liability of the person having control of the dwelling houses, if he is an agent or trustee, to the amount which he has in his hands. That seems to me to be contemplating his position in regard to each particular house. He may be receiving the rent of one house for one person, the rent of another for another person, and he may have varying sums of rent in his hands, because the amount of rent may be different and the amount of expenses may be different in the case of each house. I cannot see how that proviso can apply at all unless he knows exactly how much is claimed in respect of each house. Then sub-s. (6) creates the charge:

"The amount of any expenses and interest thereon due to a local authority under this section shall be a charge on the premises in respect of which the expenses were incurred."

It is perfectly obvious that if an omnibus demand is made for a lump sum having reference to any number of houses, that proviso is wholly inoperative because the charge on each house is in respect, not of the expenses incurred on a number of houses, but of those incurred in respect of the particular house, and, as the charge cannot be effective until there is a legal liability to pay, and as that legal liability is to start with demand, it seems to me it was contemplated beyond all question that the statutory demand must be in respect of each particular house. The third matter which seems to me decisive is s. 22 (1) (b):

"Any person aggrieved by . . . a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice."

Again, the demand is directly linked up with expenses for work done in pursuance of and specified in a particular notice. That, to my mind, makes it clear that the demand contemplated by this code is a demand which has reference to expenses incurred on each house separately.

In my opinion, a demand which fails in either of those two matters is not a demand which creates a legal liability to pay. I repeat, it may be that a demand ought to contain more. I am expressing no view about that. I can see there are very strong reasons for saying that the demand ought to tell the person on whom it is served in respect of what work, in some detail, the amount is claimed. But this is to be pointed out, that the form prescribed by the Ministry, the form of demand, Form No. 3, does not contain details of that kind. That form supports the view I take—that it must be a

demand in respect of each particular house. Indeed, the form goes so far as to say that it is to be sealed with the common seal of the local authority. That, I think, goes beyond the Act, but it does make it clear that it has got to be a demand which is on the face of it the demand of the local authority, and at least must be signed by the recognised agent, the clerk. That form does not seem to me to indicate that the work has got to be described, but it does indicate that my view is right, that at any rate it has got to be a demand in respect of a particular house.

If I am right so far, that there has been no demand which creates a legal liability, the next matter which arises and was strenuously urged is that all these were matters which could have been raised on an appeal to the county court. Counsel for the plaintiffs says: "There was nothing to prevent the defendants at once starting the relevant proceedings in the county court, and there taking the objection that these demands were not good and ought to be quashed." He places considerable reliance upon that word "quashed," which obviously gives the county court judge power to declare the notice wholly ineffective. I think this is a question of considerable difficulty, but, in my view, if the document called the demand does not in these two essentials comply with the statute and does not create a legal liability to pay such expenses as have been properly incurred, it cannot subsequently create such legal liability owing to a failure to appeal. It is quite true that sub-s. (4) of s. 18 provides that the period within which summary proceedings for the recovery of expenses must be taken is to be reckoned from the date of the service of the demand, or, if an appeal is made against that demand, from the date on which the demand becomes operative, but I do not think that quite touches the point that there has got to be a good demand to create a legal liability. If the demand is not one which satisfies the statutory requirements, and is not a demand which gives a ground of action because of that failure, I cannot see how a neglect to appeal can turn it into a good one. A neglect to appeal certainly debars a defendant from making any objection to amount, the justice of the claim, whether the work has been done, the clerk of the works' reasonableness in charge, and all that kind of thing, but I cannot see how a failure to appeal can turn a bad notice into a good one. If the defendants had appealed to the county court the judge could, perhaps, have quashed the demand as being a bad one. Section 22 (1) (b) provides: "Any person aggrieved by," not by any demand, good, bad, or indifferent, but "a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice." Why is it all set out at such length? If counsel for the plaintiffs is right, I am to read those words as meaning this: Any person aggrieved by a demand of any kind, a demand from Tom, Dick, or Harry, a demand for a lump sum which, so far from being a demand for expenses incurred for executing works specified in a particular notice, refers, if at all, to a bundle of notices. A "person aggrieved" includes a person like a mortgagee. Supposing some of these houses had been mortgaged. What is a mortgagee to do when he is served with a demand of this kind and does not know what it means? I cannot see there is any obligation on a person receiving a demand of this sort to appeal if the demand does not come within the description in those words. I think all Acts of this kind, which are very technical, and which are conferring rights which some people think are harsh upon statutory bodies and local authorities, have to be dealt with strictly, and I do not think anybody has any right practically to eliminate two or three lines there which I am satisfied were put in for a very good purpose as indicating in, I think, the clearest way the nature of a demand against which a person can, and indeed must, appeal.

If I am right in this view, that disposes of the whole action, because there has been no demand sufficient to create a legal liability to pay, and the defendants are not debarred from raising that objection because of their failure to appeal. The result is that there must be judgment for the defendants with costs. The plaintiffs, if they wish to go further, must serve proper demands in respect of each house, and then the defendants will be bound, if they wish to challenge the claim, to go to the county court. Of course, nothing I have said means that because the wrong sum is in the demand, because too much is demanded, that takes the demand outside the Act. So long as it is a demand in respect of a particular house it is a demand which complies with the statute in form.

It is one which is good on the face of it. The mere fact that it may turn out to be for too much is neither here nor there. The amount can be rectified by the county court judge, but, in my view, the demand must be one that is good on the face of it, which must comply with the statutory requirements, and, if it does not do that, it is a bad one, and no failure to appeal can turn it into a good one. Therefore, there will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: Town Clerk, West Ham; W. A. & H. Elmore Smith.

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

LONDON AND NORTH-EASTERN RAIL. CO. v. FURNESS SHIPBUILDING CO.

[House of Lords (Lord Atkin, Lord Warrington, Lord Thankerton, Lord Macmillan and Lord Wright), January 22, 1934]

[Reported 103 L.J.K.B. 180; 150 L.T. 382; 50 T.L.R. 257; 39 Com. Cas. 182]

Indemnity—Injury in connexion with works—Injury caused by negligence of third party.

By a written contract between a railway company and contractors providing that the contractors should do certain reconstruction work to a bridge carrying railway lines it was agreed that the contractors should be responsible for and provide against all risks and contingencies whatever that might arise in respect of the works, and should be liable to make good and pay for any accident, damage, loss or injury of or to any person and any loss of life "caused in connection with the works" and should indemnify the company against all actions, claims, &c., in respect of any such accident, damage, loss, or injury, or any such loss of life (even though the company might be primarily liable therefor). Two workmen employed by the contractors upon the bridge were struck by the open door of a compartment in a passing train owned by another railway company, the one being injured and the other killed. The door was open by reason of the negligence of a servant of the railway company that had made the contract at the station whence the train had started. Actions by the injured man and the representatives of the other man against this railway company were settled on terms which were admitted to be reasonable. On an action by the railway company against the contractors on the indemnity clause,

Held: that on the true construction of the very wide words of the clause no term was to be implied limiting the liability of the contractors to causes arising directly out of the works; the clause covered an accident, such as the present, where a workman on the works was injured by the negligence of a third party; and, therefore, the contractors were liable.

Notes. Referred to: *Great Western Rail. Co. v. Port Talbot Dry Dock Co.*, [1944] 2 All E.R. 328; *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 230.

As to the extent of liability under a contract of indemnity, see 18 HALSBURY'S LAWS (3rd Edn.) 534-536, and for cases, see 26 DIGEST 223 et seq.

Case referred to:

(1) *Great Western Rail. Co. v. James Durnford & Sons, Ltd.* (1928), 139 L.T. 145; 44 T.L.R. 415; 33 Com. Cas. 251, H.L.; Digest Supp.

Appeal from a decision of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.).

The plaintiff railway company agreed with the defendants that the latter should do certain reconstruction work to a bridge carrying railway lines over other railway lines.

Clauses 34 and 35 of the contract were in these terms:

Clause 34 (a): "The contractor shall be responsible for and provide against all risks and contingencies whatever that may arise in respect of the works, and shall be liable to make good and pay for any . . . accident, damage, loss, or injury of or to any person . . . and any loss of life caused in connection with the works, and shall indemnify the company against all actions, claims, losses, costs, and expenses in respect of any such accident, damage, loss, or injury as aforesaid or any such loss of life (even though the company may be primarily or jointly with the contractor liable therefor) and against all liability under . . . the Workmen's Compensation Act, 1925. . . . (b) For the purpose of more effectually indemnifying the company against all claims in respect of accident, injury, or loss of life to workmen employed by the contractor . . . the contractor shall forthwith take out a policy of insurance in the joint names of the company and the contractor . . . insuring the company and the contractor against their or his liabilities in respect of any such accident, injury, or loss of life . . . the said policy shall also include any claim or claims by third parties in respect of any injury, fatal or non-fatal, to persons . . . in connection with the carrying out of the works."

Clause 35 stated:

"In case at any time any claim or demand shall be made against the company for or in respect of any compensation . . . or other matters . . . and in case the contractor shall neglect after notice to deal with such claim or demand, then the company shall be entitled to defend or . . . to compromise or settle such claim or demand on such terms as they may think fit and the contractor shall repay to them the amount so paid together with all costs and expenses of the company in relation thereto. . . ."

Two workmen employed by the defendants and engaged on work of reconstruction upon the bridge were struck by the open door of a compartment in a passing train, one being injured and the other killed. The train was owned by the London, Midland, and Scottish Rail. Co., and was travelling upon their line at the time of the accident. From the evidence of the sole passenger in the compartment in question, the door swung wide open after leaving Fenchurch-street Station, the last place where the train was stationary, and it appeared that the station staff at that station had failed to ensure that the door was fast shut before the train started.

Actions were brought against the plaintiff company by the injured workman and the representatives of the workman who was killed. The two claims were settled for £3,614 ls. The defendants admitted that the settlements were reasonable. The plaintiff railway company sued the defendants for this sum under cl. 34 (a) and cl. 35. The Court of Appeal held, affirming the decision of BRANSON, J., that the accident was "caused in connection with the works" within the meaning of the indemnity clause, these words not being confined to meaning "caused by the railway company's men who were themselves engaged upon the works." GREER, L.J., expressed the view that what was intended was that any accident resulting in a claim which was caused by the servants of either the railway company or of the contractors, if it would not have happened but for the carrying out of these works, was to be the liability of the contractors, for which they were to indemnify the railway company. The defendants appealed.

Stuart Bevan, K.C., and Philip Vos for the appellants.

Miller, K.C., and S. Cope Morgan for the respondents were not called on to argue.

LORD ATKIN.—The dispute in this case arises under a contract made on July 10, 1929, between the appellants and the respondents. It appears that the respondents are under a liability to maintain a bridge on their system, a bridge which is near West Ham Station and which conveys the line which is used by the London, Midland, and

Scottish Railway for the purpose of conveying trains to Southend, over the line of the respondent company, which runs in a right-angled direction under the bridge. While the appellants were reconstructing this bridge the unfortunate accident occurred which gives rise to this claim. It appears that the workmen were working on the bridge; they had the assistance of two flag men, whose duty it was to warn them of the approach of trains. A train approached from Fenchurch-street, which was a London, Midland, and Scottish train. The men having been warned stood on one side, on a projecting part of a girder which formed part of the parapet and would normally have been clear of the train, but, unfortunately, a carriage door of the train swung open just as the train approached the bridge, and hit one of the men, killing him, and hit another man, inflicting upon him very serious injuries. The learned judge who tried the case in the King's Bench Division has found that the carriage door swung open owing to the negligence of the servants of the respondents, the London and North-Eastern Rail. Co., at Fenchurch-street, from which station the train started. The representatives of the deceased man brought an action under Lord Campbell's Act, and the injured workman brought his action at common law, against the London and North-Eastern Rail. Co., and those actions were settled for a sum of £3,614 1s. The London and North-Eastern Rail. Co. now claim to recover that sum from the contractors on the ground that under the contract in question the contractors had undertaken to bear that expense.

The case turns upon the construction of cl. 34 of the contract, which provides in sub-para. (a) that

"The contractor shall be responsible for and provide against all risks and contingencies whatever that may arise in respect of the works, and shall be liable to make good and pay for any interruption, accident, damage, loss or injury of or to any person, property, or rights, whether public or private, and any loss of life caused in connection with the works, and shall indemnify the company against all actions, claims, losses, costs and expenses in respect of any such interruption, accident, damage, loss or injury as aforesaid, or any such loss of life (even though the company may be primarily or jointly with the contractor liable therefor) and against all liability under the Employers' Liability Act, 1880,"

and other Acts. I need not read the rest of that clause. Then there is a further provision, in cl. 34 (b), that

"For the purpose of more effectually indemnifying the company against all claims in respect of accident, injury or loss of life to workmen employed by the contractor or any sub-contractor, the contractor shall forthwith take out a policy of insurance in the joint names of the company and the contractor with an insurance company to be approved by the engineer, insuring the company and the contractor against their or his liabilities in respect of any such accident, injury or loss of life, including all liabilities under the Employers' Liability Act, 1880 . . . the said policy shall also include any claim or claims by third parties in respect of any injury (fatal or non-fatal) to persons or damage to property, plant, materials or things of any kind in connection with the carrying out of the works."

The problem before your Lordships is the construction to be put upon cl. 34 (a); and what has been pressed upon your Lordships is this. It is said that the liability is to make good any

"loss or injury of or to any person . . . and any loss of life caused in connection with the works," and to "indemnify the company . . . in respect of any such . . . accident . . . as aforesaid."

The point which is made is that the loss of life in question was not, it is said, caused "in connection with the works" at all, but was caused by the negligence of the respondent company's servants at Fenchurch-street, miles away from the actual place where the accident happened, and, therefore, it is said, there is no obligation to indemnify. I am quite unable to accept that view of the contract, and I agree with the view which has been taken in the courts below. To put it quite shortly, I arrive at that conclusion because I am of opinion that the first words used in the clause give the key to the whole of the relations that were intended to exist in respect of this obligation:

"The contractor shall be responsible for and provide against all risks and contingencies whatever that may arise in respect of the works,"

and it is in order to carry out that obligation, which is expressed in the widest terms, that the subsequent words are used imposing upon the contractor liability to make good and pay for all damage and so on, and further, to

"indemnify the company against all actions, claims, losses, costs and expenses in respect of any such interruption, accident,"

and so on. It seems to me that it is a mistake to try to imply into the language of the clause a causal relation limited to causes which arise directly out of the works. I do not think that is the meaning of the words at all. The words "injury and loss of life caused in connection with the works" seem to me to have no narrower meaning than the first and guiding words: "All risks and contingencies whatever that may arise in respect of the works," and for this purpose it appears to me that the word "caused," as was said by one of your Lordships in the course of the argument, is a mere neutral term, and that the meaning of the word is expressed perfectly adequately and completely if for the word "caused" you substitute either the words "arising out of," or the words "coming into existence," or any similar words.

The result of that is this, that what you have to consider in this particular case is whether it can be said that this accident arose "in connection with the works," and one puts to oneself the question whether or not an accident would not be said to arise "in connection with the works" if the workmen working on the works were injured at that spot by reason of the negligence of a third person, even though the negligence began to operate away from and apart altogether from the works, if in fact it operated in respect of those workmen because they were on the works, and it would not have happened unless they had been on the works. I think that in ordinary parlance anybody would say that that accident did, in fact, arise in connection with the bridge where those particular men were working. If that is so, it appears to me that the clause provides in express terms that the contractor is to indemnify the company in respect of such a risk as that. The fact is that the whole contractual scheme appears to be that the London and North-Eastern Rail. Co. stripped themselves of any liability in respect of any risk, and the contractors assumed upon themselves the obligation to make good, if any obligation did exist, all damages that would arise in respect of the works. There was, in fact, a further provision, with which I need not further deal, that the relationship between the parties was to be protected (if "protected" is the right word) by a policy of insurance which would throw the ultimate risk upon the insurers.

The only other question arose in respect of a case which was decided in your Lordships' House in 1928, *Great Western Rail. Co. v. James Durnford & Sons, Ltd.* (1). I was a party to that decision, but I find it of no value at all in coming to a conclusion in this particular case. It was a different contract in entirely different circumstances; and I, for my part, find on all occasions a difficulty in deriving any value on the question of construction of one contract from the construction put upon a different contract made in different circumstances by either this House or any other tribunal. In that particular case, it is plain from the leading opinion, which was given by LORD SUMNER, that the contract in question was not a contract such as this is, in which all the risks were imposed upon the one party, the licensee; on the contrary, there was a large range of liability which was left to be determined by ordinary common law liability. In the circumstances of that case the House came to the conclusion that the words used in that case—which I will read, in order to accept the view that as words they are not dissimilar from the words in this case:

"All claims and demands or liability whatsoever, whether in respect of damage to person or property, arising out of or in connection with the existence or user of the said gangway"

—covered only a claim arising casually out of the existence of the gangway, so that there would be no liability in a case where the accident was, in fact, found to have been caused by the negligence of the party who claimed indemnity. Therefore, I do not find that that case affords any assistance in this particular case.

For those reasons, I am of opinion that the opinions expressed in the judgments below were quite correct, and I move your Lordships that this appeal be dismissed, with costs. A

LORD WARRINGTON.—I agree.

LORD THANKERTON.—I agree.

LORD MACMILLAN.—I also agree. I should like in particular to express my concurrence in the view of my noble and learned friend on the Woolsack, that the opening words of cl. 34 express and control its purport. Using those very words, I ask myself the question: was it a risk that might arise in respect of the works that the men whom the contractors employed on the works might be injured owing to the negligence of the company? When one states the question precisely in the language which the parties have themselves chosen, it appears to me that there can be only one answer, namely, that this was one of the risks which were covered, and in respect of which the company was entitled to the indemnity for which it contracted. B

LORD WRIGHT.—I agree. C

Appeal dismissed.

Solicitors: *William Charles Crocker; I. B. Pritchard.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.] D

Re ELLIS. NETTLETON v. CRIMMINS E

[CHANCERY DIVISION (Farwell, J.), October 4, 1934]

[Reported [1935] Ch. 193; 104 L.J.Ch. 53; 152 L.T. 370]

Annuity—Life interests in fund—Right of annuitants to capital value of annuities—Basis of valuation—Death of annuitant—Limit of benefit to his estate. F

A testator, who died on Aug. 24, 1932, after bequeathing certain pecuniary legacies, directed that a fund the market value of which was to be £40,000 at the date of appropriation, should be held on trust to pay the income thereof to his four named brothers in certain proportions for their respective lives, and then to fall into his residuary estate. He also directed that a fund of £5,000 should be similarly appropriated and held on trust for A. for life, and then to A.'s wife for life subject to restraint on anticipation, and after her death similarly to fall into the residue. The testator also directed that the two funds should each carry 5 per cent. interest from the date of his death until the date of appropriation. One of the brothers entitled to a life interest in the £40,000 fund died on Jan. 5, 1934, which was before the date of the summons in the present proceedings. The estate of the testator was found insufficient to meet the pecuniary legacies and the two funds. G

Held: (i) following *Re Richardson* (1), [1915] 1 Ch. 353, that the persons entitled to the life interests in the respective funds should be treated as annuitants and were entitled to have their annuities valued and the capital value thereof as at the date of the order paid out to them; H

(ii) following the usual rule, the annuities should be capitalised on the basis of 4 per cent., the testator's directions that 5 per cent. should be allowed until appropriation having nothing to do with the percentage to be adopted in capitalising the annuities; I

(iii) as the annuities must be valued as from the date of the order the deceased brother must be excluded and his estate would be entitled only to 5 per cent. on the capital value of his interest under the will up to the date of his death;

(iv) all the annuitants were, in accordance with the terms of the will, entitled to 5 per cent. of the capital value of their shares until appropriation, the date of which should be deemed to be the date of the order.

Notes. Referred to: *Re Cox, Public Trustee v. Eve*, [1938] 1 All E.R. 661; *Re Twiss, Barclays Bank, Ltd. v. Pratt*, [1941] 1 All E.R. 93; *Re Bradberry, National Provincial Bank v. Bradberry*, *Re Fry, Tasker v. Gulliford*, [1942] 2 All E.R. 629.

As to annuities created by will, see 28 HALSBURY'S LAWS (2nd Edn.) 188 et seq., and for cases, see 39 DIGEST 124 et seq.

Cases referred to:

- (1) *Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353; 84 L.J.Ch. 438; 112 L.T. 554; 39 Digest 113, 61.
- (2) *Arnold v. Arnold* (1835), 2 My. & K. 365, 374.
- (3) *Re Cottrell, Buckland v. Beddingfield*, [1910] 1 Ch. 402; 79 L.J.Ch. 189; 102 L.T. 157; 39 Digest 126, 195.
- (4) *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795; 84 L.J.Ch. 597; 112 L.T. 1124; 39 Digest 129, 229.

Adjourned Summons

The £40,000 fund was called the "Ellis Fund," and the £5,000 fund was called the "Brawne-Lindon Fund." The persons entitled to life interests in the Ellis Fund were the four brothers of the testator, namely, A. R. Ellis, O. H. Ellis, T. C. Ellis and H. S. Ellis. H. S. Ellis died on Jan. 5, 1934. The husband and wife entitled to life interests in the Brawne-Lindon Fund were Louis da Cunha Brawne-Lindon and Lucy Georgina Brawne-Lindon respectively. The remainder of the facts sufficiently appear from the head-note, and from the judgment of FARWELL, J.

P. M. Walters for the plaintiff.

A. Guest Mathews for the receiving legatees.

Greenland for the residuary legatees.

C. R. R. Romer for the legal personal representative of H. S. Ellis, deceased.

G. R. Upjohn, B. S. Tatham, Watmough, and C. R. Russell for other defendants.

FARWELL, J.—This summons is taken out for the purpose of determining certain questions which have arisen in the administration of the estate of the testator. There is no question of the construction of the will. The difficulty which has arisen is due to the fact that the estate is insufficient to provide in full the pecuniary legacies and the legacy duty thereon and certain specific sums which are directed to be set aside and invested and the income therefrom paid to certain named persons.

The main question which I have to consider is whether this is a case in which I ought to follow the decision of EVE, J., in *Re Richardson* (1). In that case the testator gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums. EVE, J., held that, on the authority of *Arnold v. Arnold* (2), the four legatees, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants. So treating them, he applied the rule in *Re Cottrell* (3). That decision was, I think, an extension of the earlier authorities, and it may be that the effect of it is to defeat to some extent the intention of the testator, but none the less it is a decision which I ought to follow if it is applicable in the present case.

It has not been seriously argued that *Re Richardson* (1) does not apply, and, in my judgment, it is not possible to distinguish this case from it. We have here persons who are entitled to the income of moneys to be set aside, those moneys ultimately on the death of the various life tenants falling into residue, and that is precisely the position with which EVE, J., had to deal in *Re Richardson* (1). In those circumstances it appears to me that I must follow that decision, with the result that for the purpose of administering this estate the four brothers of the testator who are entitled during their lives to the income of the £40,000 fund and the gentleman and his wife who are entitled to the income of the £5,000 fund must be treated as annuitants.

That, however, does not dispose of the various questions which arise in this case. In the first place, since *Re Richardson* (1) is to be applied and these persons are to be treated as annuitants, they are entitled, according to the well-established rule, to have

their annuities valued and to have paid out to them the capital value thereof, except in the case of the married lady, Mrs. Brawne-Lindon. In her case, it is impossible to pay to her during her husband's life the capital value of her annuity, because by the terms of the will she is restrained from anticipation. In dealing with the Brawne-Lindon Fund it appears to me that the executors must treat the husband and wife as being entitled to two separate annuities, the husband to an annuity during his life, and the wife to a reversionary annuity expectant upon his death and contingent upon her surviving him. They must be valued separately in that way, and the capital value of the contingent reversionary interest of Mrs. Brawne-Lindon must be retained during the joint lives of the spouses, and the interest thereon paid to her subject to the restraint on anticipation.

The next question to be determined is what is the rate of interest to be allowed for the purpose of calculating the value of the respective annuities. The will provides that these persons who are deemed to be in the position of annuitants are to receive 5 per cent. per annum on the sums directed to be set aside from the testator's death until appropriation; and it has been argued that that indicates that the testator intended, if there was an insufficiency and if *Re Richardson* (1) was applicable, that 5 per cent. was to be the rate of interest for the purposes of valuation. I am wholly unable to follow that. I cannot conceive that the testator ever considered the possibility of an insufficiency of his estate or that he had *Re Richardson* (1) in mind when he gave directions for his will. The mere fact that he desired his brothers and the other two persons to receive 5 per cent. on the capital value of the benefits given to them until appropriation cannot in any way regulate the rate of interest which the court directs to be taken for the purpose of making the necessary valuations. It has been suggested that the rate of interest should be less than 4 per cent. The general rule at the present time is that 4 per cent. is the rate which is taken, but I have been invited to say that, having regard to the monetary position at the present day, that rate is too high, and it should be some lower rate. What exactly is meant by "the monetary position," I am not very sure. It was suggested, I think, that I might take judicial notice of the fact that a trustee cannot get 4 per cent. nowadays on trustee securities. I do not think that is a matter of which I can take judicial notice. It is a matter for evidence, and without such evidence I should not be justified in departing from what I think is the general rule.

Then arises a more difficult question, and that is as to the date from which the annuities are to be calculated. I think in this regard the direction of the testator with regard to the 5 per cent. interest is material. It is plain from the terms of the will that the testator contemplated that there would be an interval of time between the date of his death and the date of the actual appropriation of the funds which would produce the income for these persons, and he made provision for that by directing that each of the persons were to receive 5 per cent. per annum on the capital value until appropriation. There has been something in the nature of a partial appropriation, but that was not, in my judgment, such an appropriation as the testator had in mind, and, in my opinion, the annuities must be calculated as from to-day, that is, from the date of this order, and up to that date the annuitants are entitled to be paid 5 per cent. on the capital value of the sums directed to be set aside. As against that must be set off any sums that they have actually been paid, and it will be a matter of calculation to arrive at the amount to which each annuitant will be entitled; but I am satisfied that the right date to take for the purpose of calculating the capital value of these annuities is the date of the order. I find some justification for taking that view in *Re Dempster* (4) before SARGANT, J., because in that case at the end of his judgment the learned judge says:

"In each case the amount of the annuity must be paid down to date, and a purchase must be made of an annuity to accrue henceforth."

The order which I make to-day must be treated as being a substitution for the appropriation which the testator directed to be made, and, accordingly, the interest at 5 per cent. will be payable up to that date, and the calculations made in that way.

That deals with the questions generally with regard to these annuities, but it leaves the remaining question what is the position with regard to the brother, Harold, who

survived the testator, but died some two years after his death. Counsel who appears for his legal personal representative has urged upon me that it was the duty of the executors to adopt the method of administration which I am adopting to-day at the end of the first year, and, if they had done so, they would then have arrived at the capital value of these annuities, and this brother would have been paid the capital sum accordingly, subject, of course, to proper allowance being made for the sums which he owed to the testator. It is said by counsel that the fact that the executors did not take that course cannot affect the right of the deceased brother, and he cannot now receive less than he would have been entitled to had they adopted what is said now to be the right course. On the other hand, I cannot overlook the fact that, if there had not been any question of an insufficiency, and the appropriation had been made, say, a day or so after the death of the brother, what the brother would have been entitled to would have been 5 per cent. to the date of his death and nothing more. I think that I ought not to apply the method adopted in *Re Richardson* (1) further than is necessary to give effect to that decision. I ought not to extend it so as to defeat what appears to me to have been the intention of the testator as contained in his will. If it be right to say that the annuities ought to be valued as from to-day, which is the view I have taken, then it seems to me it must follow that in valuing the annuities one must exclude the brother who is dead. The deceased person never became entitled to an annuity because he died prior to this order, which has the effect of substituting annuities for the benefits given by the will. I do not accept the view that the executors could have safely acted upon the footing that *Re Richardson* (1) applied and proceeded accordingly without first getting the directions of the court. In my judgment, until this court has made the order which I am going to make to-day, there was no right in any one to demand a valuation and payment of the capital value of the benefits given by the will. Accordingly, in my judgment, what the estate of the deceased brother is entitled to is 5 per cent. on the capital value of his interest under the will up to the date of his death, and no more, and when the various annuities come to be valued, the interest which he would otherwise have taken will be omitted.

I understand that the effect of this order will be that there will be sufficient funds to pay the other legacies in full, and that there will be some residue. If that be so, the result is not an unsatisfactory one. I shall on the whole be giving effect to the intention of the testator, disturbing it as little as possible having regard to the decision in *Re Richardson* (1), and it should now be possible to proceed with the administration of the estate in the way which I have indicated without any real difficulty.

Solicitors: *Murray, Hutchins, & Co.*; *Tamplin, Joseph, & Co.*, for *Higman & Hubbard*, *St. Austell*; *Scott, Bell, & Co.*; *Charles Russell & Co.*, for *Smallpeice & Merriman*, *Guildford*.

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

In the Goods of ROBERTS (*deceased*)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), March 23, 1934]

[Reported [1934] P. 102; 103 L.J.P. 61; 151 L.T. 79; 50 T.L.R. 321;
78 Sol. Jo. 319]

Will—Execution—Place of testator's signature—Signature in margin of will and at right angles to testamentary provisions—Wills Act Amendment Act, 1852 (15 & 16 Vict., c. 24), s. 1.

In a holograph will the testator filled a sheet of paper with testamentary directions and wrote the words of the attestation clause and his signature in the left-hand margin at right angles to the writing in the will. The words "witnesses to the signature" were at the left or bottom end of the margin, and the signature of the testator appeared at the top of the margin.

Held: the court was justified in holding that the testator's signature was so placed "beside or opposite to the end of the will" that it was "apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," within the Wills Act Amendment Act, 1852, s. 1, and the document was admitted to probate.

In the Goods of Coombs (1) (1866), L.R. 1 P. & D. 302, applied.

Notes. Considered: *In the Goods of Hornby*, [1946] 2 All E.R. 150; *Re Harris, Murray v. Everard*, [1952] 2 All E.R. 409.

As to the place of the testator's signature on a will, see 34 HALSBURY'S LAWS (2nd Edn.) 58 et seq., and for cases, see 44 DIGEST 251 et seq. For Wills Act Amendment Act, 1852, see 26 HALSBURY'S STATUTES (2nd Edn.) 1354.

Cases referred to:

- (1) *In the Goods of Coombs* (1866), L.R. 1 P. & D. 302; 36 L.J.P. & M. 25; 15 L.T. 363; 31 J.P. 9; 44 Digest 256, 820.
- (2) *In the Goods of Osborne* (1909), 25 T.L.R. 519; 44 Digest 253, 801.
- (3) *Re Stalman, Stalman v. Jones* (1931), W.N. 142; 145 L.T. 339; Digest Supp.

Motion by testator's widow for probate, in common form, of the will, dated Aug. 13, 1932, of William Edward Roberts, who died on Dec. 6, 1933, leaving estate of the value of some £20,000. An affidavit of one of the attesting witnesses showed that the will was written by the testator himself on a lined sheet of foolscap, and the dispositive words took up practically the whole sheet. There was no room for an attestation clause and the signature at the foot of the will, so the testator wrote them crosswise in the left-hand margin as reproduced on next page:

T. Bucknill for the applicant.

SIR BOYD MERRIMAN, P.—This is a case which has given me a good deal of anxiety because I have to be satisfied that under the statute a particular paper shall be admitted to probate, whether all concerned consent to the application or not. The will was quite plainly written throughout by the testator on a sheet of foolscap used for recording cash transactions. There was a margin on the left-hand side of about one inch. The paper consisted of the usual four sides, one of which is occupied with writing. The will begins immediately below the first line at the top and continues below the last line, and there is no room for the signatures or the attestation clause at the end. The testator could have come within the section if he had chosen to turn over the page and put the attestation clause and his signature there in compliance with the statute. He elected to sign within the inch margin, but it is important to note that he has done so in such a way that the words of the attestation clause and the signatures are at right angles and not parallel to the writing in the will. In his own handwriting he wrote the following words by way of an attestation clause: "Witnesses to the signature of William Edward Roberts, both being present," and underneath appear the signatures and addresses of

Signed at Parkstone, 13th August, 1932.
W. E. Roberts.

Witnesses to the signature of
William Edward Roberts, both
being present.
(Names, descriptions, and
signatures of witnesses.)

THIS IS THE LAST WILL

AND TESTAMENT, etc.

(Testamentary

dispositions

follow to the

bottom of

the page.)

the two witnesses. The words "witnesses to the signature" are at the left of the bottom end of the margin. The words "signed at Parkstone," with the date and signature of the testator, appear on the right of the attestation clause or at the top of the left-hand margin, accordingly as you look at the paper. The question is whether it is permissible to give effect to what I am satisfied was the intention of the testator, namely, to sign the paper as his will, notwithstanding the fact that it is not possible to say that the signature taken by itself is as near the side of the end of the will and as nearly opposite the end of the will as it could have been, but is, in fact, physically nearer the beginning of the will, if you do not take into account the fact that it is written at right angles to it.

I have seen both of the original wills in *In the Goods of Usborne* (2) and *Re Stalman* (3). In the latter case there was similarly a holograph will on a sheet of paper the whole of which was occupied by the dispositive part. The testatrix signed it at the top, and the Court of Appeal held that there were words in the statute which ruled it out, namely,

"but no signature . . . shall be operative to give effect to any disposition or direction which is underneath or which follows it."

That case does not hurt the present submission at all, but tends to assist it. In *Usborne's Case* (2) there was a pencilled will, the whole of which was admitted to probate, on a half-sheet of notepaper. The operative words covered the whole of the page. The testator made his mark—a cross—a little below half-way down the margin. Below the cross is written "R. B. Usborne, his mark," and it is all written parallel to the words in the will. It is said it makes a difference, when you are considering the position of the signature, whether it is written at right angles or parallel to the words in the will itself. In the present case the only remaining place on this page—namely, the margin—has been used in the only possible way in which it could be used, showing that the testator, signing in the margin in that way, intended to give effect to the whole by his signature. There would be no doubt about it if he had signed at the bottom of the left-hand side and the witnesses at the right of his signature.

In *the Goods of Coombs* (1) justifies me in saying that the signature and attestation do apply the words of the statute. In that case the words were on two sides of a double sheet of foolscap paper. The second sheet had been left blank except that crosswise, as in this case, along the middle of the sheet were written the signature and the attestation

clause. No one could suppose that it was written opposite or beside the end of the will except in the sense that the place which could have been used by the operative parts of the will being continued in it was used only for the signature and attestation clause. I think that in principle that case is the same as this. LORD PENZANCE gave effect to the signature, and I cannot see any difference in principle here. So far as the position of the attestation clause is concerned, it could not have gone to any point which was more nearly opposite or beside the end of the will, and, having regard to the fact that the whole writing is at right angles to the operative part of the will, I am justified in holding that it is so placed beside or opposite to the end of the will, that

"it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will."

The document will, therefore, be admitted to probate.

Application granted.

Solicitors: Woodcock, Ryland & Parker, for Preston & Redman, Bournemouth.

[Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.]

PURKIS v. WALTHAMSTOW BOROUGH COUNCIL

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.JJ.), March 8, 9, 12, 13, 14, 1934]
[Reported 151 L.T. 30; 98 J.P. 244; 78 Sol. Jo. 207]

Child—Negligence—Public playground—Extent of liability of local authority.

Per CURIAM. A local authority has a power, not a duty, to provide playgrounds for children which it may regulate by attendants and byelaws. An authority is not liable for the consequences of dangers obvious to children, but it is liable if it provides "traps" accessible to children. It is liable for defective or dangerous premises or implements for play, but an authority which has provided unobjectionable structures or implements for play is under no duty to supervise their employment, still less to ascertain that each child using them is physically fit to stand a swinging or revolving motion.

A child using a swing on the playground is a licensee, and the council would only be liable to him in the event of injury if there were a danger known to them and not known to the child which he could not be expected to avoid.

Per GREER, L.J.: I cannot find any foundation for the suggestion that there is a fourth category of persons on premises who are not there by the invitation or licence of the occupier and yet are not trespassers.

Per MAUGHAM, L.J.: Where a child visits a playground provided by a local authority my strong inclination is to hold that the case is in a special category arising from the fact that the authority has a special obligation to those who use the playground. The public have a right to go there and to that extent they are not mere licensees. It seems a natural conclusion that it is the duty of the authority to do something more than that which arises from the cold neutrality of a landowner who allows persons to visit his property.

Notes. Considered: *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; *Ellis v. Fulham Corpn.*, [1937] 3 All E.R. 454; *Sutton v. Bootle Corpn.*, [1947] 1 All E.R. 92. Referred to: *Baker v. Bethnal Green Corpn.*, [1944] 2 All E.R. 301; *Rockman v. Hall, Ltd.*, [1947] 1 All E.R. 895.

As to the degree of care necessary in dealing with children, see 23 HALSBURY'S LAWS (2nd Edn.) 584 et seq., and for cases, see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

- (1) *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, 255.
- (2) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, 262.
- (3) *Hastie v. Edinburgh Magistrates*, 1907 S.C. 1102; 44 Sc.L.R. 829; 15 S.L.T. 194; 36 Digest (Repl.) 119, *869.
- (4) *Stevenson v. Glasgow Corpn.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest (Repl.) 74, *423.
- (5) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 38 T.L.R. 102; 20 L.G.R. 205, H.L.; 36 Digest (Repl.) 119, 597.
- (6) *Shrimpton v. Hertfordshire County Council* (1911), 104 L.T. 145; 75 J.P. 201; 27 T.L.R. 251; 55 Sol. Jo. 270; 9 L.G.R. 397, H.L.; 36 Digest (Repl.) 29, 122.
- (7) *Gow v. Glasgow Education Authority*, 1922 S.C. 260; 36 Digest (Repl.) 30, *157.
- (8) *Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214, H.L.; 36 Digest (Repl.) 120, 604.
- (9) *Metropolitan Rail. Co. v. Jackson* (1877), 3 App. Cas. 193; 47 L.J.Q.B. 303; 37 L.T. 679; 42 J.P. 420; 26 W.R. 175, H.L.; 36 Digest (Repl.) 35, 168.

Appeal from a verdict and judgment entered by MACNAGHTEN, J., for the plaintiff for £150 damages, after a trial with a common jury.

The defendants, Walthamstow Borough Council, acting under their statutory powers, had established recreation grounds, one of which, the Selborne Recreation Ground, was marked: "For the use of children under twelve years only." It contained, inter alia, four lots of swings. In the summer the defendants provided one attendant there, as he stated in his evidence "to look after the apparatus and see that they are kept in a proper state and to see that the children use them properly."

On May 26, 1933, the plaintiff Herbert Purkis, a boy just over twelve, who sued by his next friend, went to this recreation ground, and got on a plank swing. On his third swing the plaintiff felt sick and faint. He grabbed at the swing for support and held on. When the swing came down his feet touched the ground "and then the swing went forward and it went out of my reach, so I fell on to the ground, and then when the swing came back, it hit me just above the eye, so then I got out, and as I went to get away the swing came down again and hit me on the back of the head." The boy also stated that in the course of the swinging there had been a jerk.

The only ground of claim put before the jury was that the defendants were bound to provide adequate supervision, and that a single attendant was not adequate, having regard to all the circumstances, especially the number of children using the swings and apparatus. The evidence of the attendant was that when the plaintiff was at the recreation ground there were approximately two hundred children present. On this ground the jury found for the plaintiff, for whom judgment was entered. The defendants appealed.

Macaskie, K.C., *Fox-Andrews* and *Stephen Chapman* for the defendants.

Beufus, K.C., and *Manningham-Buller* for the plaintiff.

SCRUTTON, L.J.—If it were necessary to deal with all the matters which have been argued for over two days before this court, and to provide a complete legal code for the numerous parks and recreation grounds established by local authorities in England, I should certainly have desired to reserve my judgment and commit it carefully to writing. As, however, in my view this case can be disposed of on its own particular facts, I do not propose to do more than deal with those facts, and only add a few remarks on the general law applicable.

The Walthamstow Borough Council, under powers given in the various Public Health Acts, has established for the benefit of its inhabitants and their children various recreation grounds. The Selborne Recreation Ground is labelled: "For the use of children under twelve years only," and it contains a variety of swings and roundabouts.

On May 26, 1933, the plaintiff, Purkis, on leaving school had his tea and went to a

swimming bath for about one-and-a-half hours. He then proceeded to the recreation ground with a boy named Locke, younger than himself. There they met a girl of thirteen years, and proceeded to sample the amusements. Then they all adjourned to a large swing which took a dozen or more children, sitting or standing on a plank between the footboards with divisions for holds. The maker described it, and said he had sold fifty-five of them to various recreation grounds, and had had no accidents. The motive power is provided by the occupants of the swings at each end. The board can go to forty-five degrees from the horizontal with some not very clear assistance from a lever; a brake begins to act at a slope of thirty degrees up, slowing the swing down till gravity assisted by a stop at forty-five degrees reverses the swing's action. The three children went on to the swing together, with a number of other children, the girl working the lever at one end. Locke did not find the motion attractive and got off twice because he thought he was going to be sick. Purkis had similar symptoms, but stayed on. His subsequent history had better be described in his own words in examination-in-chief. In answer to the question: "Now I want you to tell my Lord in your own words what happened after that, after you had been on that swing a little time? (A.) The swing was swinging very high and I became sick, and then all of a sudden I came faint and dark loomed up in front of me, and then I felt myself falling and I grabbed at something, and when the darkness went I found that I was on the back of the swing. Maurice, who was standing at the side, shouted to me to get off 'else you'll kill yourself,' but I had all to do to hold on. If I had let go I would have been thrown out, and so I held on. Then, when the swing came down, my feet touched the ground, and then the swing went forward and it went out of my reach, so I fell on to the ground, and then when the swing came back it hit me just above the eye, so then I got out, and as I went to get away the swing came down again and hit me on the back of the head and Eileen got off and picked me up. Then the park keeper came up and said, 'I knew something like this would happen,' and took me over to the seat." I attach considerable importance to that statement, because the boy made it straight off, without any assistance from counsel, as to what he should say, describing in his own words what happened as the cause of the accident. At later stages he suggested there had been a jerk. The judge's note records that he said this as part of the answer quoted, but there is no trace of this in the shorthand note: jerks may happen when any swing changes its motion.

Purkis was injured and his father, as his next friend, brought an action against the Walthamstow Borough Council. The learned judge adds in his note of the evidence:

"The plaintiff's counsel during the trial withdrew the allegation that the concrete base of the swing (the surface was in fact tarmac) afforded a ground of complaint or that the swing was in any respect defective or unsuitable as a swing for children. He also withdrew any suggestion that the attendant Hunt was in any respect negligent. The only ground of claim put before the jury was that the defendants were bound to provide adequate supervision, and that a single attendant could not exercise adequate supervision, having regard to all the circumstances of the case, and especially in view of the number of the children using the swings, &c."

The learned judge does not seem to have directed the jury as to the precise nature of the duty owed by the council to the children. He said:

"Whether the toddling child who toddles into this field in the hope of getting on to the 'babies' swing' is to be regarded in law as an invitee or a licensee can be left for the determination of the court, supposing this case goes further."

That is to say, to the Court of Appeal. The learned judge continues:

"As I have explained to you, it is for the jury to determine the facts. It is for the judge merely to say what is the law, and I give you the direction in law that there was, I think, some duty of care that the defendants owed to the children coming to this place; and now it will be for you to determine whether they discharged that duty properly."

With respect to the learned judge, I think it would have been better if he had made up his mind what the duty of the council was, and directed the jury accordingly, instead of

leaving the task for the Court of Appeal or asking the jury to settle the extent of the duty. He seems, however, to have made up his mind that either there was a duty to supervise, or that there was evidence on which a jury might consider there was a duty to supervise. Again he said:

"If you think that there ought to have been more than one attendant at that time and place, then you have got to make up your minds as to whether the accident happened in consequence of there not being more than one attendant. If you find there ought to have been more than one attendant, and owing to the failure to provide a sufficient number of attendants the accident happened, then it will be your duty to find a verdict for the plaintiff."

I deal with the second question first—whether the absence of a sufficient number of attendants caused the accident. It is a remarkable thing that the learned judge did not say a word to the jury as to the legal or actual effect of the boy's being sick and fainting. He treated the matter as being a fall from the effect of a jerk. Some children get sick on swings and roundabouts, though most children thoroughly enjoy them, and I do not understand how one or a dozen attendants are to stop a child being sick and fainting on a swing. I have come to the conclusion that, whatever was the duty of the council, there was no evidence on which the jury could find that Purkis's sickness, fainting, and fall was due to the absence of adequate supervision. What is suggested is that some larger boys, described vaguely as "college boys," because they wore the same coloured caps, and suggested to be from fourteen to sixteen years of age, were swinging at one end of the swing, while Purkis's girl friend, aged thirteen, was at the lever at the other end, and that those college boys worked the swing higher than the younger boys would have done. But in view of the evidence of the maker of the swing, I do not see what this had to do with the fainting. The judge invites the jury to deal with the matter on the footing that the swings are perfect swings, perfectly situated, perfectly conducted, and in perfectly good order—perfectly proper swings for children to play on. They were being worked, as they were intended to be worked, with a brake to slow them up and a stop to prevent them going too high. True, they were being worked at one end by boys said to be from fourteen to sixteen years old, but it is curious that children—two of whom were over twelve—should complain of that. This view is enough to dispose of the case. There is, in my opinion, no evidence on which a reasonable jury could find that the absence of adequate supervision caused an accident obviously occasioned by the unfitness of children at the close of a tiring day to stand the ordinary use of a swing. No amount of reasonable supervision will stop some children from being sick on a swing or a roundabout. As I have said, the jury got no proper or any direction as to the effect of Purkis's sickness or fainting on the liability of the plaintiff.

Taking this view, I do not think it necessary to essay a complete exposition of the liability of local authorities who provide recreation grounds, including playgrounds for children. I have stated to the best of my ability the grades of variety from trespassers to invitees for payment in *Hayward v. Drury Lane Theatre* (1), and *HAMILTON, L.J.*, did the same in *Latham v. Johnson* (2). It is not easy to decide in the case of a local authority providing a recreation ground whether it licenses or invites. It has a power, but not a duty, to provide, and may regulate by attendants and byelaws. The cases appear to show that the authority is not liable for the consequences of dangers obvious to children. It is not liable if a child, even of four-and-a-half years, tumbles into either natural or artificial water: (see *Hastie v. Edinburgh Magistrates* (3), and *Stevenson v. Glasgow Corpn.* (4)). The authority is liable if it provides "traps" accessible to children, such as shrubs with attractive but poisonous berries: *Glasgow Corpn. v. Taylor* (5). It would be liable for defective or dangerous premises or implements for play. But, in my opinion, the authority which has provided unobjectionable structures or implements for play is under no duty to supervise their employment, still less to ascertain that each child using them is physically fit to stand a swinging or revolving motion. I am aware that many authorities do not attempt to supervise the proper swings they provide, and I am not aware of any authority or principle that requires them to do so. In *Shrimpton v. Hertfordshire County Council* (6), an education authority provided a vehicle

to take children to school, and the driver moved on while a child was getting out at the back. The jury found that the driver was negligent, and that the authority was also negligent in not supplying a conductor, and on the ground that there was evidence of the second finding, the House of Lords supported their verdict. That was a case of a local authority doing something and doing it badly, but local authorities do not work these swings or roundabouts. The children work them, and it would be a shock to one's youthful ideas to hear that swings or roundabouts are dangerous. In *Gow v. Glasgow Education Authority* (7), the Scottish courts negatived the view that the authorities of a blind school were bound in law to supply constant supervision of the blind children, to protect them from each other's frolics. A B

Counsel for the plaintiff, following MACNAGHTEN, J., argued that authorities providing recreation grounds for children were bound to use some care and that the extent of the care necessary was a matter of fact for the jury. This transfers the decision of legal liability to the jury, and I cannot accept such a proposition. But, as I have said, though I have expressed provisional opinions on the question of the measurement of duty, I am satisfied that there was no evidence on which a reasonable jury could find that failure to give reasonable supervision was the cause of the plaintiff fainting on this proper swing. C

The appeal must be allowed, the judgment for the plaintiff set aside and judgment entered for the defendants with costs here and below. D

GREER, L.J.—I agree that this appeal should be allowed on the terms stated by my Lord. In *Addie v. Dumbreck* (8) it was laid down by LORD HAILSHAM, L.C. (in that case they were dealing with a claim for damages by one person who had trespassed on the property of another), that there are three classes to be considered, and only three classes: first, does the injured person come on the land by invitation expressed or implied of the occupier? Secondly, does he come with the leave and licence of the occupier? Or, thirdly, does he come as a trespasser? The learned Lord Chancellor went on to say ([1929] A.C. at p. 364): E

"It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or Scottish law, and I do not think that the category exists." F

The Lord Chancellor there was referring to cases that had been considered in Scotland, and he treats the law of England and the law of Scotland as being the same. Probably, with the knowledge of the law as laid down by LORD HAILSHAM, counsel for the plaintiff prepared his statement of claim, in which he pleads definitely, clearly and solely on the basis that the plaintiff, the little boy, was either an invitee or was what LORD DUNEDIN has called a "permittee" on the premises when he received these injuries, and the duties which the defendants are alleged to have failed in performing were the duties which the law has laid down as duties either to a permittee or invitee on the one or a licensee on the other hand. G

In my judgment, it was not open to the plaintiff on these pleadings to argue the case in the way in which it has been argued in this court, and put the liability on an entirely different ground, namely, on the ground that the defendants had failed carefully to exercise the powers of management given to them by the statutes under which they instituted this playground, and, for my part, I decline to consider the case on any other view than that it deals with the rights of either an invitee or of a licensee to come upon the premises. H

What was this boy? Was he invited there or was he merely permitted to be there because he was not turned out by the superintendent? In the circumstances, in my judgment, he was a licensee and nothing more than a licensee. The playground was established for the recreation of children under twelve years of age. It was not established, and was not intended by the Walthamstow Borough Council, for the recreation of children over twelve, although, no doubt, in the actual performance of his duty the superintendent could not possibly insist on every boy producing his birth certificate so as to see whether he was or was not within the class of persons for whom the recreation I

A ground was instituted. Undoubtedly, there did come from time to time some persons, including the plaintiff, who were not persons for whom the recreation ground was instituted, and that was sufficient, or, at any rate, the council thought so, to prevent the plaintiff from being treated as a trespasser.

B Counsel for the plaintiff got an admission from the defendants' counsel that he was not going to ask the jury to say that this boy was a trespasser. The defendants admitted that he was at least a licensee, and counsel for the plaintiff contended that that amounted to an admission that he was an invitee, but I do not so hold. It was open to counsel for the plaintiff to go to the jury on his contention that the boy was an invitee or a permittee and not merely a licensee. On the other hand, I think, on the admitted facts of the case, he was a licensee, and the only duty on the defendants was their duty to him as such licensee—that is to say, they would be liable if there were a danger which C was known to them and was not known to the boy, and which the boy could not be expected to avoid.

What happened in this case was that the boy got on to this swing for the third time, and as it was being operated by some bigger boys at one end and by his friend, the girl Eileen Clark, at the other end, it went rather higher than he liked it to go, and he became sick. Knowing that the boys at the one end were continuing to work it and that the superintendent was engaged in some other part of the playground, he, having I suppose D the necessary adventurous spirit, determined that he would not get off, but would run the risk of feeling sick again, and the risk he ran eventuated and he was sick and fell off. In the first place, I think that the evidence did not establish any breach of duty towards the boy, who was a licensee, but apart from that I am satisfied, as my Lord has stated, that the effective cause of this accident to the boy was that he got sick, and it is not at E all manifest from the evidence that he would not have equally got sick if younger boys had been working the swing at the other end and if the superintendent had been there. I do not think the evidence was sufficient to justify a jury in establishing a causal connection between the alleged negligence of the defendants, if there were any at all, and the accident. I think the accident was due to the persistence of the boy who felt sick in going on and running the risk of getting sick again, and not through any dereliction of F duty on the part of the defendant council.

The case is not without its difficulties, having regard to the subtlety that has been used in the decisions in distinguishing the liability of inviters to invitees and of licensors to licensees, but I am glad to think that we have come to a conclusion similar to that which was adopted in the two Scottish cases that have been referred to with regard to the obligation on public authorities providing public parks for the use of its citizens and G their children. It seems to me that the judgment we are giving is on the same lines and is a judgment dictated by common sense; and it is always a satisfaction to find that a judgment which one thinks is right is in accordance with the common-sense tradition. I agree that this appeal should be allowed with the results stated by SCRUTTON, L.J.

H MAUGHAM, L.J.—I also agree. I think, in considering this appeal, it is worth while to repeat the well-known passage from the judgment of LORD CAIRNS, L.C., in *The Metropolitan Rail. Co. v. Jackson* (9) in regard to the direction of the jury. LORD CAIRNS, L.C., said (3 App. Cas. at p. 197):

I “The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct.”

The passage says that the judge in such a case must make up his mind as to the limits of the obligation of the defendants in a case of negligence, and I cannot help thinking that this case has gone wrong because the learned judge has abstained from clearing his mind as to what was the maximum liability of the local authority here. Having said that, I want to add a few sentences in relation to the facts which have been stated by my brother SCRUTTON, L.J.

The first observation I want to make is this. It is not open, in the events which have happened, for the plaintiff to say that the plank swing, which is the original cause of the plaintiff's misfortunes, was in itself dangerous. Hunt, the attendant at the Selborne Recreation Ground, did explain at one place that there might be danger in connection with it. His view was that the children, not unnaturally, are in the habit of sometimes getting off the swing when it is in motion, when they thereby hurt themselves. That, of course, is a misuse of the swing, and it is something for which I imagine even a jury would not think the local authorities were responsible. I would add this, as relevant to the accident which took place here, that a swing with a number of children on it, while in motion may, of course, be most dangerous if another child stands so close to it or in such a position that the swing hits him. That is enough to kill, not only a child, but a grown-up human being; and that again is an obvious risk inseparable from the use of anything in motion, whether a swing or anything else. The other observation I want to make is in reference to the sickness which followed the visit to the swimming baths and the swings, and, perhaps, not unnaturally resulted, both in the case of the infant plaintiff Purkis and that of his friend Maurice Locke. They were both sick; it is not a case of one only being sick. There is no evidence that merely swinging on the plank swing makes boys or girls sick; and I cannot help thinking that, if there is a moral to this case it is: if you have had an abundant tea and then go on to the swimming baths, and then visit certain other amusements in a park or pleasure ground of this kind, and then have some sweets, you would be well advised not to go and play on a swing.

The plaintiff, not unnaturally, attempted to make a good deal of the causal connection with regard to certain "college boys"—they were called college boys because they wore caps like college boys. I would observe, in reference to them, that there is practically no evidence as to their age, except that they were taller than most of the children in the park. We do not even know whether there were two or three of them. Apparently, they behaved quite well in connection with this swing, because on the two occasions when Maurice Locke felt sick and wanted to get off the swing, on one occasion they stopped the swing and let him get off, and then, on another occasion they slowed it down. It cannot be suggested, I think, that they were behaving unreasonably, if they had anything to do with the case. Nothing is said about them in the pleadings or the particulars, and I see no ground whatever for the suggestion that the fact that there were college boys at one end of the swing was the cause of the accident which took place here. What happened, as my Lord has pointed out, is that, unfortunately, the plaintiff sought to swing, bravely but not wisely, until he was faint, and then, in the most extraordinary way, which it is difficult to understand, he fell from this swing, but not to the ground. Maurice Locke then urged him to get off because he would get hurt. He did get off, but that did not hurt him. What did hurt him was the fact that, being in a state of faintness, he was unable to get out of the way of the swing, which hit him twice.

I want to say a word or two on the subject of the legal inquiry which lies on the threshold of the question which we have had submitted to us. The real question, it seems to me, that arises is this, apart from the question as to the evidence which SCRUTTON, L.J., has dealt with: is this a case where the measure of the obligation of the defendants arises merely from the circumstances that they are the owners or occupiers of the Selborne Recreation Ground and that the plaintiff was allowed to be there in accordance with their byelaws and regulations? Or is it a case which ought to be placed in a separate category arising out of the fact that the defendants are in a different position and that they have to exercise their powers in the interests of the public and that they are empowered to provide playgrounds for children with the result that there is a qualified right in respect of children who are members of the borough or living in the neighbourhood to visit the recreation ground while it is open, in accordance with the regulations? If the first view were correct, a question would arise whether the plaintiff is to be treated merely as a licensee, or whether in the special circumstances he is to be treated as an invitee in the technical sense which has been given to that word in this class of case, namely, a person who is present on premises either on lawful business,

in the course of fulfilling a contract, or a person who is invited into or on to the premises for some purpose of business or of material interest.

The question is one on which I agree different views might be held, but my strong inclination is to hold that this case is in a special category, arising from, as I have suggested, the fact that the local authority has a special obligation as owners of the park to those who use such a place as we have to deal with here. Subject to the byelaws and regulations which may relate to such a place, the public have a right to go there, and to that extent they are not mere licensees; and it seems to me a natural conclusion that it is the duty of the local authority to do something more than what I may describe as that arising from the cold neutrality of a landowner who allows persons to visit his property.

I do not, however, think it is necessary to define precisely what the duties of such local authorities are, because I am satisfied that on no reasonable view of their duty was there evidence that the accident here was due to a neglect of it. In that connection I should like to read the very short introduction to the judgment of LORD DUNEDIN in *Hastie v. Edinburgh Magistrates* (3), where LORD DUNEDIN, then Lord President of the Court, delivered the leading judgment. It was a case where a child of four-and-a-half years old had fallen into an artificial pond in a public park and been drowned, and his father brought an action for damages and averred that the pond was badly constructed and dangerous, inasmuch as the bank, level at the top with the adjoining path, sloped at a sharp angle to the bottom of the pond. The father suggested that the pond should have been fenced or sufficiently watched. This pond, apparently, was in a public park at Inverleith, and the Lord Ordinary held that the averments were irrelevant and the defenders assailed. LORD DUNEDIN begins his judgment thus (1907 S.C. at p. 1105):

"I think the judgment of the Lord Ordinary is right. I do not think it expedient in such a case as this to lay down in general terms what are the precise duties which lie on persons who, like the magistrates here, have the care of public places, but the existence of the so-called negligence which is averred here would, in my humble judgment, prevent the existence of artificial water at all."

I would observe in the first place that that seems implicitly to agree with the view I have attempted to express, that a case such as we have here, and such as the Lord President had before him there, was not an ordinary case of licensee or invitee to the premises of the defendants, but was a special case. Secondly, I would observe that LORD DUNEDIN takes what I venture respectfully to say is a common-sense view—that you have to see whether the public authority or the magistrates, as the case may be, who are providing recreation grounds are subject to such a liability that the very existence of the recreation grounds for the purposes of recreation will be at stake. As he justly observes, the negligence averred would prevent the existence of artificial water at all, in all probability, and in the same way the negligence averred here, if it were held to be well established, would probably lead to the removal of swings from grounds of this character.

One other observation which the Lord President made is also, I think, very pertinent to the present case. He said (1907 S.C. at p. 1105):

"He"—the learned counsel for the pursuer—"says the proximate cause" (of the accident) "was not the existence of the pond, but the fact of the child being unattended. He says the child had a right to be there; of course it had, just as a child has a right to be on the public street. But if the parents of children of such tender years cannot provide nurses to look after them, those children run risks which other children, who are more carefully looked after, do not. That cannot be altered by law—it is just one of the results of the world as we find it—and to say that, if a child unattended falls into a pond and is drowned, that imposes a liability on the magistrates, seems to me to be against all common sense."

Of course, that passage wants a somewhat different rendering to make it applicable to the present case, but it does seem to me to be in *pari materia* to observe that, if a child, a boy of a little over twelve, cannot go on a swing in certain circumstances without

feeling sick, it is one of the results that cannot be altered by law, and one of the results of the world as we find it, if an accident is thereby occasioned, and not an accident for which any local authority can be held responsible. . A

I want to say one word, too, on a subject which has been so much discussed here, and that is the subject of supervision. It seems to me that it is necessary to define what one means, because supervision, in a sense, is something which the local authority here did provide. If you mean that there ought to be some attendant at a public park or at a recreation ground such as this one, I am not at all sure that I should deny it, but if you mean by supervision, an obligation to provide direct supervision for every swing, chute, "ocean wave," and every other appliance for amusing or thrilling children, I should strongly deny it, and I should deny it on the ground that I think LORD DUNEDIN has given expression to in the case to which I have referred. Nothing short of that, it seems to me, could possibly have prevented an accident taking place in the case of this unlucky boy, who fainted on the swing at a time when there were ten or a dozen children on it, and when it was swinging, not in any way which was dangerous to the other children, but in a way which certainly might lead to an accident to a boy who got sick and faint and was no longer able to hold on. B C

The result, in my opinion, is that this court is able to say that, although the standard of obligation on the part of the defendants might not be so small as that which a landowner owes to a licensee, although it may be as great as that which he owes to an invitee or even greater, still it is clear that it is right to say that the standard cannot be so high that the accident here, on any reasonable view of the evidence, can be said to be due to the want of exercise of the reasonable care which the defendants owed to the children who came to this recreation ground. On those grounds, it seems to me, that the appeal must succeed, and accordingly the action must be dismissed. D E

Appeal allowed.

Solicitors: *Joynton-Hicks & Co.; Wynne, Davies, & Co.*

[*Reported by C. G. MORAN, ESQ., Barrister-at-Law.*]

WILCHICK v. MARKS AND OTHERS (SILVERSTONE THIRD PARTY)

[KING'S BENCH DIVISION (Goddard, J.), February 26, 27, March 6, 1934]

[Reported [1934] 2 K.B. 56; 103 L.J.K.B. 372; 151 L.T. 60; 50 T.L.R.

281; 78 Sol. Jo. 277]

Landlord and Tenant—Liability of landlord to repair—Liability of tenant—Injury to third party—Landlord at liberty to enter and repair—Neither landlord nor tenant under covenant to repair.

Premises were let on a weekly tenancy on the terms that the landlord should be at liberty to enter and do repairs as and when he thought fit, but there was no covenant binding either landlord or tenant to repair. A shutter, which was defective to the knowledge of both landlord and tenant, fell and injured a passenger on the highway. In an action against the landlord and the tenant by the injured party,

Held: both landlord and tenant were liable; the landlord on the ground that he had the right to repair, knew that repairs were necessary and failed to execute them; and the tenant on the ground that, even if the landlord habitually did repairs and had notice that repairs were necessary, the tenant was not thereby relieved from the duty to prevent injury to members of the public passing his premises.

Per GODDARD, J. The fact that the landlords had raised the rent as permitted by the Rent Restrictions Act where the landlords undertook repairs and had served the statutory notices stating that the increases were made on that footing did not result in the landlords being estopped from denying that they had agreed to repair the premises.

Morgan v. Liverpool Corpn. (1), [1927] 2 K.B. 131, applied.

Notes. Considered: *Wringe v. Cohen*, [1939] 4 All E.R. 241; *Heap v. Ind Coope and Alsopp, Ltd.*, [1940] 3 All E.R. 634. Distinguished: *Howard v. Walker*, [1947] 2 All E.R. 197.

As to the liability of landlord and tenant to third persons for injury caused by premises being out of repair, see 20 HALSBURY'S LAWS (2nd Edn.) 206–208, and for cases, see 31 DIGEST (Repl.) 380 et seq.

Cases referred to:

- (1) *Morgan v. Liverpool Corpn.*, [1927] 2 K.B. 131; 96 L.J.K.B. 234; 136 L.T. 622; 91 J.P. 26; 43 T.L.R. 146; 71 Sol. Jo. 35; 25 L.G.R. 79, C.A.; Digest Supp.
- (2) *Bowen v. Anderson*, [1894] 1 Q.B. 164; 58 J.P. 213; 42 W.R. 263; 38 Sol. Jo. 131; 10 R. 47, D.C.; 31 Digest (Repl.) 62, 2189.
- (3) *Gandy v. Jubber* (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch.; 31 Digest (Repl.) 382, 5098.
- (4) *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311; 46 L.J.Q.B. 675; 25 W.R. 877; 31 Digest (Repl.) 380, 5083.
- (5) *Rich v. Basterfield* (1847), 4 C.B. 783; 2 Car. & K. 257; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.
- (6) *Lane v. Cox*, [1897] 1 Q.B. 415; 66 L.J.Q.B. 193; 76 L.T. 135; 45 W.R. 261; 13 T.L.R. 142; 41 Sol. Jo. 142, C.A.; 31 Digest (Repl.) 195, 3261.
- (7) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, H.L.; 31 Digest (Repl.) 386, 5124.
- (8) *Laugher v. Pointer* (1826), 5 B. & C. 547; 8 Dow & Ry. K.B. 556; 108 E.R. 204; 36 Digest (Repl.) 281, 324.
- (9) *Payne v. Rogers* (1794), 2 Hy. Bl. 350; 126 E.R. 590; 31 Digest (Repl.) 380, 5081.
- (10) *R. v. Pedly* (1834), 1 Ad. & El. 822; 3 New & M.K.B. 627; 3 L.J.M.C. 119; 110 E.R. 1422; 36 Digest (Repl.) 318, 641.
- (11) *Todd v. Flight* (1860), 9 C.B.N.S. 377; 30 L.J.P.C. 21; 3 L.T. 325; 7 Jur. N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest 381, 5094.
- (12) *Pretty v. Bickmore* (1873), L.R. 8 C.P. 401; 28 L.T. 704; 37 J.P. 552; 21 W.R. 733; 31 Digest 382, 5096.

- (13) *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L.T. 1; 92 J.P. 180; 44 T.L.R. 703; 26 L.G.R. 638, C.A.; 36 Digest 292, 391. A
- (14) *Gwynnell v. Eamer* (1875), L.R. 10 C.P. 658; 32 L.T. 835, D.C.; 31 Digest (Repl.) 382, 5097.

Action tried by CODDARD, J.

The plaintiff claimed damages for personal injuries sustained by reason of a nuisance existing at a house, No. 16, Sidney Square, Stepney, of which the defendant Marks was the tenant and the defendants A. and J. Silverstone were the landlords. By a third-party notice Marks claimed indemnity from A. and J. Silverstone.

As the plaintiff was passing the premises on March 4, 1933, a wooden shutter fell from a window and injured her. The shutter had been in a defective condition to the knowledge of all the defendants for some time prior to the accident. The tenant said that he was under no liability to repair, and that the duty to repair was on the landlords. The landlords denied that they were under any obligation to the tenant to repair, and said that, as they had let the property by the week, the tenant alone was liable for any nuisance caused by want of repair.

The house was within the scope of the Rent Restriction Acts, and the rent had been increased from time to time to the full amount which the landlords were entitled to charge on the basis that the liability to repair was theirs. The landlords had done certain repairs. His Lordship held that they were under no contractual liability to the tenant to do so. They had the right, by the terms of the tenancy, to enter the premises at all reasonable times to inspect and execute repairs, the measure and extent of which was left to their discretion.

The landlords contended that, unless they had bound themselves by contract with the tenant to do the repairs, they were under no liability to a passenger on the highway who might be injured by the premises getting into a condition amounting to a nuisance, and that this was so whether they knew of that condition or not.

Monckton, K.C., and *Avgherinos* for the plaintiff.

H. I. P. Hallett for the defendant Marks.

Monier-Williams for the defendants A. and J. Silverstone.

GODDARD, J.—On the night of March 4, 1933, Miss Golda Wilchick, a young sempstress who earned as a piece-worker an average of 25s. a week, was walking with a friend past 16, Sidney-square, Stepney. This house is owned by the defendants Silverstone, who are large property owners in the East End, and is occupied by the defendant Marks as a weekly tenant. He is a tailor in a small way of business and pays a rent for the house and workshop of £2 13s. 8d. a week. As the plaintiff was passing, Marks's son was closing the wooden shutters across the window of the front ground-floor room, and one of them fell on the plaintiff and stunned her. It fell because the top hinge was broken and had drawn out from the wall, and it had been in a defective condition to the knowledge of Marks since the last days of the previous December. The plaintiff suffers from an obscure nervous affection which was aggravated or lit up by the blow on the head which she received. She has lost a year's earnings—£65, she has incurred some £6 14s. 6d. for doctors' fees, and I think that a fair sum at which to estimate her damages is a round sum of £271 14s. 6d. She brings this action against both occupier and owner, alleging a failure by both, or, alternatively, by one or the other, to keep the shutter secure so as not to fall on and injure passers-by. She alleges that there was a duty on the owners to repair and alleges an express contract by them with their tenant to that effect. In this she is supported by the tenant, who has taken third-party proceedings in the action against the owners, claiming indemnity from them if he is held liable. He alleges that the sole duty of repair was on the owners, and that he is under no liability at all. The owners deny that they were under any obligation to the tenant to repair, and say that, they having let the property by the week to Marks, he alone is liable for any nuisance that may be caused by the premises being out of repair. Moreover, they deny that they had any notice or knowledge of the shutter's being out of repair.

Marks became the tenant of his co-defendants in March, 1914, and has remained

there as a weekly tenant ever since. The original rent was 35s. a week and it has been increased as permitted by the Rent Restriction Acts from time to time to the present rent of £2 13s. 8d. The increases include the full amount which the landlords are entitled to charge on the basis of the liability for repairs being theirs. The requisite statutory notices were duly served from time to time. The terms of the letting, except in so far as they were contained in the rent book, were verbal, and both the plaintiff and Marks sought to prove that it was expressly agreed at the outset of the tenancy that the repairs should be done by the landlords. I listened with care to the evidence of Marks and of Jacob Silverstone. It is clear that something was said about repairs at the time of letting. It is equally clear that the landlords have from time to time done repairs to the premises at their own expense, but I am satisfied that there was no contract by the landlords with the tenant to do any repairs at all. The tenant was told that he was not required to repair. He may have been told, and I think very probably was, that, if anything was necessary, the landlords would do it. They would naturally take what steps they thought fit to preserve their property, and also, I suppose, to keep it in a state that would satisfy the sanitary authority, but I am clearly of opinion that they did not as a matter of contract bind themselves to repair any more than they put an obligation on the tenant. The matter was left as it is in the vast majority of lettings of this small class of property—as it was, for instance, in *Morgan v. Liverpool Corpn.* (1), where ATKIN, L.J., said:

“In the bulk of the cases which come within the Increase of Rent Acts the landlord is under no contractual relation to the tenant to do any repairs at all.”

But in the terms of tenancy appearing in the rent book, I find that it is provided that the landlord, his agent, or workman shall have permission to enter the premises at any reasonable hour to inspect same or execute any necessary repairs, showing that they reserved to themselves the right of doing repairs to the premises and to that extent at any rate exercised a measure of control over them for this purpose. Contractually, therefore, the position was that neither landlord nor tenant was bound vis-à-vis the other to repair at all, but the former reserved a right to enter and do repairs, the measure and nature of which was left to his discretion.

The next matter to be dealt with is whether the landlords heard that this shutter was out of repair. Marks said that he first noticed that the hinge was broken in the last two days of December, 1932, and called the attention of the landlords' agent and rent-collector, Maurice Silverstone, to it when next he called, which, according to the rent book, was Jan. 2, 1933. He said that Maurice Silverstone looked at it and promised attention, and that he mentioned the matter to Silverstone on subsequent visits, getting the same promise, but no attention. This Maurice Silverstone strenuously denied. He said he had a note-book in which he put down any repairs that wanted doing, and that he had no record of any such complaint. On this point, I accept the evidence of Marks. He gave a clear and circumstantial account of how he pointed out the shutter to Maurice Silverstone, and it seems to me that it is inherently likely that he would have done so. I do not think Silverstone is wilfully trying to mislead the court in this matter. He collects the rents of many houses, and doubtless has to listen to a host of complaints every week, and I think the truth is that he paid but little attention to a matter which probably did not seem of great moment to either party at the time, and forgot about it, but that he was told about it I do not doubt. When Marks reported the accident to the elder Silverstone, he was told that he need not worry as they were insured against matters of that sort. There was no reproach for not having told them before of the defective shutter.

Before dealing with the principal and most difficult part of the case, I propose disposing of two points made by counsel for the tenant in support of his contention that there was an obligation on the Silverstones vis-à-vis Marks to repair, independent of an express term of the tenancy. He contends that, having raised the amount of the rent by 40 per cent. as permitted by the Rent Acts where the landlords undertake repairs and having served on each occasion the statutory notice which stated that the increase was made on that footing, the landlords are estopped from denying that they agreed to

repair. The difficulty, however, in his way is, that, in *Morgan v. Liverpool Corpn.* (1) A the majority of the Court of Appeal held that the Rent Acts did not alter or enlarge the contract between landlord and tenant and that the raising of rent by the statutory maximum did not import an agreement to repair which was not in the original letting. It is true that ATKIN, L.J., pointed out that this part of his judgment and that of the Master of the Rolls was technically obiter, as the case was actually decided on lack of notice, but the point was argued and dealt with at some length by all the members of the court, LAWRENCE, L.J., being of a different opinion. Whatever conclusion I B might have come to but for that case, I think it is clearly my duty to follow the opinions expressed, as the Lord Justice put it, for guidance, though they are not technically binding on me. Counsel also contends that the point of estoppel was not considered by the court nor is there any reference in the argument or judgments to the terms of the notices which have to be served as a condition of the increase. But I cannot assume C that this point escaped the court even if it be not expressly mentioned in the judgment, and, moreover, if the fact that the rent is raised does not effect a variation of or addition to the contract, I cannot see how the service of a notice which is a condition precedent to raising the rent can affect the contract either of itself or by way of estoppel. This point, therefore, fails.

Having, therefore, decided that there was no agreement between landlords and tenant D as to repairs, but that the former knew that there was adjoining the street a defective shutter on premises over which they had reserved the right to enter and do repairs, the question is whether the plaintiff has a right of action against the landlords or must be left to what I fear is but a barren remedy against the tenant. Counsel for the landlords has strenuously argued that, unless a landlord has bound himself by contract with the tenant to do the repairs, he is under no liability to a passenger on the highway who E may be injured by the premises getting into a condition amounting to a nuisance owing to disrepair, and, as I understand the argument, that it is immaterial whether he knew of this condition or not. The question is one, I venture to think, of some difficulty, and involves a consideration of a considerable body of case law which has formed the subject of comment by leading text-writers on the law of torts. I pause here to say that no question arises as to the landlords' having knowingly let the premises in a ruinous F condition. It is now well settled that in a weekly or other periodic tenancy there is no re-letting each week, or month, as the case may be (see *Bowen v. Anderson* (2); and the reported, but undelivered, judgment of the Lord Chancellor in *Gandy v. Jubber* (3)). The tenancy here had existed for some twenty years, and the matter complained of was of very recent origin.

SIR F. POLLOCK in his work on torts (12th Edn., p. 437), says: G

"If the landlord has not agreed to repair he is not liable for defects of repair happening during the tenancy even if he looks to the repairs in fact."

For this proposition the learned author cites *Nelson v. Liverpool Brewery* (4) and refers also to *Rich v. Basterfield* (5) and *Lane v. Cox* (6). But I do not think these authorities are decisive of this case. *Rich v. Basterfield* (5) was a case of a tenant himself creating H a nuisance (in that case by smoke) by the manner in which he used the premises, which could have been used without creating a nuisance. The landlord, therefore, had done nothing wrong. *Nelson's Case* and *Lane's Case* both relate to injuries caused to invitees on premises which the landlord was under no liability to the tenant to repair. There is nothing wrong in letting unfurnished premises which are out of repair, and as, in such a case, the landlord owes no duty to the occupier, who takes the premises at his own risk, I it follows he is under no duty to persons whom the tenant invites to come there. *Cavalier v. Pope* (7) is another instance of the same doctrine.

Now what is the principle that determines the liability for nuisance? Why is it that *prima facie* it is the occupier who is liable? In *Laugher v. Pointer* (8), ABBOT, C.J., said:

"I have the control and management of all that belongs to my land or my house, and it is my fault if I do not exercise my authority so as to prevent injury to another."

In the same case LITLEDALE, J., stated the principle thus:

"Where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured."

The first case in which a landlord was made liable for a nuisance arising during the tenancy is *Payne v. Rogers* (9), the ground of the decision being, apparently, that the landlord was under an obligation to his tenant to repair. This case has been approved in *R. v. Pedly* (10), *Todd v. Flight* (11), *Pretty v. Bickmore* (12), and *Nelson v. Liverpool Brewery* (4), and establishes that where the landlord has assumed an obligation to repair he is liable to a person injured through disrepair, though to that must now be added that the plaintiff must prove that he had knowledge of the state of disrepair: (see *Morgan v. Liverpool Corpn.* (1), and *St. Anne's Well Brewery, Co. v. Roberts* (13)). If a landlord lets premises on which he knows that a nuisance exists, but takes a covenant from his tenant to put or keep them in repair, no liability remains in him (*Pretty v. Bickmore* (12), and see per BRETT, J., in *Gwinnell v. Eamer* (14)).

There is, however, no case which precisely covers the present facts, where, neither landlord nor tenant being under covenant to repair, the former reserves the right to enter and do necessary repairs, and knowing that repairs are necessary fails to do them. Clearly, if the plaintiff had been a visitor to the premises she would have had no cause of action against the landlord, as no duty was owed to visitors by the landlord any more than to the tenant. The duty in such a case arises only from contract, but why may there not be a duty apart from contract to passers-by on the highway? If I use a highway, the duty I am under not to injure other persons is not special or contractual but general and arising from what LORD ESHER used to call proximity. A property owner knows that his house, if not repaired, must at some time get into a dangerous state: he lets it to a tenant and puts him under no obligation to keep it repaired: it may be that the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs. Why then, should he be under no duty to make it safe for passers-by when he knows that the property is dangerous? The proximity is there: he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant who, in this sort of tenancy, which commonly obtains only with regard to small properties, is probably in quite humble circumstances? In this connection it is of some assistance to refer again to *Gwinnell v. Eamer* (14). It is true that this was a case of a landlord letting a house with a nuisance existing in it at the time of letting and of taking a covenant to repair, but BRETT, J., did suggest, both in the argument and in his judgment, that, if the landlord knew of the defect and did nothing to cause it to be remedied, he might be liable as well as the tenant.

The last case to which I desire to refer is *St. Anne's Well Brewery Co. v. Roberts* (13). There the premises were let to a weekly tenant, and part of them, the old city wall of Exeter, fell on the plaintiff's inn and demolished it. There again it was sought to place on the defendants liability for letting property with an existing nuisance upon it, and the action failed, as the defendants had no knowledge of the nuisance at the time of the demise. On the question I am now considering, I refer particularly to the judgment of LAWRENCE, L.J. After pointing out that, as in the present case, neither landlord nor tenant was liable to repair, and, therefore, the *prima facie* liability of the occupier remained, he went on to say that the case had been fought and decided upon the question whether the defendants themselves had been guilty of negligence and of failing to abate a nuisance on their property for a reasonable time after it had come or ought to have come to their knowledge. On the facts it was held that the defendants neither had nor ought to have had knowledge, and were, therefore, guilty of no negligence, but it seems to me that the learned Lord Justice, and, indeed, the whole court, were of opinion that, had the defendants acquired that knowledge during the demise, they would have been liable. While, therefore, that case is not a direct authority, it seems to me to give support to the view which I have formed. I think it all comes back to the words of the Lord Chief Justice in *Laugher v. Pointer* (8) already quoted, "it is my fault if I do not exercise my authority so as to prevent injury to another." The Silverstones

had the authority; they knew, as I have found, of the necessity to exercise it; they A failed to do so, and are accordingly liable.

One further point remains. Counsel for the tenant argued that, if the Silverstones were liable, it followed that Marks was not. I do not think so. It is true that the cases which establish liability in the landlord do not in terms say that the tenant is also liable, but that, I think, is explained by the fact that in all three cases the court was only considering the landlord's liability. But I see no reason why, because the tenant has B made a contract with his landlord, that should alter the duty he owes to persons on the highway. Take the case I put during the argument—a landlord has agreed to do outside repairs; the tenant one day finds that guttering is defective and may fall at any moment on to the pavement; the landlord may be abroad or in a distant part of England; the tenant cannot surely escape liability merely by writing to the landlord and telling him of the defect; he must take steps to see that no injury befalls members of the public C who pass his house. The law, I think, is correctly stated in *SALMOND ON TORTS* (7th Edn.) p. 279, note (a), and I hold that the tenant is not exempt because the landlord is liable, but that both are liable.

The result is that judgment will be entered for the plaintiff against all the defendants for £271 14s. 6d. with costs. As Marks has not proved a contract by the Silverstones to do the repairs the third-party proceedings instituted by him fail and will be dismissed, D but, as they ought to have done the repairs, without costs.

Judgment for the plaintiff.

Solicitors: *T. Magnus Wechsler; Edward Fail; Clifford-Turner, Hopton, & Lawrence.*

[*Reported by V. R. ARONSON, Esq., Barrister-at-Law.*]

ELVIRA RODRIGUES SIQUEIRA v. GONDICALO HYPOLITO CONSTANCIO NORONHA

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton and Sir Sidney Rowlatt), February 2, 15, 1934]

[Reported [1934] A.C. 332; 103 L.J.P.C. 63; 151 L.T. 6]

Account—Account stated—Promise to pay balance—Consideration—Discharge of items on each side of account.

There are two forms of account stated. Such an account may take the form of a mere acknowledgment of a debt, and, while it amounts to a promise and the existence of a debt may be inferred, that can be rebutted and it may turn out that there is no debt at all, there being no consideration and no binding promise. Another, and very usual, form of account stated contains entries on both sides, the parties having agreed that the items on one side should be set against those on the other side and that the balance only should be paid. The consideration for the payment of the balance is the discharge of the items on each side, and there is thus a promise for good consideration to pay the balance.

Observations of VISCOUNT CAVE, L.C., in *Camillo Tank S.S. Co., Ltd. v. Alexandria Engineering Works* (1) (1921), 38 T.L.R. 134, 143, applied.

Notes. Considered: *Bishun Chand Firm v. Seth Girdhari Lal* (1934), 50 T.L.R. 465.

As to account stated, see 8 HALSBURY'S LAWS (3rd Edn.) and for cases, see 12 DIGEST (Repl.) 642 et seq.

Cases referred to:

(1) *Camillo Tank S.S. Co., Ltd. v. Alexandria Engineering Works* (1921), 38 T.L.R. 134, H.L.; Digest Supp.

- (2) *Laycock v. Pickles* (1863), 4 B. & S. 497; 3 New Rep. 73; 33 L.J.Q.B. 43; 9 L.T. 378; 10 Jur. N.S. 336; 12 W.R. 76; 122 E.R. 546; 12 Digest (Repl.) 186, 1279.
(3) *Ashby v. James* (1843), 11 M. & W. 542; 12 L.J.Ex. 295; 152 E.R. 920; sub. nom. *Ashley v. James*, 1 L.T.O.S. 170; 12 Digest (Repl.) 656, 5089.

Appeal by defendant from a judgment of the Court of Appeal for Eastern Africa (SIR JOSEPH SHERIDAN, C.J., THOMAS, J., and LOW, AG., C.J., Uganda) in favour of the plaintiff in an action on an account stated.

Evershed, K.C., and *T. Mathew* for the appellant (the defendant).

Singleton, K.C., and *Lawrence Tooth* for the respondent (the plaintiff).

Feb. 15. **LORD ATKIN.**—Their Lordships do not think it necessary to hear counsel for the respondent.

This is an appeal from a judgment of the Court of Appeal for Eastern Africa varying a judgment given in the Supreme Court of Kenya by the then Chief Justice, SIR JACOB BARTH. They varied the judgment by increasing the amount due.

The claim of the plaintiff arises in these circumstances. It appears that before and up to 1911, a Mr. Siqueira carried on the business of a general store in Nairobi. In that year he died, leaving as his widow the present appellant, Mrs. Siqueira. Mrs. Siqueira does not seem to have taken an active part in the conduct of the business, and from 1913 it seems to have been conducted up to the year 1922 by her brother, Mr. Rodrigues, under a power of attorney, granted by the lady.

The plaintiff, Noronha, had been carrying on business before 1913 elsewhere, and in 1913 he joined this business and worked under Rodrigues, who happened to be his brother-in-law, Rodrigues being, as stated, the brother of Mrs. Siqueira, and the plaintiff being a cousin of the lady and of Rodrigues as well as his brother-in-law. He was employed continuously in the business from 1913 to the beginning of 1928, except for a short absence in India at one time. During the whole of the time, the plaintiff's salary had never been definitely settled. There seems to have been a sort of understanding that he should get something, not less than what he had been getting before, which was Rs. 150 per month, and commission, but the exact extent of the salary never was settled during the whole time that he was there. The business went on in the ordinary way, except that in 1922 Rodrigues became a partner, until, in 1930, the business was wound up.

In January, 1928, the plaintiff left his employment by agreement and went to India to better himself, and it is plain from the evidence that, before he went, he asked Rodrigues for a statement of his account, and Rodrigues promised to send it, and in due course he sent it.

During the whole of this period the plaintiff had been making drawings of different amounts from the cash of the business, which he had entered in the books which he kept, or which he had caused to be entered in the books, in some cases by a subordinate. The accounts showed drawings for his own purposes, and in some cases he had provided cash for the purposes of Mrs. Siqueira in respect of some passage money which had been paid on her account. At any rate, at the time he left there were in the books of the business statements of certain drawings, and there were no credits in the books for salary at all, because the salary had never been fixed by the employer.

Eventually, in March, 1928, Rodrigues, who was then, and had been for a long time, the managing partner, sent a document headed: "In account with B. C. Siqueira, Nairobi and Mombasa," and is dated March 27, 1928. It begins: "By balance due on Dec. 31, 1921," 26,000 odd shillings. It then states accounts for the ensuing six years, entering debits during the years in one instance of 5,162 shillings, and salary and other credits 9,968 shillings. Then 1923: "To total debits for the year, 5,818 shillings," and "By salary for the year and refund of passage, 4,914 shillings." It proceeds in that way to deal with the debits, which vary each year: 1,315 shillings; 1,350 shillings; 773 shillings; and the last year, 3,014 shillings. The last year also contains as a credit item "By salary and bonus for the year, 4,700 shillings," which is the amount to credit in each year. It ends "By balance in your favour on 31.12.27, 42,458.84." On that document Mr. Rodrigues put two stamps of 10 cents. each, which appear to have no real

legal significance, or revenue significance as far as one can see, and over the stamps he signed: "For and on behalf of B. C. Siqueira"—which is the firm's name—"B. A. Rodrigues, Managing Partner." Upon that document the plaintiff sued, representing it as an account stated, and their Lordships have no doubt that is the substance of the claim. A

When the claim was brought forward there was an attack made upon it in the first instance on the ground that the settlement had been collusive between Rodrigues and the plaintiff. The trial judge negatived that. There was no evidence to support it, and the case comes before their Lordships as one in which there were genuine business relations between the parties and a genuine settlement. B

The next matter that was sought to be said against the account was that Rodrigues had no authority to settle such an account as this. The learned judges have held in favour of Rodrigues that he had such authority, and it appears to their Lordships quite plain from the nature of the case that Rodrigues was the one person who could have settled it; he was the one person who had the adequate knowledge, and it was quite within the ordinary and regular course of the business that he should settle an outstanding account of this kind with one of the servants of the business. Their Lordships, therefore, find it unnecessary to say anything further on the question of authority. C

Now, when the courts came to deal with this matter they appear, as it seems to their Lordships, somewhat unfortunately, to have been asked to deal with the matter upon the footing that this, which was alleged to be an account stated, amounted to an implied promise to pay without consideration, and, having got that in mind, they then began to consider questions that arise under the Indian Contract Act and the Indian Limitation Act, which are applied to Kenya by appropriate Orders in Council, which it is unnecessary to deal with here. D

The account itself goes back to the whole of the period from 1913, and it obviously relates to items and transactions which happened long before the period of three years, which is the appropriate period of limitation for simple contracts, or contracts for service under the Indian Limitation Act. E

There was an argument put before the learned judges that this was an acknowledgment under the Limitation Act. The acknowledgment has to be made during the period of limitation, and the question might have arisen whether or not this was or was not an acknowledgment within the meaning of the Act. F

Then the matter was thought to be disposed of by the terms of s. 25 of the Indian Contract Act. That section deals only with the question of promises made without consideration. The relevant part of that Act provides that an agreement when made without consideration is void unless it is expressed in writing; but it says by sub-s. (3): G

"Unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specifically authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

An interesting argument was addressed to the courts there, and would probably have been addressed to their Lordships by counsel for the appellant, if it had not turned out to be unnecessary, to the effect that the promise which is by law implied from an account stated, even though the account is stated in writing, is not a promise made in writing, and therefore such a promise would not be one which would come within sub-s. (3). H

In the opinion of their Lordships, this question does not arise because it appears to them reasonably plain that, in this particular case, the account stated is, in fact, an account from which there arises a promise made for good consideration to pay the balance shown in the account. Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But, on the other hand, there is another form of account stated which is a very usual form as between merchants in I

business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid. The items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described.

Probably the best authority for that definition on an account stated is that which was selected by VISCOUNT CAVE in *Camillo Tank Steamship Co., Ltd. v. Alexandria Engineering Works* (1), which was in the year 1921, although the account in that case was not an account of the nature described because it was merely a repairer's account with the items probably only on one side. LORD CAVE, in dealing with the various descriptions in law of an account stated, goes on to cite this passage (38 T.L.R. at p. 143):

"There is a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by BLACKBURN, J., in *Laycock v. Pickles* (2) a 'real account stated,' and he describes it as follows: 'There is a real account stated, called in old law an *insimul computassent*—that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts in *præsenti*, or that they should be legal debts.' I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side, and the balance is recoverable as if money had been really taken in satisfaction, subject to this, that where some of the items are such that if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated."

By that must be meant, in view of many subsequent authorities, would be invalidated to the extent of those items which are objected to on that footing. Although BLACKBURN, J., does not, in fact, deal with debts which are barred by the statute of limitation, yet he says it is not necessary that the debts should be in *præsenti* or that they should be legal debts. That is borne out by the fact, as is shown by *Ashby v. James* (3), that, though some of the items in the account are items which would have been barred by the statute of limitation, yet they are similarly deemed to have been paid. That was the precise position in *Ashby v. James* (3).

In these circumstances this seems to their Lordships to be precisely the kind of account stated which was mentioned by BLACKBURN, J. Here is an account which has been running over a period of about fifteen years, the remuneration has never been fixed. Apparently, the parties expected, though there was no legal bargain to that effect, that the remuneration should include the consideration of commission or share of the profits, or a bonus based upon the profits. Salary had never been quantified at all, and, more than that, the items of debts had never been agreed at all. So that at this particular time, when the employment had just ceased and when the ex-servant desired to receive his proper remuneration for the whole of that period, it was open to the employer to investigate each and all of the items that appeared in the books to determine for himself what the remuneration should be, and certainly to determine so as to bind the other side what his share of the profits, if any, should be. That was done. The man writes an account which was demanded by the servant for the express purpose of knowing what sum he would be entitled to get and which, it seems to their Lordships, was stated by the managing partner of the business, for the sole purpose of enabling the servant to know what his final remuneration was to be. To make quite clear that it was intended to express something in the nature of an obligation he authenticated the document—

and that can be the only effect of that particular part of the transaction—by writing his signature over two 10 cent. stamps. A

In their Lordships' view, that was a plain case of a promise made to pay the balance for a good consideration. One cannot help thinking that if an account stated in those circumstances did not give rise in Kenya to the promise to pay, and for a good consideration, Kenya would be certainly without one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English contract law. B

For these reasons, it appears to their Lordships that the decision of the Court of Appeal was quite correct, though perhaps for different reasons from those which commended themselves to the members of the court. Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and appellant must pay the costs of the appeal. C

Appeal dismissed.

Solicitors: *Charles Russell & Co.; Hy. S. L. Polak & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*] D

PEAT v. GRESHAM TRUST, LTD. E

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Russell, Lord Macmillan, and Lord Wright), February 20, 22, 23, March 27, 1934]

[Reported [1934] A.C. 252; 103 L.J.Ch. 173; 151 L.T. 63; 50 T.L.R. 345; [1934] B. & C.R. 33]

Company—Winding-up—Fraudulent preference—Suffering judicial proceeding in favour of creditor—Onus of proof—Need to prove dominant intent to prefer—Proof of intent by inference—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 44 (1)—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 265 (1). F

On May 6, 1930, a debtor company deposited with the respondents title deeds as security for money owing by the debtor company to the respondents. The charge was not registered, as it should have been, under s. 80 (1) of the Companies Act, 1929. On March 3, 1931, the solicitors of the debtor company prepared draft resolutions for the winding-up of that company. On March 4 the respondents applied for an order extending the time for registration on the ground that the omission to do so in time was accidental. On March 7 the debtor company withdrew its instructions to its solicitors regarding the proposed liquidation and regarding opposition to the respondents' application for an extension of time. On March 10 the respondents' application was heard, the debtor company not appearing by counsel. MAUGHAM, J., was satisfied that the omission to register in time was accidental and made an order extending the time to March 24. On March 18 a petition was presented by the debtor company for an order for its compulsory winding-up, and an order was made on March 31. G

By Companies Act, 1929, s. 265 (1), any act relating to property which would, if done by an individual, be deemed in his bankruptcy, a fraudulent preference, was, if done by a company, to be deemed, in the event of that company being wound-up, a fraudulent preference of its creditors and invalid accordingly. By Bankruptcy Act, 1914, s. 44 (1), every judicial proceeding suffered by any person unable to pay his debts as they become due in favour of a creditor with a view to giving such creditor a preference over other creditors shall, if the person suffering the same is adjudged bankrupt within three months, be deemed fraudulent and void as against the trustee in bankruptcy. H I

On a summons issued by the liquidator of the debtor company for a declaration that the order made by MAUGHAM, J., constituted an undue and fraudulent preference of the respondents over the other creditors of the debtor company, the proceedings before MAUGHAM, J., being suffered by the debtor company in favour of the respondents with a view to giving the respondents such a preference,

Held: the onus was on the liquidator, as the person claiming to avoid the transaction, to establish that the real intention of the debtor company was to prefer the respondents; that onus was only discharged when the court, on a review of all the circumstances, was satisfied that the dominant intent to prefer was present; that might be a matter of direct evidence or of inference, but where there was not direct evidence and there was room for more than one explanation it was not enough to say that the intent to prefer must be inferred; in the present case the inference that there was an intent to prefer could not be drawn; and, therefore, the liquidator had failed to make out his case.

Notes. Section 265 (1) of the Companies Act, 1929, was repealed by the Companies Act, 1948. See now, s. 320 (1) of that Act.

Considered: *Re Lyons, Ex parte Barclays Bank, Ltd. v. Trustee* post, p. 124; *Re Kris Cruisers, Ltd.*, [1948] 2 All E.R. 1105. Referred to: *Re Kushler, Ltd.*, [1943] 2 All E.R. 22.

As to the effect of a fraudulent preference in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 682 et seq., and for cases, see 10 DIGEST (Repl.) 1029 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321, and for Companies Act, 1948, see *ibid.*, vol. 3, 452.

Cases referred to:

- (1) *Re Cohen, Ex parte Trustee*, [1924] 2 Ch. 515; 94 L.J.Ch. 73; 132 L.T. 540; [1924] B. & C.R. 143; sub. nom. *Re Cohen, Ex parte Trustee v. Snow (W. R.) & Co.*, 69 Sol. Jo. 35, C.A.; 22 Digest (Repl.) 511, 5670.
- (2) *Sharp v. Jackson and others*, [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264, H.L.; 4 Digest 55, 471.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.).

The liquidator of M.I.G., Ltd., sought by summons a declaration that certain proceedings by motion in the Chancery Division taken by the Gresham Trust, Ltd., in which an order was made on March 10, 1931, extending the time for registration of particulars of a charge created on May 16, 1930, by deposit of deeds by the company in favour of the trust constituted an undue and fraudulent preference of the trust, and such further relief as would be consequential on the making of such declaration.

The facts, which are sufficiently summarised above, are fully set out in the opinion of LORD TOMLIN.

The Court of Appeal held, reversing the decision of EVE, J., that, assuming in favour of the liquidator, without so deciding, that s. 265 was as wide in effect as s. 44 of the Bankruptcy Act, 1914, and s. 44 applied in full, the absence of the company on the motion for extension of time was a suffering by it of a judicial proceeding, the evidence was not sufficient to show that the suffering of that judicial proceeding was done with a view of giving a creditor preference, so as to be fraudulent and void against the liquidator. It was necessary in order to establish a fraudulent preference to prove that the dominant intention of the company in suffering the judicial proceeding was to prefer the Gresham Trust. The liquidator appealed.

Millard Tucker, K.C., and *H. M. Pratt* for the appellant.

Spens, K.C., and *C. N. Tindale Davis* for the respondents were not called upon to argue.

The House took time for consideration.

March 27. **LORD TOMLIN.**—The appellant is the liquidator of a company called M.I.G. Trust, Ltd., which is being wound-up compulsorily by the court under an order dated March 31, 1931. I shall hereafter refer to M.I.G. Trust, Ltd., as the debtor

company. The respondents are a limited company claiming to be secured creditors of the debtor company by virtue of a charge created by deposit of deeds on May 6, 1930, and registered with the Registrar of Companies on March 10, 1931, as the result of an order extending the time for registration made by MAUGHAM, J., on that day. A

This appeal arises out of a summons issued by the appellant under s. 265 of the Companies Act, 1929, for a declaration that the proceedings before MAUGHAM, J., and the order made by him (being proceedings alleged to have been suffered by the debtor company with a view to prefer the respondents) constituted an undue and fraudulent preference of the respondents over the other creditors of the debtor company and for consequential relief. B

For many years prior to March 3, 1931, the business of an outside stockbroker under the style of Arthur Wheeler & Co. was carried on, up to 1920, by one Sir Arthur Wheeler alone, and thereafter by him in partnership with one George Victor Smith. The debtor company was formed in 1910 by Sir Arthur Wheeler for the purpose of carrying on the business of buying and selling stocks and shares in association with the business of Arthur Wheeler & Co. Sir Arthur Wheeler and his son (hereafter called Mr. Wheeler) were the only two directors of the debtor company from October, 1930, to March 3, 1931, a third director, Mr. Leeson, having retired in October, 1930. C

The respondents are a public limited company. During the year 1930 and in the year 1931, up to March 3, Sir Arthur Wheeler was chairman of the board of directors of the respondents. At all material times Mr. Wheeler was managing director of the respondents. A substantial number of shares in the capital of the respondents were held by Sir Arthur Wheeler, his wife and Mr. Wheeler. D

On May 6, 1930, the debtor company deposited the title deeds of certain freehold property with the respondents as security for money owing from the debtor company to the respondents. Such deposit was accompanied by a letter dated May 6, 1930, from the debtor company to the respondents in which the debtor company agreed to execute any necessary deed in respect of the properties charged, when called upon to do so. Particulars of the charge were not sent to the Registrar of Companies for registration, pursuant to s. 80, Companies Act, 1929, within twenty-one days after the date of the creation of the charge, and such charge, in consequence, became void against the liquidator and any creditors of the company by reason of the provisions of s. 79 of the Companies Act, 1929. E

On March 3, 1931, the firm of Arthur Wheeler & Co. was adjudicated bankrupt. Immediately after the adjudication Mr. Wheeler consulted the solicitors of the debtor company as to the position of that company, and the solicitors prepared draft resolutions for voluntary winding-up. F

On March 4, 1931, the respondents instituted proceedings in the High Court of Justice Chancery Division by way of originating notice of motion under the provisions of s. 85 of the Companies Act, 1929, for an order that the time for delivering particulars of the charge for registration should be extended, on the ground that the omission to deliver such particulars was accidental. The notice of motion was addressed to the debtor company. G

On March 4, 1931, Mr. Wheeler instructed the solicitors of the debtor company to bring to the notice of the court his connection with the respondents and the debtor company, the transactions between the two companies, and the position of the debtor company. The solicitors, accordingly, instructed counsel, delivering to him a brief which, after referring to the bankruptcy of Arthur Wheeler & Co. and the position of Mr. Wheeler, contained, inter alia, the following statements: H

"(i) That Mr. Wheeler was confident that in the circumstances which had happened the debtor company must be put into liquidation, either on its own petition, or following resolutions for its voluntary winding-up, and that it would probably present its own petition. (ii) That the respondents had from time to time loaned very large sums of money to the debtor company, the debtor company depositing various securities with the respondents. (iii) That Mr. Wheeler's instructions were that he was merely a nominal director of the debtor company and knew nothing of its operations, except as to the transactions involving the loans to I

the debtor company by the respondents, and that counsel would appreciate that Mr. Wheeler's position was a somewhat difficult one. (iv) That the creditors of the debtor company, of which there were a very large number, would undoubtedly be prejudiced if the respondents were permitted to register the charge, and that Mr. Wheeler felt that these facts should be brought to the knowledge of the court on the application by the respondents."

On March 6, 1931, the respondents' application came before MAUGHAM, J. The debtor company appeared by counsel and the application was adjourned until March 10, 1931. On March 7, 1931, Mr. Wheeler signed and sent to the solicitors of the debtor company a letter which, omitting immaterial parts, was in the following terms:

"On behalf of the M.I.G. Trust, Ltd., we withdraw any instructions given to you in respect of either the proposed liquidation of the company or the opposition to the registration of the charge given in favour of the Gresham Trust, Ltd.—Yours faithfully, for M.I.G. Trust, Ltd."

On March 10, 1931, the respondents' application came again before MAUGHAM, J. The debtor company did not appear by counsel. MAUGHAM, J., upon the evidence of two affidavits of the respondents' secretary, was satisfied that the omission to register had been accidental, and made an order, the operative part of which was as follows:

"This court being satisfied that the omission to register the mortgage or charge created by deposit of deeds on May 6, 1930, by the respondents M.I.G. Trust, Ltd., in favour of the applicants within the time required by the Companies Act, 1929, was accidental, doth, pursuant to s. 85 of the said Act, order that the time for registration of the particulars of the said mortgage or charge be extended until March 24, 1931. But this order is to be without prejudice to the rights of parties acquired prior to the time when such mortgage or charge shall be actually registered."

On the same day that the order was made the charge was registered.

The appellant does not suggest that the omission to register the charge in May, 1930, was otherwise than accidental, nor does he suggest that there was any collusion between the respondents and the debtor company in connection with the application to extend the time for registration or the making of the order thereon.

On March 18, 1931, a petition was presented by the debtor company and a contributory and a creditor of the debtor company for an order for the compulsory winding-up of the debtor company. On March 31, 1931, an order was made on this petition for the compulsory winding-up of the debtor company, and by an order dated May 7, 1931, the appellant was appointed liquidator in the winding-up. On June 22, 1932, the appellant issued the summons originating the proceedings out of which this appeal arises.

On Nov. 6, 1932, EVE, J., made an order declaring that the proceedings suffered by the debtor company in which the order extending the time for registration was made was a fraudulent preference of the respondents over the other creditors of the debtor company and that the charge was void against the appellant and the creditors of the debtor company.

On Feb. 28, 1933, the Court of Appeal unanimously reversed this decision, holding that the appellant had not proved that the proceeding was suffered by the debtor company with a view of giving the respondents a preference over the other creditors of the debtor company.

The sections upon which the appellant relies are s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914.

The material parts of s. 265 of the Companies Act, 1929, are as follows:—

"(1) Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound-up, a fraudulent preference of its creditors, and be invalid accordingly. (2) For the purposes of this

section, the commencement of the winding-up shall be deemed to correspond with the presentation of the bankruptcy petition in the case of an individual."

Section 44 of the Bankruptcy Act, 1914, is in the following terms:—

"(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy. (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. (3) Where a receiving order is made against a judgment debtor in pursuance of s. 108 of this Act, this section shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order."

Now it is to be observed that the appellant in order to succeed has to establish the validity of a number of propositions of law and fact, including the following: (i) that a judicial proceeding such as the application to extend the time for registration if suffered by a company unable to pay its debts as they become due out of its own money in favour of any creditor within the meaning of s. 44 of the Bankruptcy Act, 1914, is an act relating to property within the meaning of s. 265 of the Companies Act, 1929; (ii) that what occurred in the present case was a suffering by the debtor company in favour of the respondents of a judicial proceeding within the meaning of s. 44; (iii) that such suffering (a) was done with a view of giving the respondents a preference over the other creditors of the debtor company and (b) did result in such a preference being given.

Each member of the Court of Appeal has been content to assume an answer in the appellant's favour to each of the first two of the foregoing propositions, because they decided against him on the third proposition and without success on the third proposition success on the first two propositions would avail the appellant nothing.

I, too, am prepared to make the same assumptions, but in doing so I do not indicate any opinion upon the merits of either of the propositions, the validity of which I assume. There remains, therefore, to be considered whether the lords justices in the Court of Appeal reached a right conclusion upon the third proposition.

In my opinion they did. It is necessary for the appellant to establish that the debtor company suffered the judicial proceeding with a view to giving a preference. Now a limited company cannot have a view except so far as the views of the agents by which it acts are to be deemed the views of the company. That means in the present case that the state of Mr. Wheeler's mind has to be examined as it is only through him that any view can be attributed to the debtor company. Of the state of Mr. Wheeler's mind there is no evidence except such as is afforded by his actions regarded in the light of the circumstances in which he was placed.

The circumstances in which he was placed were (i) that in addition to his knowledge of the position of the debtor company as indicated in his instructions to the debtor company's solicitors he knew all the facts with regard to the loan by the respondents to the debtor company; (ii) that he knew that the charge given by the debtor company had by reason of an accidental omission not been registered and that it ought to have been registered; and (iii) that he was both the managing director of the respondents and a director of the debtor company, and consequently owed a duty to each of them, though the two duties might be conflicting.

His actions so far as material were (i) that immediately after the adjudication of Sir Arthur Wheeler as a bankrupt he gave to the solicitors of the debtor company instructions to prepare a resolution for the voluntary winding-up of the debtor company, and also the instructions as to the respondents' application which resulted in the preparation and delivery of the brief which has been mentioned, and (ii) that on the day after the

preliminary hearing of the respondents' application he withdrew his instructions both as to the voluntary winding-up and as to the respondents' application.

On the assumption that the direct and necessary result of the withdrawal of the instructions in relation to the respondents' application was that an order extending the time for registration which would not otherwise have been made was made, it is still essential for the appellant to prove that Mr. Wheeler acted with a view to giving the respondents a preference over the other creditors of the debtor. It is contended on the appellant's behalf that once given the withdrawal and the consequences of the withdrawal, then, in the absence of any other explanation, the intent to prefer must be inferred because a man is presumed to intend the natural consequences of his act.

I do not accept this contention. In my opinion, in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was, to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence, and there is room for more than one explanation it is not enough to say that, there being no direct evidence, the intent to prefer must be inferred. In my opinion, there is nothing in the decision in *Re Cohen, Ex parte Trustee* (1); to justify the doctrine for which the appellant contends, and I do not think that such a doctrine could be reconciled with the opinion expressed in your Lordships' House in *Sharp v. Jackson and others* (2) and, in particular, with the views indicated by LORD HALSBURY, L.C. ([1899] A.C. at pp. 421 and 422). I may add that I do not think that the headnote in the case of *Re Cohen, Ex parte Trustee* (1) accurately expresses the result of the decision in the Court of Appeal. The majority of the court held that upon the evidence the intent to prefer was made out, but it is only in the judgment of SARGANT, L.J., that any support can be found for the headnote as expressed.

In the present case it is plain, in my judgment, that Mr. Wheeler's action may have been due to reasons unconnected with any intention to prefer. He may, for example, have come to the conclusion that his position vis-à-vis the two companies was such that he could not fairly take an active part in what was done. It is improper to speculate what the reasons for his actions were, and in my opinion upon the material available the inference that the intent was to prefer cannot in law properly be drawn. I think the appellant failed to make out his case upon the evidence in this respect. This conclusion renders it unnecessary to consider whether the withdrawal of the brief resulted in the order being made and a preference being given to the respondents. This matter has been dealt with below by ROMER, L.J., but I think that as it is unnecessary so it is inadvisable to express any opinion upon it. I invite your Lordships for the reasons which I have indicated to dismiss this appeal with costs.

LORD WARRINGTON.—I concur.

LORD RUSSELL.—I also concur, and have nothing to add.

LORD MACMILLAN.—I also concur.

LORD WRIGHT.—I agree.

Appeal dismissed.

Solicitors: Mayo, Elder, & Rutherfords; Clifford-Turner Hopton, & Lawrence.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

FOLEY v. CLASSIQUE COACHES, LTD.

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.J.J.), March 15, 16, 1934]

[Reported [1934] 2 K.B. 1; 103 L.J.K.B. 550; 151 L.T. 242]

Contract—Uncertainty—Sale of goods—No definite price fixed at time of contract—Illegality—Restraint of trade.

By an agreement in writing the plaintiff agreed to sell and the defendants agreed to purchase certain freehold property adjoining the land belonging to the plaintiff on which he had erected a petrol filling station. The agreement for sale was made subject to the condition that the defendants would enter into a supplemental agreement with the plaintiff for the sale of petrol to them for the purposes of their business as motor coach proprietors. That second agreement provided that the defendants would purchase from the plaintiff all petrol which should be required by the defendants for the running of their business "at a price to be agreed by the parties in writing and from time to time," and further, that the plaintiff should deliver the petrol to the defendants from the plaintiffs' pumps, which were on his land, and that the defendants should not purchase any petrol from any other person so long as the plaintiff was able to supply them with sufficient petrol. The agreement also contained an arbitration clause: "If any dispute or difference shall arise on the subject-matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889." The land was conveyed to the defendants, and for three years the parties acted on the agreement as to the supply of petrol. Disputes having arisen between them, the plaintiff brought an action claiming a declaration that the petrol agreement was valid and binding and an injunction.

Held: (i) there must be implied in the contract a term that the petrol was to be supplied at a reasonable price and should be of reasonable quality; the arbitration clause would apply to any failure to agree the price; and, therefore, the contract was enforceable although no definite price was fixed for the petrol at the time the contract was made.

May and Butcher, Ltd. v. R. (1) (1929), 151 L.T. 246, distinguished.

Hillas & Co., Ltd. v. Arcos, Ltd. (2) (1932), 147 L.T. 503, applied.

(ii) the contract was not bad as being in restraint of trade.

Notes. Referred to: *British Homophone, Ltd. v. Kunz and Crystallite Gramophone Record Manufacturing Co.*, [1935] All E.R. Rep. 627; *Scammell v. Ouston*, [1940] 1 All E.R. 59; [1941] 1 All E.R. 14.

As to contracts void for uncertainty, see 8 HALSBURY'S LAWS (3rd Edn.) 83, 84, and for cases, see 12 DIGEST (Repl.) 22 et seq.; as to implication of a term in a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 122 et seq., and for cases, see 12 DIGEST (Repl.) 681 et seq.; as to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 397 et seq., and for cases, see 43 DIGEST 19 et seq.

Cases referred to:

- (1) *May and Butcher, Ltd. v. R.* (1929), [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 246 n.; Digest Supp.
- (2) *Hillas & Co., Ltd. v. Arcos, Ltd.* (1932), 147 L.T. 503; 38 Com. Cas. 23, H.L.; Digest Supp.
- (3) *Brathwaite v. Foreign Hardwood Co., Ltd.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 21 T.L.R. 413; 10 Asp. M.L.C. 52; 10 Com. Cas. 189, C.A.; 12 Digest (Repl.) 491, 3695.
- (4) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (5) *Catt v. Tourle* (1869), 4 Ch. App. 654; 38 L.J.Ch. 665; 21 L.T. 188; 17 W.R. 939, L.J.J.; 31 Digest (Repl.) 113, 2542.
- (6) *Courage & Co., Ltd. v. Carpenter*, [1910] 1 Ch. 262; 79 L.J.Ch. 184; 101 L.T. 940; 26 T.L.R. 196; 31 Digest (Repl.) 116, 2563.

Appeal by the defendants from a decision of LORD HEWART, C.J.

The plaintiff was the owner of land on part of which he had erected a petrol filling station; the defendants were proprietors of a motor-coach business. By an agreement in writing, dated April 11, 1930, it was agreed that the plaintiff should sell and the defendants should purchase for £1,100 the freehold property which adjoined that belonging to the plaintiff. The contract of sale was made subject to certain conditions, among others that the defendants would enter into a supplemental agreement with the plaintiff for the sale of petrol and/or oil, the terms of which had already been agreed between the parties. On the same day a second agreement was signed for the purchase by the defendants of their petrol from the plaintiff. It recited that it was

"supplemental to an agreement bearing even date herewith and made between the same parties as are parties thereto, and whereby the vendor has agreed to sell and the company to purchase [the property mentioned in the first agreement, and] whereas the vendor and his present wife are the proprietors of a petrol and oil filling station at his said address, and the company are proposing to carry on the business of charabanc and garage proprietors on the said adjoining land, and it has been agreed that the vendor shall supply to the company and the company will take from the vendor all petrol as shall be required by the company as hereinafter mentioned. Now it is hereby agreed as follows:

"1. The vendor shall sell to the company and the company shall purchase from the vendor all petrol which shall be required by the company for the running of their said business at a price to be agreed by the parties in writing and from time to time.

"2. The vendor shall deliver the said petrol to the company from the vendor's pumps now or hereafter on his said land.

"3. This agreement shall remain in force during the life of the vendor and his present wife if she survives him. . . .

"5. In the event of the company being wound-up . . . the vendor may determine this agreement at any time after the commencement of such winding-up by giving one week's notice in writing of his intention so to do . . . and upon the expiration of such notice this agreement shall cease . . . but without prejudice to the right of action of the vendor in respect of any breach of the company's agreements herein contained.

"6. The company shall not purchase any petrol from any other person or corporation so long as the vendor is able to supply them with sufficient petrol to satisfy their daily requirements, but nothing herein contained shall prevent the vendor from selling petrol and (or) oil to any other person or corporation to be used for any purposes whatever, provided that the company and their servants shall be at liberty to purchase such petrol as may be found necessary to complete the particular journey when engaged on journeys over a distance necessitating the re-fuelling of their vehicles.

"7. The vendor shall supply the said petrol of a standard and quality at present supplied by the vendor or of such other standard and quality as the company may reasonably approve.

"8. If any dispute or difference shall arise on the subject-matter or construction of this agreement, the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889."

The land which was the subject of the agreement was conveyed by the plaintiff to the defendants and from April, 1930, until October, 1933, the defendants purchased their petrol from the plaintiff at the prices charged by the plaintiff in statements of account rendered by him to the defendants from time to time.

As the result of disputes which had arisen between the parties as regards the price and quality of the petrol supplied, the defendants' solicitor wrote a letter dated Sept. 29, 1933, to the plaintiff in the following terms:

"It appears that although you have supplied petrol to my clients as and when they have required it, no agreement in writing as to price has ever been made, nor

any agreement of any sort thereunder. My clients have from time to time sent you their cheque in payment of statements of account rendered by you. Having considered this alleged agreement and the aforesaid facts, I have advised my clients that this document is of no force or effect, and, therefore, acting on their behalf, I hereby give you notice that my clients do not intend to be bound by any of the provisions contained in this alleged agreement. As from Oct. 8, 1933, my clients will be purchasing their petrol supplies elsewhere."

The plaintiff thereupon issued a writ claiming (i) a declaration that the petrol agreement was valid and binding upon the parties; (ii) an injunction to restrain the defendants from purchasing any petrol required by them for the carrying on of their said business from any persons other than the plaintiff; (iii) an account of all petrol bought by the defendants in breach of the said petrol agreement from any person other than the plaintiff; and (iv) damages for breach of contract. The defendants, by their defence, pleaded, *inter alia*, that no price had been agreed at which the petrol was to be sold to them by the plaintiff, and, further, that cl. 6 of the agreement was contrary to public policy and illegal.

LORD HEWART, C.J., held (i) that the plaintiff was entitled to judgment upon the ground that there was under cls. 1 and 7 an agreement between the parties that the defendants should purchase their petrol from the plaintiff, and that if the parties failed to agree the law would imply that a reasonable price would be paid; and (ii) that cl. 6 was not in restraint of trade. The defendants appealed.

Van den Berg, K.C., and *Astell Burt* for the defendants.
Glyn-Jones for the plaintiff.

SCRUTTON, L.J.—This is an appeal from a decision of the Lord Chief Justice in a case relative to the supply of petrol to the defendant. I think that that decision was right, and I am very glad he came to that conclusion, because I do not regard the defendants' contention as an honest one.

The plaintiff had some land, part of which was occupied by pumps used for the supply of petrol. Adjoining that land was some vacant land belonging to him which the defendant wanted to use as the headquarters for their charabancs, and, as there was no other suitable land in the neighbourhood, they approached the plaintiff, who was willing to sell on the terms that they should obtain all their petrol from him. It is quite clear that unless the defendants had agreed to this they would never have got the land. There was a discussion whether this term about the petrol and the agreement to purchase the land should be put in one document or in two, but ultimately it was agreed that there should be two documents of even date. The first relates specifically to the sale and purchase of the land, which, it was agreed, should go through on condition that the defendants undertook to enter into the petrol agreement, the terms of which had been already agreed. On the same day a second agreement was signed reciting that it was supplemental to the agreement of even date—that is, the agreement for the sale and purchase of the land. The second agreement included a clause that, if any dispute or difference should arise on the subject-matter or construction "the same shall be submitted to arbitration in the usual way." It is clear that the parties intended to make an agreement, and for the space of three years no doubt entered the mind of the defendants that they had a business agreement, for they acted on it during that time. The petrol supplied by the plaintiff was non-combine petrol, and it was supplied to the defendants at a price lower than that paid by the public. Accounts were rendered periodically in writing and paid after having been checked as to amount. A difficulty arose in the third year because someone acting for the defendants thought he could get better petrol elsewhere, and on Sept. 29, 1933, their solicitor, thinking he saw a way out of the agreement, wrote on their behalf a letter on Sept. 29, 1933, repudiating the agreement. Possibly the solicitor had heard something about the decision of the House of Lords in *May and Butcher v. R.* (1), but, probably, he had not heard anything about *Braithwaite v. Foreign Hardwood Co., Ltd.* (3), in which the Court of Appeal decided that the wrongful repudiation of a contract by one party relieved the other party from the performance of any conditions precedent. Thereafter the plaintiff brought his

action claiming damages for breach of the agreement, a declaration that the agreement was binding, and an injunction to restrain the defendants from purchasing petrol from any person other than the respondent. The Lord Chief Justice decided that the plaintiff was entitled to judgment, as there was a binding agreement between the parties that the defendants should get the land upon the condition that they should buy their petrol from the respondent.

A good deal of the case turns upon the effect of two decisions of the House of Lords which are not easy to fit in with each other. In the first of these cases, *May and Butcher Ltd. v. R.* (1) known as the tentage case, the plaintiffs were buying surplus stores from a government department. In the Court of Appeal two members of the court took the view that, inasmuch as there was a provision that the stocks were to be offered from time to time at prices to be agreed, there was no binding contract because an agreement to make an agreement does not constitute a contract, and that the language of the arbitration clause that any dispute as to the construction of the agreement should be referred was irrelevant. Then came the Russian timber case of *Hillas & Co., Ltd. v. Arcos, Ltd.* (2) in which there was an agreement between Hillas & Co., Ltd., and the representatives of the Russian Government under which Hillas & Co., Ltd., were to purchase over the season 22,000 standards of soft wood goods of fair specification, and under a later clause in the same agreement they had an option to purchase in the next year 100,000 standards, with no particulars as to the sort of wood or as to the terms and ports of shipment or any of the other matters one expects to find dealt with on a sale of a large quantity of Russian timber over a period. The Court of Appeal came to the conclusion that, as the House of Lords in *May and Butcher, Ltd. v. R.* (1) considered that where a detail had to be agreed upon there was no agreement until that detail was agreed, they were bound to follow the decision in *May and Butcher, Ltd. v. R.* (1) and to hold that there was no effective agreement in respect of the option, because the terms had not been agreed. It turned out that we were wrong in so deciding and that we had misunderstood the decision in *May and Butcher, Ltd. v. R.* (1).

The House in *Hillas & Co., Ltd. v. Arcos, Ltd.* (2) took this line. It is quite true that there seems to be considerable vagueness about the agreement, but the parties managed to perform the contract so far as it related to 22,000 standards, and so the House thought there was an agreement as to the option which the parties would be able to perform in spite of the lack of details. It is true that in the first year the parties got through quite satisfactorily; that was because during that year the majority of English buyers were boycotting the Russian sellers. In the second year the position was different. The English buyers had changed their view and were buying large quantities of Russian timber, so that obviously different conditions would arise. The House of Lords said that the Court of Appeal were not justified in thinking that the House intended to lay down universal principles of construction in *May and Butcher, Ltd. v. R.* (1) or to negative the rule that each case must be decided on the construction of the particular document, and, in that case, *Hillas & Co., Ltd. v. Arcos, Ltd.* (2), they found that the parties did enter into a complete and binding contract.

In the present case the parties obviously believed they had a contract, and they acted on that belief for three years. They had an arbitration clause which related to the subject-matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price. As in the case of a tied house there is to be implied in this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality. For these reasons I have come to the conclusion that the Lord Chief Justice was right in holding that there was an effective and enforceable contract, although no definite price had been agreed with regard to the petrol in the future.

It was said, secondly, on behalf of the defendants that the contract was bad, as being in restraint of trade. In my view, that contention is clearly untenable. The contract is a perfectly ordinary one to purchase petrol from a particular person, and as long as petrol of a reasonable price and quality is supplied there is no undue restraint of trade. It is suggested, however, that the injunction granted to restrain a breach of cl. 6 of the agreement might have this result, and that if the defendants moved their coaching

business, say to Edinburgh, they would still be required to purchase their petrol in London from the plaintiff. I think it is clear that the defendants' obligation to take their supplies of petrol from the plaintiff applies only to the business carried on by them on the land adjoining the respondent's petrol pumps, and has no application to a business carried on in Edinburgh or Aberdeen or any other place remote from London. A

The appeal, therefore, fails, and no alteration is required in the form of the injunction that has been granted. B

GREER, L.J.—I think the judgment of the Lord Chief Justice was quite right, and ought not to be disturbed, for the reasons given by him. In the present case the implied intention of the parties was that there should be two considerations for the purchase of the land by the defendants, (i) the payment of £1,100; and (ii) the defendants' promise to purchase all their petrol from the plaintiff; and, if that second promise does not amount to an agreement, then one of the two considerations which both parties intended disappears, and the defendants get the land in consideration of the payment of £1,100. C

I think the words of **BOWEN, L.J.**, in *The Moorcock* (4) are clearly applicable to a case of this kind, and that in order to give effect to what both parties intended the court is justified in implying that in the absence of agreement as to price a reasonable price must be paid, and if the parties cannot agree as to what is a reasonable price then arbitration must take place. It is quite true that one cannot add to a contract an implied term inconsistent with the express terms of the contract, but in a suitable case one can imply a term, and, in my judgment, to imply a term in this contract that the price of the petrol supplied by the plaintiff shall be reasonable does not seem to me to be in any way inconsistent with the terms of the agreement. D

May and Butcher, Ltd. v. R. (1) is distinguishable from the present case both on its facts and as to the terms of the agreement. In that case, as I understand, there was no question of anything whatever except the sale of what was called tentage, and it was provided by the agreement that the purchaser should leave a deposit in the hands of the seller. There was no consideration, unless it be that a term to agree a price in the future was a consideration. It is a common observation that a decision upon the construction of one contract is not an authority upon the construction of another contract in different words and entered into under different conditions. The facts of this case and the nature of the contract take it out of the authority of *May and Butcher, Ltd. v. R.* (1), and the court is entitled to construe this contract as containing the word "reasonable" as the implied term. When the buyers said that they would have nothing more to do with the contract they thereby relieved the seller from the necessity of discussing what should be the price of the deliveries in the future. Having repudiated the contract when they were not entitled to do so they cannot rely on the fact that the contract might have broken down in the future because of their refusal to pay a reasonable price or to accept what the seller said was a reasonable quality of petrol. E

For these reasons I am of opinion that the judgment of the Lord Chief Justice should be affirmed both on the main question and also on the point as to restraint of trade. F

MAUGHAM, L.J.—The question raised in this case involves the construction of the agreement dated April 11, 1930. It is indisputable that unless all the material terms of the contract have been previously agreed there is no binding obligation. An agreement to agree in the future is not a contract, nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for determining the question. None of these propositions were in question either in *May and Butcher, Ltd. v. R.* (1) nor in *Hillas & Co., Ltd. v. Arcos, Ltd.* (2) and it happens that in the first case the decision was one way, and in neither case was any new principle of construction laid down. G

I desire to say, first, that it is plain from the circumstances that the agreement as to the sale and purchase of the petrol was intended to be a binding contract constituting part of the inducement for the sale of the land; and, secondly, that the agreement was duly stamped and bears all the signs of a legal contract, and is not, as in *May and Butcher, Ltd. v. R.* (1), a mere informal letter. In *Hillas & Co., Ltd. v. Arcos, Ltd.* (2) H

some weight ought to be attached to the fact that the parties thought that they were entering into a binding contract, but the maxim still applies that the document should, if possible, be so interpreted ut res magis valeat quam pereat. As to the agreement relating to the sale of petrol, I think it is plain that the words in cl. 1 that

"the company shall purchase from the vendor all petrol which shall be required by the company for the running of their said business"

refer to the business intended to be set up next door to the respondent. The two parties were carrying on business side by side, and one of them was to supply petrol from his pumps to the other. That appears also from cl. 2, which provides that the vendor shall deliver the petrol from the pumps on his land. The petrol cannot, therefore, be supplied elsewhere; it forms an essential term of the agreement entered into between the parties. Clause 5, which has some bearing on the question we have to determine, says:

"In the event of the company being wound-up . . . the vendor may determine this agreement at any time after the commencement of such winding-up by giving one week's notice in writing of his intention so to do to the liquidator of the company, and upon the expiration of such notice this agreement shall cease and no claim shall be made against the company by the vendor but without prejudice to the right of action of the vendor in respect of any breach of the company's agreements herein contained."

Why this provision should have been inserted if the vendor was not to sell petrol to the buyers I cannot conceive. The obvious implication is that there is an obligation resting on the vendor which is or may be of some importance, and that in the event of the company being wound up he is entitled to determine the agreement.

We now come to cl. 6, which provides that

"the company shall not purchase any petrol from any other person or corporation so long as the vendor is able to supply them with sufficient to satisfy their daily requirements, but nothing herein contained shall prevent the vendor from selling petrol and/or oil to any other person or corporation to be used for any purposes whatever provided that the company and their servants shall be at liberty to purchase such petrol as may be found necessary to complete the particular journey when engaged on journeys over a distance necessitating the refuelling of their vehicles."

The only condition there expressed being that, so long as the vendor is able to supply the company with sufficient petrol, are we to assume that both parties were so ignorant of business that they did not contemplate that disputes as to price could possibly arise? In my opinion, it is necessary to imply in cl. 6 a proviso that so long as the vendor is able and willing to supply the company with sufficient petrol either at a price to be agreed under cl. 1 or at a fair and reasonable price if the price has not been so agreed, the company shall purchase it from him.

In coming to this conclusion I am following the old-established rule laid down in the case of tied houses in *Catt v. Tourle* (5), and more recently in *Courage & Co., Ltd. v. Carpenter* (6). In each of these cases the publican agreed that he would not take beer from any one except the brewer. The court thought it plain that that meant so long as the brewer was willing to supply beer of reasonable quality and at a reasonable price, and an injunction was granted in that form in *Courage's Case* (6). The judgment of BOWEN, L.J., in *The Moorcock* (4) has been referred to, where the principle as to implications was stated in admirable terms; but the same thing may be stated in popular language about tied houses, that no publican binds himself to take all his beer from the particular brewer at any price the brewer likes to put upon it. There is no distinction in principle between a contract for the price of beer to be paid by the tenant of a tied house and the contract we have to deal with in the present case. Why should cl. 7, which says that

"the vendor shall supply the said petrol of a standard and quality at present supplied by the vendor or of such other standard and quality as the company may reasonably approve,"

be inserted unless there was a binding obligation on the company to purchase? Clause A 8, the arbitration clause, is in an unusual form, providing that

"if any dispute or difference shall arise on the subject-matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889."

In my opinion cls. 1, 5 and 6 constrain the court to hold, construing the contract as a whole, that there must be implied in the obligation to sell and purchase the petrol at an agreed price words to this effect: "or failing agreement at a reasonable price to be determined under the arbitration clause." The contract must be construed as a whole, and, construing it as a whole, I come to the conclusion I have stated. The duty of the court is to ascertain the intention of the parties from the document as a whole. "*Verba intentioni, non e contra, debent inservire.*"

On the question as to restraint of trade I agree with what SCRUTTON, L.J., has said, and I can see no reason for altering the terms of the injunction that has been granted, and is to the effect that the defendants are only compelled to purchase petrol from the plaintiff for the purposes of their business carried on next door and so long as the plaintiff is willing to supply it of a reasonable quality and at a reasonable price from the pumps belonging to him on his land.

Appeal dismissed.

Solicitors: J. R. Cort Bathurst; C. J. Lewis.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re HAWKSLEY'S SETTLEMENT. BLACK v. TIDY

[CHANCERY DIVISION (Luxmoore, J.), December 14, 15, 19, 1933, February 5, 6, 15, 1934]

[Reported [1934] Ch. 384; 103 L.J.Ch. 259; 151 L.T. 299; 50 T.L.R. 231]

Will—Construction—Chancery Court not bound by decision of Probate Court.

Will—Revocation—Description of later instrument as "last will and testament" and reference to earlier will as "cancelled will"—Provisions of later will inconsistent with, or repeating, provisions of earlier will.

Power of appointment—Exercise—Appointment by will to A.—Appointment by later will to B.—Failure of second appointment—No revival of first appointment.

On many occasions the Court of Probate has to consider what is the true construction of a document claimed to be testamentary before coming to a conclusion whether or not it should be admitted to probate, but, apart from this incidental consideration, it is no part of the duty of the Court of Probate to sit as a court of construction. That duty devolves on the appropriate court when it becomes necessary to consider the effect of whatever documents the Court of Probate has determined the testamentary provisions of a particular testator or testatrix. The fact that the Court of Probate has admitted a document to probate as forming part of a testator's testamentary provisions has never prevented a court of construction from coming to the conclusion that the document—after a consideration of the whole of the documents admitted to probate—has no operative effect.

The mere description therein of a testamentary document as the "last will and testament" of the testatrix and a reference therein to an earlier will as a "cancelled will," held, not by themselves sufficient completely to revoke the earlier will, but since, on their true construction, the provisions of the later will were either entirely

inconsistent with the provisions of the earlier will or repeated those provisions, the later will rendered all the provisions of the earlier will ineffective because any of those provisions which were repeated in the later will took effect under the provisions of that will.

If an absolute gift or appointment is made by one testamentary instrument to A. and the subject of the gift or appointment is then given or appointed absolutely by a subsequent testamentary instrument to B., it is difficult to see how, if the second gift or appointment fails to take effect, it can be said that the first gift or appointment is operative. In such a case the second gift or appointment takes away that which was given or appointed in the first gift, and there is nothing in either instrument to show that the testator intended that A. was to take if B. could not take.

Notes. Distinguished: *Re Stirling, Union Bank of Scotland, Ltd. v. Stirling*, [1954] 2 All E.R. 113. Referred to: *Re Bagnall, Scale v. Willett*, [1949] L.J.R. 1.

As to the functions of the Probate Division, see 16 Halsbury's Laws (3rd Edn.) 150, para. 244; and as to the revocation of an earlier will by a later will or codicil, see 34 Halsbury's Laws (2nd Edn.) 78 et seq., and for cases, see 44 DIGEST 530 et seq., and 320 et seq. As to revocation of an appointment, see 25 HALSBURY'S LAWS (2nd Edn.) 568-570, and for cases, see 44 DIGEST 527-529.

Cases referred to:

- (1) *Briggs v. Penny* (1849), 3 De G. & Sm. 525; 21 L.J.Ch. 265; 13 L.T.O.S. 443; 13 Jur. 905; 64 E.R. 590; on appeal (1851), 3 Mac. & G. 546, L.C.; 44 Digest 625, 4561.
- (2) *Saltmarsh v. Barrett* (1861), 3 De G.F. & J. 279; 29 Beav. 474; 30 L.J.Ch. 853; 4 L.T. 690; 7 Jur. N.S. 813; 45 E.R. 885, L.J.J.; 23 Digest 470, 5391; Subsequent proceedings (1862), 31 Beav. 349; 31 L.J.Ch. 783; 7 L.T. 87; 8 Jur. N.S. 737; 10 W.R. 640; 54 E.R. 1173; 24 Digest 698, 7220.
- (3) *Lemage v. Goodban* (1865), L.R. 1 P. & D. 57; 35 L.J.P. & M. 28; 13 L.T. 508; 12 Jur. N.S. 32; 44 Digest 246, 721.
- (4) *Townsend v. Moore*, [1905] P. 66; 74 L.J.P. 17; 92 L.T. 335; 53 W.R. 338; 49 Sol. Jo. 146, C.A.; 44 Digest 247, 727.
- (5) *Ellcock v. Mapp* (1851), 3 H.L. Cas. 492; 18 Digest 18, 173.
- (6) *Vezey v. Jamson* (1822), 1 Sm. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 864.
- (7) *Ward v. Van der Loeff, Burnyeat v. Van der Loeff*, [1924] A.C. 653; 93 L.J.Ch. 397; 131 L.T. 292; 40 T.L.R. 493; 68 Sol. Jo. 517, H.L.; 44 Digest 336, 1662.
- (8) *Re Baker, Baker v. Baker*, [1929] 1 Ch. 668; 98 L.J.Ch. 174; 141 L.T. 29; Digest Supp.
- (9) *Re Bund, Cruikshank v. Willis*, [1929] 2 Ch. 455; 99 L.J.Ch. 4; 142 L.T. 39; Digest Supp.
- (10) *Gawler v. Standerwick* (1788), 2 Cox, Eq. Cas. 15; 30 E.R. 8; 44 Digest 1112, 9638.
- (11) *Walsh v. Gladstone* (1843), 1 Ph. 294; 13 L.J.Ch. 52; 2 L.T.O.S. 93; 7 Jur. 1143; 41 E.R. 644, L.C.; affirmed 13 Sim. 261; 23 Digest 233, 2826.
- (12) *Chichester v. Quatrefoiges*, [1895] P. 186; 64 L.J.P. 79; 72 L.T. 475; 43 W.R. 667; 11 T.L.R. 328; 11 R. 605; 44 Digest 334, 1637.
- (13) *In the Goods of Bryan*, [1907] P. 125; 76 L.J.P. 30; 96 L.T. 584; 44 Digest 334, 1647.
- (14) *Re Spooner's Trust, Ex parte Mouritz* (1851), 2 Sim. N.S. 129; 21 L.J.Ch. 151; 18 L.T.O.S. 269; 61 E.R. 289; 23 Digest 461, 5336.
- (15) *Re Van Der Byl, Fladgate v. Gore*, [1931] 1 Ch. 216; 100 L.J.Ch. 108; 144 L.T. 401; 74 Sol. Jo. 770; Digest Supp.
- (16) *Re Thurston, Thurston v. Evans* (1886), 32 Ch.D. 508; 55 L.J.Ch. 564; 54 L.T. 833; 34 W.R. 528; 37 Digest 464, 650.
- (17) *Re Henfrey* (1842), 4 Moo P.C.C. 29; 1 Notes of Cases, 356; 6 Jur. 355; 13 E.R. 211, P.C.; 44 Digest 333, 1629.
- (18) *Kent v. Kent*, [1902] P. 108; 71 L.J.P. 50; 86 L.T. 536; 18 T.L.R. 293; 46 Sol. Jo. 247; 44 Digest 334, 1640.

- (19) *Re Boyes, Boyes v. Carritt* (1884), 26 Ch.D. 531; 53 L.J.Ch. 654; 50 L.T. 581; 32 A W.R. 630; 43 Digest 601, 487.
- (20) *Baker v. Story* (1874), 31 L.T. 631; 23 W.R. 147; 44 Digest 335, 1655.
- (21) *Re Bernard's Settlement, Bernard v. Jones*, [1916] 1 Ch. 552; 85 L.J.Ch. 414; 114 L.T. 654; 60 Sol. Jo. 458; 44 Digest 528, 3448.

Summons taken out by one of the executors of the will of the testatrix, Mrs. Florence Hawksley, and the two present trustees of three settlements dated respectively in 1887, 1893 and 1910. B

The testatrix, besides her own free property, had certain general and special powers of appointment in respect of trust funds in which she had a life interest. The material general powers were conferred by two settlements, one of May 27, 1887, and the other of April 15, 1910. The special powers were conferred by a settlement of June 19, 1893. They were two in number—(i) a power to appoint, subject as therein mentioned, by deed or will, a life or lesser interest to her husband; and (ii) a power to appoint, in the events that happened, by deed or will, among the children and remoter issue of her brother, Charles Hawksley. The gift over in default of appointment under the 1910 settlement was to the university of Oxford. The testatrix made a will on Sept. 3, 1922, a codicil on March 24, 1925, and a second will on June 10, 1927. C

By cl. 3 of the will of 1922 the testatrix purported to exercise the general power conferred on her by the 1887 settlement. In effect, the power was exercised for the benefit of two of the grandchildren of her brother Charles Hawksley—the defendants, Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, children of her nephew Leonard Thomas Hawksley—in such manner that neither of the appointees was to take a vested interest unless he or she were living on Feb. 28, 1942, and subject thereto the funds subject to the 1887 settlement were to fall into and form part of the testatrix's residuary personal estate. By cl. 4 she purported to exercise the special power conferred on her by the 1893 settlement in favour of her husband George Musgrave, by giving him a full life interest in the funds subject to the trusts thereof. By cl. 5 she purported to exercise the special power conferred on her by the last-mentioned settlement in favour of Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, who were both objects of the power, being grandchildren of the testatrix's brother, Charles Hawksley. The trusts in their favour were declared by reference to those set out in cl. 3, but in the event of their ultimate failure, these funds were given to their father, Leonard Thomas Hawksley, absolutely. By cl. 6 the testatrix purported to exercise the general power conferred on her by the 1910 settlement in favour of Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley on trusts which again were declared by reference to those set out in cl. 3. In the event of their failure, the ultimate trust was in favour of the residuary legatees. By cl. 7 she appointed as executors and trustees her husband and her nephew, the defendant Leonard Thomas Hawksley, and the defendant, Henry Letheby Tidy. By cl. 8 she gave a number of specific legacies. Those material were in para. (d). By it she gave to her husband George Musgrave absolutely all furniture, plate, &c., which she might have acquired during her and her husband's joint married life and which should be in or about or belonging to or appropriated for her leasehold house in Oxford, other than such articles as were the subject-matter of the specific gifts given in the preceding paragraph. By para. (e) she gave the use and enjoyment of all such of the furniture and chattel premises described in the bequest in para. (d), but which she had not acquired during their married life, to her husband for life, and by para. (f), subject to this gift, she made an absolute gift of her musical instruments to a third party, and directed that all the remainder of the furniture and other chattel premises bequeathed by para. (e) should fall into and form part of her residuary personal estate. By cl. 9 she gave a number of pecuniary legacies, including by sub-cl. (b) a legacy of £100 to each of her executors who should prove her will. By cl. 10 she gave to her husband the use and enjoyment of her house in Oxford for his life, and by cl. 11, subject to the life interest, she gave that house to her nephew Leonard Thomas Hawksley absolutely. By cl. 12 she devised and bequeathed all other property, real or personal, over which she might have any general power of appointment or disposition by will, and of which she might not otherwise dispose of by that her will or D E F G H I

any codicil thereto, unto and to the use of her trustees, upon trust for sale and conversion with a power of postponement, and out of the money forming part of or arising from the sale and conversion of her said estate to pay her debts, funeral and testamentary expenses and legacies, and by cl. 13 for investment in the usual manner, and she directed that the investments of the residue should be held upon trust to pay out of the annual income thereof certain annuities. She further directed that subject thereto the trustees should pay the income to her nephew Leonard Thomas Hawksley for his life, and after his death to Emma Marion Hawksley for her life, and subject thereto, she directed that the residuary estate should be held in trust in equal shares as tenants in common for Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, if both should be living on Feb. 28, 1942, and if only one should be living at that date, then in trust for that one, and if neither should be living on that date, then in trust for Leonard Thomas Hawksley absolutely.

By the codicil of March 24, 1925, she revoked the appointment of Leonard Thomas Hawksley as one of the executors and trustees of her will, and appointed the plaintiff Zoe Dobell Black to be an executor and trustee in his place, and she gave her husband the first life interest in her residuary estate, subject to the annuities already mentioned.

The 1927 will, described as: "Last will and testament of Florence Hawksley Musgrave," continued in those terms: "I appoint my husband George Musgrave, Henry Letheby Tidy, M.D., and Mrs. Zoe Dobell Black, to be my executors and residuary legatees to carry out instructions that I may leave in writing or verbally which I have not yet fully completed. To my husband George Musgrave I leave everything for his life. To my great-nephew and niece Ronald Harry Stephen Hawksley, and Cicely Winifred Hawksley, such trust moneys as I am compelled to leave back into the family (see cancelled will). To my dear friend Henry Letheby Tidy, my kind trustee and executor, my grandfather clock and one thousand pounds. To Mrs. Zoe Dobell Black, my diamond and dark blue enamel brooch. To the University of Oxford (see proper form) for the use of the Society of Women Home Students, my house, 1, South Parks-road, Oxford, i.e. the Merton Coll. lease thereof, and such of the furniture as may be useful in the conditions of the purposes to which it is to be put and which is not otherwise appointed. My trustees can use their discretion. To Rev. Henry Gow, D.D., of Manchester College, Oxford, mottled mahogany wardrobe in Yellow Room." There followed gifts of chattels to members of the Hawksley family, and a clause that: "If anyone raises dispute or goes to law about my will, he or she is to have nothing"; and: "My corpse to be disposed of as is easiest for the survivors—preferably by cremation."

The testatrix died on Dec. 8, 1930. By a decree of the Probate, Divorce, and Admiralty Division dated Oct. 26, 1932, all three testamentary dispositions above referred to were admitted to probate.

The husband, George Musgrave, died on Sept. 10, 1932, having by his will appointed the defendants, Fanny Josephine Phelps, Edward Adams Parker and Charles Henry May, his executors. The testatrix's brother, Charles Hawksley, died on Nov. 27, 1917, Leonard Thomas Hawksley was one of his sons, and the two infant defendants, Harry S. R. Hawksley and Cicely W. Hawksley, were Leonard's children. The defendant Phyllis Bromage (married woman) was a daughter of Kenneth P. Hawksley, a son of Charles, and a nephew of the testatrix. He also predeceased the testatrix, namely, on May 2, 1924. The defendant, Thomas E. Hawksley, was another son of K. P. Hawksley, and a great-nephew of the testatrix, and the last defendant, Alice Hawksley, was a daughter of Charles Hawksley.

Difficulties having arisen on the construction of the above-mentioned documents, the present summons was taken out. It was entitled:

In the matter of (A) the trusts of a settlement dated May 27, 1887, and made between, &c.; (B) the trusts of a settlement dated June 19, 1893, and made between, &c.; (C) the trusts of a settlement dated April 15, 1910, and made between &c., and (D) the estate of the [said] Florence Hawksley Musgrave deceased.

and the questions were: (1) That it may be determined: (a) Whether the powers of appointment given to the testatrix by the 1887 settlement and the 1910 settlement were

effectually exercised by the 1922 will. (b) Whether the power of appointment given to the testatrix by the 1893 settlement was effectually exercised by (i) the 1922 will or (ii) the 1927 will, and in the latter event that the interest of the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley in the settled funds may be determined. (2) That it may be determined: (a) Whether cl. 8 (d) of the 1922 will operated to vest in the said George Musgrave absolutely the chattels therein specified or whether the bequest therein contained was to any and if so what extent revoked by the 1927 will and in that event that the interest of the University of Oxford in the said chattels may be determined. (b) Whether by virtue of cl. 8 (f) of the 1922 will the chattels therein described as "the remainder of the said furniture and other chattel premises bequeathed by para. 8 (e) hereof" forms part of the residuary personal estate of the testatrix or whether the bequest in such sub-paragraph contained was to any and if so to what extent revoked by the 1927 will and in that event that the interest of the University of Oxford in the said chattels may be determined. (3) That it may be determined: (a) Whether the defendant Henry Letheby Tidy as one of the proving executors of the testatrix is entitled to the legacy of £1,000 given by the 1927 will in addition to the legacy of £100 given to him by cl. 9 (b) of the 1922 will or whether the said legacy of £1,000 is in substitution for the said legacy of £100. (b) If such legacy be cumulative interest thereon runs from Dec. 22, 1932, being the date of probate, or from Dec. 8, 1931 (when twelve months from the date of the death of the testatrix expired). (4) That it may be determined whether by virtue of cl. 11 of the 1922 will the defendant Leonard Thomas Hawksley is now absolutely entitled to certain leasehold property known as 1, South Parks-road, Oxford, or whether the bequest therein contained was revoked by the 1927 will, and in that event that the interest of Oxford University in the said property may be determined. (5) That it may be determined whether the residuary estate of the testatrix: (a) was effectually disposed of by and falls to be dealt with under the 1922 will, (b) passed under the 1927 will to the executors thereby appointed absolutely, or (c) was undisposed by the testatrix.

R. W. Turnbull for the plaintiffs.

Evershed, K.C., and *G. R. Upjohn* for the first defendant, H. L. Tidy.—The will of 1927 revoked that of 1922 and the codicil. The residue therefore goes to the executors beneficially subject to their carrying out instructions given by the testatrix.

Denis Browne, for the defendant Leonard T. Hawksley, referred to *Briggs v. Penny* (1) and *Saltmarsh v. Barrett* (2).

Morton, K.C., and *Andrewes-Uthwatt*, for the defendants Harry S. R. Hawksley and Cicely W. Hawksley.—The later will only revokes the 1922 will and the codicil so far as it contains effective dispositions inconsistent with them. There is no effective disposition of the residue: *Lemage v. Goodban* (3); see *Townsend v. Moore* (4). The President in effect has determined question 1 (a) and (b) of the summons. The executors do not take beneficially: *JARMAN ON WILLS* (7th Edn.), vol. 1, p. 696; *Ellcock v. Mapp* (5), *Vezey v. Jamson* (6) and *Ward v. Van der Loeff* (7). Question 1 (b) the President has decided.

Danckwerts, for the defendants Fanny J. Phelps, Edward A. Parker, and Charles H. May, executors of the will of the testatrix's husband, George Musgrave.—We get a life interest subject to the special power: *Re Baker, Baker v. Baker* (8) and *Re Bund, Cruikshank v. Willis* (9).

Norman Daynes, K.C., and *C. Montgomery White* for the University of Oxford.—The general power under the 1887 settlement has not been exercised. If the will of 1927 is revoked by that of 1922, it does not make an effective disposition of the residue. As to the effect of the views of the President, see *WILLIAMS ON EXECUTORS* (12th Edn.), vol. 1, p. 385. See also *Gawler v. Standerwick* (10), *Walsh v. Gladstone* (11), *Chichester v. Quatrefages* (12). As to intention, see *In the Goods of Bryan* (13); and see *Re Spooner's Trust* (14), *Re Van der Byl, Fladgate v. Gore* (15), *Re Thurston, Thurston v. Evans* (16), and *Re Baker, Baker v. Baker* (8).

T. K. Wigan, for the three defendants Thomas E. Hawksley, Phyllis Bromage and Alice Hawksley: The general power has not been exercised. The 1922 will was not revoked by the later one: *Re Henfrey* (17), *Kent v. Kent* (18), *Re Boyes, Boyes v. Carritt*

(19); see also *Baker v. Story* (20), *Re Bernard's Settlement*, *Bernard v. Jones* (21), *Ward v. Van der Loeff* (7), and *Re Van der Byl*, *Fladgate v. Gore* (15).

Upjohn replied.

Cur. adv. vult.

Feb. 15.—LUXMOORE, J., read the following judgment. This summons raises a number of questions of construction arising under the testamentary dispositions of the late Mrs. Florence Hawksley Musgrave. Those dispositions are contained in three separate documents which have been admitted to probate under an order of the Probate Division pronounced by LORD MERRIVALE on Oct. 26, 1932. The three documents admitted to probate are: (i) a will dated Sept. 3, 1922, which I will call the 1922 will; (ii) a codicil dated March 24, 1925; and (iii) a will dated June 10, 1927, which I will call the 1927 will.

The 1922 will is a well-drawn document, obviously carefully prepared by a lawyer so as to exercise certain special and general powers of appointment vested in the testatrix. The codicil is also a lawyer's document. No question of construction arises on either of those documents, whether considered alone or together. The 1927 will was, unfortunately, not prepared by a lawyer; it was prepared by the testatrix herself. Read alone, the only substantial question which would arise on it is whether the executors are intended to take the residue beneficially, or are merely trustees of it for objects which, in the events that have happened, cannot be ascertained, with the result that the next-of-kin become entitled. Further difficulties, however, arise when the 1927 will is read in conjunction with the 1922 will and codicil, the chief of these being with regard to the exercise of the special and general powers. The solution of these questions depends on the answer to the questions: Did the 1927 will, on the true construction of all the documents, revoke the exercise by the 1922 will of all or any of these powers? Has the 1922 will any operative effect as an exercise by the testatrix of any and which of the powers? These are purely questions of construction.

Some difficulty is caused by the fact that in considering whether any, and which, of these three documents should be admitted to probate, the learned President addressed himself to some of the questions of construction and expressed a definite opinion with regard to them. The first question is whether that opinion is binding on me, and whether I ought, whatever my own opinion may be, to accept it as the expression of opinion of a court of co-ordinate jurisdiction and follow it without further comment.

It is quite true that the Court of Probate has on many occasions to consider what is the construction of a document claimed to be testamentary before coming to a conclusion whether it should be admitted to probate or not; but, apart from this incidental consideration, it is no part of the duty of the Probate Court to sit as a court of construction. That duty devolves on the appropriate court when it becomes necessary to consider the effect of whatever documents the Court of Probate has determined constitute the testamentary provisions of a particular testator or testatrix.

In considering questions of construction in relation to the question what are a particular testator's testamentary provisions, the Court of Probate in practice is entitled to consider, and rightly considers, many facts which are wholly inadmissible in a court of construction when the only matter to be determined is: What is the meaning of a particular document or series of documents. The fact that the Court of Probate has admitted a document to probate as forming part of a testator's testamentary provisions has never prevented a court of construction from coming to the conclusion that this document—after a consideration of the whole of the documents admitted to probate—has no operative effect. Many examples of such a result are to be found in the books.

In the present case the learned President has in his judgment expressed an opinion on construction of these documents. In so doing, if he intended to bind the parties and any court of construction subsequently called upon to construe the documents, he has gone further than was necessary, because the only purpose for which he had to consider these documents was to decide whether all or any and which of them should be admitted to probate. For this purpose all that was necessary for him to do was to satisfy himself whether any question of construction arose on the documents considered together. If the answer to this question was in the affirmative then it was his duty to admit all the

documents to probate, leaving the ultimate solution of the questions of construction to the court of construction. In expressing the opinion which he did as to construction, the learned President referred to matters which were obviously inadmissible in a court of construction on a question of construction, but which were equally clearly germane to the solution of the question what constituted the testatrix's testamentary dispositions. The order as drawn up does not contain any finding on the question of construction, and, in my judgment, the learned President, in expressing the opinion he did on construction, was doing so only with regard to the particular matter which he had to decide, and not with the intention of binding any court before which the question of construction might ultimately come. It is to be observed that having regard to the form of the order of the Probate Division, there was no opportunity of appealing from it in the case of some at least of the parties to it who would be materially affected by the opinions expressed as to construction, if those opinions should be held to be binding on them.

The conclusion which I have come to is that having regard to the form of the order of the Probate Court I am free to consider the question of construction and to treat the opinion expressed by the President for this purpose as merely obiter.

The question which I have to determine is whether there is, on the true construction of these three documents, any part of either of the first two documents which remains unrevoked by the 1927 will. There is no clause in the latter document which expressly purports to revoke the earlier documents.

Counsel on behalf of the first defendant, and counsel on behalf of the University of Oxford, both argue that—apart from the inconsistent gifts contained in the 1927 will—there is, in fact, an expression of intention to revoke which, as a matter of construction, is to be found in the description of the document as the testatrix's last will and testament, and the reference contained in it to a document called a "cancelled will." It is admitted that the testatrix only made one will before she made the 1927 will—that is, the 1922 will—and that she wrote on that will the word "cancelled," and the document referred to in the 1927 will as the "cancelled will" is the 1922 will. I do not think these words by themselves are sufficient to effect a complete revocation of the 1922 will and codicil, and that, if revocation of these two documents is to be found, it must be by reason of the fact that the testatrix has disposed of the whole of her own property and the property over which she had a testamentary power of disposition in a manner wholly inconsistent with the provisions of the two earlier documents. Of course, in considering the 1927 will from this point of view, the fact that it is described as "Last will and testament," and the fact that there is a reference to the 1922 will as a "cancelled will" must be taken into consideration. If the 1927 will is read alone it is fairly plain that it would operate as a complete disposition of the whole of the testatrix's own estate, and also of all property over which she had a general power of appointment. It is, I think, also fairly plain that it would operate as an exercise of the special power conferred on the testatrix by the 1893 settlement, to take effect immediately on the testatrix's death in favour of the defendants Harold Stephen Ronald Hawksley and Cicely Winifred Hawksley. On this basis the provisions of the 1927 will are either entirely inconsistent with the provisions of the 1922 will and codicil, or repeat the provisions therein contained. I am consequently of opinion that, as a matter of construction, the 1927 will in fact renders the whole of the provisions of the 1922 will and codicil ineffective, because so far as any of them are repeated in the 1927 will, those provisions take effect under the provisions of that will.

This does not, however, entirely dispose of the questions relative to the exercise by the testatrix of the general and special powers. With regard to the general powers, it is said that, although the 1927 will is in form a sufficient exercise of those powers, there is, in fact, no effective disposition of the property subject to those powers, because the exercise is in favour of persons who can only take as trustees and there are no trusts declared capable of ascertainment.

Three different results are claimed to flow from this position. First, it is said on behalf of the University of Oxford that the funds subject to the general power go in default of appointment under the settlement creating the power. It is essential to the success of this argument that the appointment of the 1922 will was revoked by the 1927

will, and that, although the 1927 will was sufficient to operate as an exercise of the general powers, the testatrix did not thereby indicate any intention of making the property the subject of the power her own for all purposes. Secondly, it is said on behalf of the defendants, Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, that the doctrine of dependent relative revocation applies, namely, that the object of the revocation of the 1922 will by the 1927 will was to make a different disposition of the particular property, and that, as that disposition failed, the disposition originally made by the 1922 will remains in force. Thirdly, it is said that the general powers were so exercised by the testatrix as to make the property subject thereto part of the testatrix's estate, with the result that in the absence of any effective trusts relating thereto, the property passes to the next-of-kin of the testatrix.

The first question to consider is whether, on the true construction of the 1927 will, the residuary legatees take a beneficial interest thereunder or are merely trustees. *Primâ facie*, the appointment of a person as residuary legatee connotes the intention to confer on that person a beneficial interest. If the gift had stopped at the appointment of residuary legatees, there would, I think, have been little room for doubt but that the intention was to give the residue to them for their own benefit. The words that follow are material—they appear to state the purpose of the gift. The words are:

“to carry out instructions that I may leave in writing or verbally which I have not yet fully completed.”

If the testatrix had in fact communicated her wishes with regard to the disposal of her residue to the residuary legatees in her lifetime, there could be no question but that the residuary legatees would have been legally bound to carry them into execution. It seems to me that the *primâ facie* meaning of the words used of necessity negatives any intention to confer a beneficial interest, and I think this view is supported and strengthened by the fact that specific legacies and a pecuniary legacy are given later in the will to two of the residuary legatees, and by the fact that the husband, who is named as one of the residuary legatees, is given a life interest in everything of which the testatrix is disposing. The decision in *Re Boyes, Boyes v. Carritt* (19), in my judgment, covers this case, and I hold that the residuary legatees only take what is given them by the will as trustees. It is admittedly impossible for the court to ascertain what are the trusts intended by the testatrix, and consequently whatever passed to the residuary legatees under the gift, is held by them on trust for the testatrix's next-of-kin.

The next question, therefore, that arises is whether the funds, the subject of the general powers of appointment, pass under the 1927 will or devolve as in default of appointment under the appropriate settlements. The answer to it depends on whether the testatrix has expressed any intention of making the property subject to the general powers her own for all purposes. It is plain from the 1927 will that the testatrix knew of the existence of the special and general powers—that is shown by the reference to the cancelled will, and to the direction that the defendants, Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley, are only to take that which the testatrix was “compelled to leave back to the family,” that is, the property subject to the special power of appointment under the 1893 settlement—apart from this she leaves everything to her husband for life. This direction, coupled with the appointment of executors and residuary legatees, is sufficient to satisfy me beyond any reasonable doubt that the testatrix intended the property subject to the general powers to be aggregated with her own estate and treated together with it as one mass.

The third question, therefore, arises: Does the doctrine of dependent relative revocation apply? The question in each case is whether the testator's intention was in any case to revoke the prior gift or appointment or only to revoke it for the purpose of carrying out the second gift or appointment. This question is not determined by the presence or absence of express words of revocation: see *Re Bernard's Settlement, Bernard v. Jones* (21), *Ward v. Van der Loeff* (7). If an absolute gift or appointment is made by one testamentary instrument to A., and the subject of the appointment is then given or appointed absolutely by a subsequent testamentary instrument to B., it is difficult to see how, if the second gift or appointment fails to take effect, it can be said that the first

gift or appointment is operative. In such a case the second gift or appointment takes away that which was given or appointed in the first gift, and there is nothing in either instrument to show that the testator intended that A. was to take if B. could not take. A

In the present case it is plain from the terms of the 1927 will that the testatrix when making it had determined that no member of the Hawksley family was to get any part of the property of which she was entitled to dispose, except that subject to the limited power in favour of the issue of her brother Charles Hawksley. In other words, the paramount intention of the 1927 will was to revoke the provisions of the 1922 will in favour of the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley for all purposes and to make an entirely fresh disposition in favour of other persons. B

It remains to apply the general conclusions at which I have arrived to the particular questions raised by the originating summons. In answer to Question 1 (a), I declare that the general powers of appointment given to the testatrix by the 1887 and 1920 settlements respectively were effectually exercised by the 1927 will. I answer Question 1 (b) by saying that the special power of appointment given by the 1893 settlement was exercised by the 1927 will and that the defendants Harry Stephen Ronald Hawksley and Cicely Winifred Hawksley took an absolute interest in the funds subject to that settlement immediately on the testatrix's death, and that the testatrix's husband did not take a life interest in those funds. I answer Questions 2 (a) and (b) by declaring that, on the true construction of the testamentary documents, the testatrix's husband took a life interest only in the whole of the chattels referred to, and that subject to such life interest these chattels form part of the testatrix's residuary estate, subject, however, to the power of the trustees to determine in their absolute discretion whether any and which of the said chattels may be of use to the society named having regard to the purposes for which it may be determined to use the house No. 1, South Parks-road, Oxford. In answer to Questions 3 (a) and (b), I declare that the defendant Henry Letheby Tidy is not entitled to the legacy of £100 given to him by the 1922 will, but that the legacy of £1,000 given to him by the 1927 will is in substitution therefor. In answer to Question 4, I declare that the defendant Leonard Thomas Hawksley takes no interest under the testatrix's testamentary dispositions in No. 1, South Parks-road, Oxford, but that this property is given to the chancellor, masters and scholars of the University of Oxford to be used at their discretion for the Society of Women Home Students. In answer to Question 5 (a), (b), and (c), I declare that the testatrix's residuary estate falls to be dealt with under the provisions of the 1927 will, and that in the events that have happened is divisible among the next-of-kin of the testatrix. The costs of all parties to be taxed as between solicitor and client will be raised and paid out of the residuary estate. I do not think there will be any difficulty with regard to the questions; I have dealt with them all. C D E F G

Solicitors: *Bircham & Co.*; *May, May, & Deacon*; *Field, Roscoe, & Co.*, for *Morrell, Peel, & Gamlen*, Oxford.

[Reported by A. W. CHASTER, ESQ., Barrister at Law.]

HAYNES v. G. HARWOOD & SON

[COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), October 29, 30, 1934]

[Reported [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 51 T.L.R. 100; 78 Sol. Jo. 801]

Negligence—Duty to class of persons—Plaintiff member of class—Users of highway—Horses bolting after being left unattended—Person trying to stop horses—Novus actus interveniens—Volenti non fit injuria.
Police—Execution of duty—Protection of life and property—Stopping runaway horses—Volenti non fit injuria.

To give a cause of an action for negligence an act must be the neglect of some duty owed to the plaintiff. The duty need not be expressly directed to the plaintiff; if it includes him as one of the class affected by the want of care, that is negligence of which he can avail himself as a cause of action. A person is guilty of a want of reasonable care if he leaves horses unattended in a crowded street in which many people, especially children, are likely to be at that time. If the horses bolt owing to the act of a mischievous child, that is, on the part of the driver, a failure to use reasonable care for the safety of persons lawfully using the highway. Any person, and a fortiori a police officer, trying to stop the runaway horses would fall within the category of lawful users of the highway.

The defence of novus actus interveniens is not available to a defendant in an action for negligence if what is relied on as novus actus (e.g., the act of a mischievous child) is the very thing which is likely to happen as a result of the negligent act—in other words, if the damage suffered by the plaintiff might well be anticipated as a natural and probable result of the negligence.

Where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty, and the plaintiff has thereby suffered injury, the defence of volenti non fit injuria is not available to the defendant.

Dictum of SCRUTTON, L.J., in *Cutler v. United Dairies (London), Ltd.* (1), [1933] 2 K.B. 297, not applied.

A police constable sustained personal injuries while stopping runaway horses, which had bolted owing to the negligence of the defendants' servant. In an action by him against the defendants for negligence,

Held: that as the plaintiff had a moral, if not a legal, duty to prevent injury to persons lawfully using the highway, the principle of volenti non fit injuria did not apply, and he was entitled to recover damages from the defendants.

Notes. Distinguished: *Sylvester v. Chapman, Ltd.* (1935), 79 Sol. Jo. 777. Considered: *Deen v. Davies*, [1935] All E.R. Rep. 8; *Aldham v. United Dairies (London), Ltd.*, [1939] 3 All E.R. 478. Applied: *The Gusty and the Daniel M.*, [1940] P. 159; *Hyett v. Great Western Rail. Co.*, [1947] 2 All E.R. 264. Referred to: *Lathall v. Joyce & Son*, [1939] 3 All E.R. 854; *Morgan v. Ayles*, [1942] 1 All E.R. 489; *Bourhill (or Hay) v. Young*, [1942] 2 All E.R. 396; *Philco Radio and Television Corp'n. of Great Britain, Ltd. v. Spurling (J.), Ltd.*, [1949] 2 All E.R. 882.

As to the effective cause of an accident and novus actus interveniens, see 23 HALSBURY'S LAWS (2nd Edn.) 590 et seq., and as to volenti non fit injuria, see *ibid.*, 715 et seq., and for cases, see 36 DIGEST (Repl.) 33 et seq., 150 et seq.

Cases referred to:

- (1) *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K.B. 297; 102 L.J.K.B. 663; 149 L.T. 436, C.A.; Digest Supp.
- (2) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.

- (3) *Engelhardt v. Farrant & Co. and Lipton*, [1897] 1 Q.B. 240; 66 L.J.Q.B. 122; 75 A.L.T. 617; 45 W.R. 179; 13 T.L.R. 81, C.A.; 36 Digest (Repl.) 33, 153.
- (4) *Illidge v. Goodwin* (1831), 5 C. & P. 190, N.P.; 36 Digest (Repl.) 43, 224.
- (5) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 8 Digest (Repl.) 151, 956.
- (6) *Brandon and another v. Osborne, Garrett & Co.*, [1924] 1 K.B. 548; 93 L.J.K.B. 304; 130 L.T. 670; 40 T.L.R. 235; 68 Sol. Jo. 460; 36 Digest (Repl.) 191, 1008. B
- (7) *Eckert v. Long Island Railroad*, 43 New York Rep. 502.
- (8) *Wilkinson v. Kinneil Cannell & Coking Coal Co.* 1897, 24 R. (Ct. of Sess.) 1001; 34 Sc.L.R. 533; 4 S.L.T. 349; 34 Digest 232.
- (9) *Scaramanga & Co. v. Stamp and Gordon* (1880), 5 C.P.D. 295; 49 L.J.Q.B. 674; 42 L.T. 840; 28 W.R. 691; 4 Asp. M.L.C. 295, C.A.; 29 Digest 154, 1087.
- (10) *Wagner v. International Rail. Co.* 232 N.Y. 176. C
- (11) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 850, H.L.; 36 Digest (Repl.) 85, 458.

Appeal from an order of FINLAY, J., in an action tried by him without a jury.

On Aug. 24, 1932, a two-horse van, belonging to the defendants, was left unattended by its driver, their servant, in Paradise-street, Rotherhithe. The horses became alarmed and bolted along the street, which was a crowded one. The plaintiff, a police constable, was on duty in a police station and saw the occurrence through a window. He ran out, seized the horses' heads, and succeeded in stopping them, but in so doing he sustained injuries. He brought this action, alleging that his act was performed in the course of his duty to protect life and property, and that the injuries were due to the defendants' negligence. The defendants denied negligence, and, alternatively, they said that the plaintiff was a volunteer, and that the cause of the injuries was his own voluntary act. FINLAY, J., held that the police constable was acting in the course of the duty which he owed to the public to protect life and property, that his injuries were the natural and probable result of the negligence of the defendants' servant, and that he was entitled to recover damages, notwithstanding the doctrine *volenti non fit injuria*. The defendants appealed. D

Rowland Thomas, K.C., and *Gilbert Paull* for the defendants.

Hilbery, K.C., and *Fox-Andrews* for the plaintiff. E

GREER, L.J.—This is an appeal from a decision of FINLAY, J., in which he awarded the plaintiff damages for personal injuries to the agreed amount of £350. No question arises with regard to the amount, but liability was disputed at the trial. Various points have been raised which amount to contentions that the learned judge was wrong in law in coming to the conclusion to which he did. F

To understand the case and to apply the law it is necessary to state quite shortly the relevant facts. The defendants were the owners of a two-horse van which was being driven on Aug. 24, 1932, at Rotherhithe, by a man in their employ named Bird. One of the horses, a mare, was on the left or near side, and the other, a gelding, on the right or off side. The business on which Bird was engaged on behalf of his employers took him into Quiney's Yard and Quiney's Wharf, which is on the left-hand side of Paradise-street, Rotherhithe. He had to go to the wharf and there unload goods. To get through the yard and on the wharf he had to go down a hill. His van was provided with a chain which, when properly put into position for the purpose, operated as a drag on the near back wheel of the van. As there was a slope down from the road to the wharf it was usual to put the drag on, and, according to the evidence of Bird, he did that on this occasion, and he was supported by a man at the wharf who said that he never allowed a van to come in without this drag in operation. When Bird had finished his unloading he had to get a receipt. Instead of waiting where he was and getting his receipt for the goods first, out of consideration for the owners of the wharf who wanted to go on with their work by receiving another van to unload at the wharf, he took his two horses and the van into Paradise-street, and left them standing on the left-hand side of the road facing in the direction of the police station while he went and got his G

receipt. He said in his evidence that there was no room in the yard for him to have left his van and horses there.

Accepting his statement that there was not enough room in Quiney's Yard for him to stay there and let the van which was going to unload next come into the yard, it seems to me that that does not afford sufficient excuse for his doing something which may be regarded as indicating an absence of reasonable care for the safety of those properly using the highway. I accept the evidence which was given on behalf of the defendants by an independent observer who said that what happened was this. There were two boys coming along, one obviously had a mischievous propensity, and he threw a stone at the horses which caused the horses to run away. They ran a considerable distance without anyone interfering with them until they got opposite the police station. The plaintiff, who was in the charge-room of the police station, observed what was happening, and as he came out into the street he saw that a woman was in grave danger if nothing was done to rescue her. He also observed a considerable number of children about who would be in danger if he did nothing to arrest the progress of the horses. At great risk to his life and limbs he seized the off-side horse and tried to pull the horses up. After going about fifteen yards he succeeded in the object which he had in view, but, unfortunately, he was seriously injured by one of the horses falling on him.

In considering the case account has to be taken of the nature of the street in which the two horses were left. A little way to the left of Quiney's Yard, on the opposite side of the road, is a number of buildings described as tenement dwellings, and just opposite Quiney's Yard there are dwelling-houses. On the same side as were the horses and van are a church, a school entrance, and a number of houses which, having regard to the locality, are probably occupied by working-class people with families. It was said that there are three schools in this neighbourhood in which, between four and five o'clock, there is always a number of children about. That was the kind of place in which the defendants' driver chose to leave his vehicle.

It is said that the plaintiff is in law without remedy. I should say, before dealing with the reasons given for that contention, that it would be a little surprising if a rational system of law did not provide, in the circumstances stated, any remedy for a brave man who had received his injuries through the original default of the defendants' servant. If the matter had concerned this case alone, and we had not dealt with some dicta in other cases, I should almost have been content to say that I agreed with the admirable judgment of the trial judge, but I do not think I ought to deal with it in that short way.

With regard to the defences put forward, it was said, first, that there was no evidence of negligence on the part of the defendants' driver. Secondly, that, assuming some evidence of negligence, the accident happened through the intervention of some consciously acting persons between the wrongful conduct of the defendants' driver and the accident which resulted in the injuries from which the plaintiff suffered, and in respect of which he claims damages. As frequently happens when precision of thought is not very helpful, this point was put into the language of Latin terms. It was said that here there was a *novus actus interveniens*, and that by the law of this country once a *novus actus interveniens* is established the chain of causation between the cause of the accident and the damage is broken and the claim of the plaintiff cannot be sustained. The third point was that, quite apart from that question and independently of it—although it is very difficult to separate the second and third points—the plaintiff took on himself the risk which he ran, and that, therefore, he cannot recover because the damage he suffered was the result of his own act. That, again, was put into the Latin phrase *volenti non fit injuria*.

I wish to consider, first of all, on general principles and without dealing with the authorities, whether any of these points are sound. What is meant by negligence? It must, to give a cause of action, be the neglect of some duty owed to the person who makes the claim. In this case the duty may be not expressly directed to the plaintiff, but if it includes him and if he is one of a class affected by the want of care, that is negligence of which he can avail himself as a cause of action. What is the negligence complained of here? It seems to me that counsel for the plaintiff was right in describing

it as a failure to use reasonable care for the safety of others who were lawfully using the highway in which this van with the two horses was left unattended. I have no doubt that anyone, and still more a policeman, using the highway for the purpose of stopping a runaway horse, and thereby preventing serious accidents and possibly loss of life, is a person within the category of those lawfully using the highway. Accordingly, I think the first point fails. It does not follow that in all circumstances it ought to be held to be negligence to leave horses unattended in a highway; all the facts of the case must be considered. What, to me, makes it quite clear that the defendants' servant was guilty of a want of reasonable care in leaving his horses unattended is that this is a crowded street in which a great many people and a good many children are likely to be at the time when the horses were left and before the defendants' servant could get back to them. According to him the time was 4.25 p.m., but the policeman says that when he pulled up the horses it was 4.40 p.m. I rather doubt whether the whole incident took as much as ten minutes, and I cannot help thinking that the driver underestimated the time he was away, or may have mis-stated the time at which he left the horses and van in the road. Be that as it may, the neighbourhood was one in which he had frequently been before and he had often delivered goods at Quiney's Wharf. He must be taken to know something of the character of the neighbourhood. To leave horses unattended, even for such a short time as three minutes in a place where mischievous children may be about and where something may be done which may result in the horses running away, seems to me to be negligent having regard to all the proved circumstances of the case.

The next point to consider is the one called *novus actus interveniens*. It is not true to say that, in English law, where a plaintiff has suffered damage occasioned by a combination between the wrongful act of a defendant and some further conscious act by an intervening person, that necessarily of itself prevents the court from coming to a conclusion in his favour, if the accident was the natural and probable consequence of the wrongful act. That seems to me to be the necessary result of some of the decided cases which are accepted as authorities.

The third point is *volenti non fit injuria*. Unfortunately, there is a dearth of authority in this country on the subject, and apparently a wealth of authority in the decisions of the courts of the United States, which are not binding on us. We must only act on principles accepted in this country. There is, unfortunately, an obiter dictum of SCRUTTON, L.J., in *Cutler v. United Dairies (London), Ltd.* (1) ([1933] 2 K.B. at p. 303), which has to be dealt with and explained, an observation which, I think, has been much misunderstood and misapplied in the argument put before us.

With regard to the authorities, in *Lynch v. Nurdin* (2), a case decided in 1841, the facts were as follows. The defendant left his horse and cart in the roadway. I dare say he had left it for a much long period than the period in this case, but if it is negligent to leave it for one hour it seems to me that it is negligent, though in a less degree, to leave it for three or five minutes. He left his horse and cart in the road where a number of children were likely to be about and they began to play with the horse and cart. While the plaintiff, a child seven years old, who had climbed on to the cart, was getting down, another child wrongfully set the horse in motion and so injured the plaintiff. Undoubtedly there was there a *novus actus interveniens*—namely, the misconduct of the boy who started the horse—but it was held that, none the less, the accident and the damage could be treated as a result of the wrongful act of the defendant, because it was to be anticipated that children would do mischievous things and that anyone who gave an opportunity or invited mischievous children to do a dangerous thing could not succeed in escaping liability on the ground that he did not do the wrong, but that the wrong was done by the mischievous children. That case has been the law ever since 1841, and it is sufficient by itself to decide the question that there is no absolute rule that an intervening act of some third person who is not the defendant is in itself sufficient to break the chain of causation between the wrongful act and the damage and injury sustained by the plaintiff.

There are other cases, and one to which I especially wish to refer—*Engelhardt v. Farrant & Co. and Lipton* (3). In that case the negligence on which the action was

based was the negligence of a man named Mears, the driver of a van, in leaving his position to do work which ought to have been done by a boy named Tucker, who accompanied him. The driver got off the van to attend to some business of his employers to which he ought not to have attended, and while he was away the boy started the horse and van, with the result that a serious accident happened to the owner of another vehicle in the neighbourhood. The defence there relied on the intervening act of the boy for which, it was said, the employers were not responsible because it was not within the boy's authority to drive the horse at all and he was not acting for his employers when he did it, and it was contended that the employers were not liable. The case went to the Court of Appeal, and RIGBY, L.J., whose judgment, I think, accurately states the law as applied to cases of this kind, said ([1897] 1 Q.B. at p. 246):

"I am of the same opinion. It is not questioned here that if Mear's negligence is that to which the accident can be attributed the defendant is liable. It was argued, with some show of authority I agree, that wherever between the negligence of a servant and the incident the act of some third person intervenes and is the proximate cause of the accident, the employer is not liable. I do not consider that this is the state of the law upon the authorities. There are numerous cases. There is the case that LOPES, L.J., referred to before CHIEF JUSTICE TINDAL" [namely, *Illidge v. Goodwin* (4)], and *Lynch v. Nurdin* (2), which was tried before WILLIAMS, J., whose decision, that it was a proper case to leave to a jury, was supported by the court, the judgment being by LORD DENMAN, C.J. There are many other cases; but I take it that the question is a question for a jury"—[that is to say, it is a question of fact]—"and that we, sitting here and dealing with the finding of the county court judge as to matters of fact, ought to exercise the function of a jury. The county court judge has found that Mears was negligent. About that there can be no doubt at all, and he has found it as a fact. He has also found that Tucker was negligent, and that might be important if the point of law contended for on behalf of the plaintiff were really established law; but I do not think it is. I think it is right here to say that the county court judge was entitled to find upon the facts in favour of the plaintiff, that the Divisional Court was right in supporting that finding, and that we ought now to support it ourselves."

I regard the law on the subject as being this. If what is relied on as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged in the case takes place, then it is no defence to say that there has been a *novus actus interveniens*. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (5), the accident can be said to be the natural and probable result of the breach. If it is the very thing which ought to be anticipated by a man who was leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, then it is no defence at all; it is only a step in the way of proving that the damage is really the result of the wrongful act.

In my judgment, there can be no doubt that in the present case the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable, but it is sufficient if it is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

The third ground was treated as if it was a separate ground, namely, that the principle of *volenti non fit injuria* applied. On this question there is very little authority in this country in the actual decisions of the courts, and I do not think that there is any actual decision of the Court of Appeal, although there is a very helpful judgment by SWIFT, J., in *Brandon and another v. Osborne, Garrett, & Co.* (6). But there is a wealth of authority in the United States, and one of the cases cited before us, *Eckert v. Long Island Railroad* (7), is quite sufficient to show what the American law is. The effect of the American cases, although we are not bound by them, is, I think, accurately stated in PROFESSOR GOODHART's article: "RESCUE AND VOLUNTARY ASSUMPTION OF RISK" (*Cambridge Law Journal*, 1934, vol. V, No. 2, p. 192). In summing up the American

authorities and stating the result of *Eckert v. Long Island Railroad* (7), the learned A
author says (at p. 196):

"The American rule is that the doctrine of the assumption of risk does not apply
where the plaintiff has, under an exigency caused by the defendants' wrongful mis-
conduct, consciously and deliberately faced a risk, even of death, to rescue another
from imminent danger of personal injury or death, whether the person endangered
is one to whom he owes a duty of protection, as a member of his family, or is a B
mere stranger to whom he owes no such special duty."

In my judgment, that passage not only represents the law of the United States but also
the law of this country. It is all the more applicable to this case because the man
injured was a policeman who might readily be anticipated to do the very thing which
he did, whereas the intervention of a mere passer-by was not so probable.

In *Brandon and another v. Osborne, Garrett & Co.* (6), a wife received injury by
reason of her doing something to protect her husband from further injury due to the
wrongful act of the defendants, and SWIFT, J., quite properly in my judgment, held
that it was no defence to say that, as it was her own act which brought about her injury,
she could not recover. That decision is in point if it is right, and I think it is right;
but we still have to consider the observations of SCRUTTON, L.J., in *Cutler v. United* C
Dairies (London), Ltd. (1). The decision in that case, which has no bearing on the
question which we have to determine, was one relating to facts on which it could not be
said that the injured man was doing what he did in order to rescue anybody from danger;
it could not be said that he was doing more than assisting the defendants' servant in
the defendants' work, which was to get a horse as quiet as he could in the field into which
the horse had gone. With the decision in that case, on the facts proved, no one can
quarrel. It was entirely right and cannot in any way be criticised, but observations
were made, both by SCRUTTON, L.J., and SLESSER, L.J., which give occasion to some
difficulty. SCRUTTON, L.J., said this ([1933] 2 K.B. at p. 303):

"I now come to the more serious point in the case. I start with this: A horse bolts
along a highway, and a spectator runs out to stop it and is injured. Is the owner
of the horse under any legal liability in those circumstances? On those facts it
seems to me that he is not. The damage is the result of the accident. The man
who was injured, in running out to stop the horse, must be presumed to know the
ordinary consequences of his action, and the ordinary and natural consequence of
a man trying to stop a runaway horse is that he may be knocked down and injured.
A man is under no duty to run out and stop another person's horse, and, if he
chooses to do an act the ordinary consequence of which is that damage may ensue,
the damage must be on his own head and not on that of the owner of the horse."

That observation is certainly obiter, but any observation made by SCRUTTON, L.J.,
whether obiter or not, is entitled to very great weight. I do not think that SCRUTTON,
L.J.'s mind was directed to the circumstances which we have here, of somebody running
out for the purpose of rescuing or protecting people in danger of being damaged by a
runaway horse. I think that the dictum, unfortunately, is expressed too widely and
has led to a misunderstanding. I agree to this extent, that the mere fact of a spectator
running out into the road to stop a runaway horse would not necessarily entitle him to
succeed in an action for the damage which happened in consequence. All the circum-
stances of the case must be considered, and if his act is one which everybody would
expect from a normally courageous man doing what he does to protect other people, then
I do not think the observation, if it is intended to cover that case, accurately represents
the law of this country. SLESSER, L.J., preferred to put his judgment on the other
principle, that the rule as to *novus actus interveniens* applied. It obviously did apply
in that particular case, but it does not follow that it applies in every case because it
applied there.

I have considered the matter from the point of view of principle, and from that point
of view I think it is immaterial whether the policeman acted on impulse or from a sense
of moral duty to do his best to prevent injury to people lawfully on the highway. If it
were necessary to find that he acted on impulse, there is ample support in his own

evidence that he did it on the spur of the moment. But I do not think that that is essential. It would be absurd to say that if a man deliberately incurs a risk he is entitled to less protection than if he acts on a sudden impulse without thinking whether he should do so or not.

A Scottish case, *Wilkinson v. Kinneil Cannel & Coking Coal Co.* (8) was cited. I am not able to derive very much assistance from that case because the learned judges who gave the majority decision do not agree about the reasons for their decision, and I am not quite satisfied what view they took of the facts of the case; whether the plaintiff was endeavouring to protect his fellow workman, or whether he was doing what he did to protect himself, or to save the property of his employer. I cannot myself derive any assistance from that case except that it certainly was a case of *novus actus interveniens*, although it was, whichever way it is looked at, the very kind of *novus actus interveniens* which ought to have been anticipated as a natural and probable consequence of the wrongful act of the defendants' servants. To that extent it helps to a decision in this case.

On these grounds I am satisfied that the judge's decision was right, and that the appeal should be dismissed, with costs.

MAUGHAM, L.J.—I am of the same opinion. For the reasons already given by GREER, L.J., I think that the defendants' servant was guilty of negligence in leaving the horses and cart unattended in this particular street at the time in question. With regard to that I shall say nothing.

There are, however, some legal questions of considerable interest, if not difficulty, which arise in the present case, and with those I desire to deal. The case is one of the class which has come to be called "rescue cases"—a matter which has been the subject of a great many decisions in the United States, but, for some reason unknown to me, of quite a small number of decisions in this country. I do not think it would be expedient, even if it were possible, to endeavour in this case to state any general propositions with regard to the circumstances in which a person who puts himself into peril in attempting to save life or property is entitled to recover damages from the person whose negligence has occasioned the danger. The rescuer in this case is a member of the Metropolitan Police Force on duty at the time, and at the risk of his life he stopped two runaway horses with a van attached. The street was Paradise-street, Rotherhithe, a crowded part of London; the hour was 4.30 on an August afternoon when the local schools had just been emptied, and, according to the evidence, the street was congested with children. It is not open to doubt that the action of the plaintiff, equally quick, energetic and courageous, was inspired by a desire to save persons in the street, and, in particular, the numerous children, from injury and possible death. It so happened that his action was successful, he stopped the horses in about fifteen yards, but he was himself injured because one of them slipped and fell on him as he was stopping them. Nobody else was hurt. These circumstances are of a special character, and, while I do not entertain any doubt with regard to the learned judge's decision being correct, it does not, in my opinion, follow that every man who attempts to stop a bolting horse on a highway and is injured in doing so can necessarily recover damages from the negligent owner.

I will endeavour to state the reasons for my decision in the present case. The criticisms of jurists on the terms used in a great number of reported cases, are, I think, well founded; the maxims *novus actus interveniens* and *volenti non fit injuria*, and, indeed, the word "negligence" itself, are vague and uncertain and may well be misunderstood. This court, however, is not justified in departing from the well-marked out legal roads and finding a short cut across untrodden fields of law. If *novus actus interveniens* is understood as meaning an act which in the eye of the law was not being anticipated, and *volenti* as referring to a volunteer, we shall avoid some of the difficulties which arise from the use of Latin terms. We start with the proposition that it is the duty of men in charge of horses on the highway to use reasonable care to prevent injury to others using the highway. For the reasons given by GREER, L.J., it was a lack of such reasonable care which justifies the view that the defendants are guilty of legal negligence. In this respect I agree with the statement of FINLAY, J., in his admirable judgment ([1934] 2 K.B. at p. 245), where he says:

"I do not doubt that where you have a pair of horses and a van left unattended in the street and the horses run away, that raises a presumption of negligence. It may be rebutted, but it casts an onus upon the owner of the horses and van to show that what happened happened without negligence."

Assuming that to be established, we have then to see whether the appellants can establish that the plaintiff comes either within the exception applicable to volunteers or comes within the exception derived from the other maxim in which the words *novus actus* appear, the act of the rescuer being so exceptional as to amount to a *novus actus*. I agree that in the present case it is difficult to keep the two contentions altogether separate, but I will do my best.

On the first point my opinion is that the police constable was not in any true sense a volunteer. It is true that he was under no positive legal duty to run out into the street and at the risk of his life to stop two galloping horses, and I quite accept that nobody would have thought of reprimanding him if he had done nothing. It is also true that the primary duty of the police is the prevention of crime and the arrest of criminals, but that is only a part of the duties of the police in London. There is a general duty to protect the life and property of the inhabitants, and a discretionary duty to direct the traffic, to help blind and infirm people to cross the road, and to direct people who have lost their way. I think it is common knowledge to all of us that the position of the police in this city has grown as the result of long habit and intercourse between them and the people, so that they are now regarded as the friends of the inhabitants engaged in lawful avocations. They are not mere lookers-on when an accident takes place, or looks as if it were likely to take place. They have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so. At any rate, they have a moral duty to intervene in such a case as the present, where it appeared to the plaintiff that there was a reasonable chance of preventing a most serious accident. In deciding whether such a rescuer is justified in putting himself into a position of such great peril, the law has to measure the interests which he sought to protect and the interests involved. We have all heard of the reasonable man whom the law postulates in certain circumstances. The reasonable man here must be endowed with qualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when it is in peril. So regarded, the plaintiff was not acting unreasonably in the risks which he took, and there was no such voluntary assumption of risk, to use PROFESSOR GOODHART's phrase in the article, "RESCUE AND VOLUNTARY ASSUMPTION OF RISK" (Cambridge Law Journal, 1934, vol. V, No. 2, p. 192), as would bring him within the exceptions under consideration.

I agree with GREER, L.J., that the judgment of SCRUTTON, L.J., in *Cutler v. United Dairies (London), Ltd.* (1) has been misunderstood. When ([1933] 2 K.B. at p. 303) the learned lord justice made the remark which has been quoted, beginning with the words, "A horse bolts along a highway, and a spectator runs out to stop it and is injured," I do not take the view that he was expressing an opinion about every horse on every highway and every spectator. All that I think he meant to say was that the mere fact that a spectator runs out to stop a runaway horse is not sufficient to establish the proposition that he is entitled to sue the person whose negligence caused the horse to run away. If his dictum is understood in that sense I agree with it. For example, one may imagine a horse bolting on a desolate country highway where it would—as one knows happens to runaway horses—ultimately get tired and stop and graze by the side of the road without injuring anybody. If a person rushes out in those circumstances he may well not be entitled to a legal remedy.

The second alleged exception—that founded on *novus actus interveniens*—leads to this question: In law, was the negligence of the defendants the proximate cause of the injury to the plaintiff? That is as good a phrase as one can use, although I do not think that any such phrase can be used without serious objection. I shall not attempt to analyse the meaning of the phrase "legal proximity of causation." It is sufficient to say, as the learned judge said in the court below in this case ([1934] 2 K.B. at p. 247):

"It seems to me that if horses run away it must be quite obviously contemplated that people are likely to be knocked down. It must also, I think, be contemplated that persons will attempt to stop the horses and try to prevent injury to life or limb."

Then he cited (at p. 248) a passage from SIR FREDERICK POLLOCK'S *LAW OF TORTS* (13th Edn., at p. 498), with which I think everyone will agree:

"The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue."

I will add that I agree with SLESSER, L.J.'s dictum in *Cutler v. United Dairies (London), Ltd.* (1), ([1933] 2 K.B. at p. 306), with reference to the father who, seeing his child in great peril, dashes out and holds a runaway horse's head to save his child. I agree also with the decision of SWIFT, J., in *Brandon and another v. Osborne, Garrett & Co.* (6).

My decision in the present case is not based on the view that the plaintiff acted instinctively, and I would observe that SWIFT, J., never laid down as a proposition that there must be an instinctive action by a plaintiff before he can bring himself within the protection of the law. If the view expressed in *SALMOND ON TORTS* (7th Edn., at p. 38)

"The danger must be imminent and the plaintiff must have had but a short interval in which to grasp the situation. He must not have time to think. If his action was deliberate, even though rapid, it will be a *novus actus interveniens*, and his error, not that of the defendant, will be held to be the cause of the accident,"

is intended to be general and to apply to such a case as the present, in my opinion it is wrong and it is not supported by anything which fell from SWIFT, J., in the case of *Brandon and another v. Osborne, Garrett, & Co.* (6). If one imagines a man in danger of drowning owing to the negligent management of a boat, and two persons are looking on, is it to be said that the man who jumps in immediately and tries to save the person struggling in the water has got a right of action, but that the man who thinks over all the circumstances and then, perhaps with even greater bravery, determines to attempt to save life is to be regarded as not within the protection of the law? That would be a very strange doctrine.

To avoid misconception, I wish to repeat that I am not expressing the opinion that if the plaintiff here had been a layman, instead of a policeman on duty, the result would necessarily have been otherwise. That question does not arise. My present view is that a rescuer who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by would be entitled to succeed in such an action as the present. But that is only my present view and the question does not arise for decision.

In conclusion, I wish to cite a passage from the judgment of COCKBURN, C.J., in *Scaramanga & Co. v. Stamp and Gordon* (9) (5 C.P. D. at p. 304), where he observes:

"The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences."

ROCHE, L.J.—I agree that this appeal should be dismissed. With regard to the finding of negligence on the part of the defendants' servant, LORD DENMAN, C.J., in *Lynch v. Nurdin* (2) (1 Q.B. at p. 38), in considering an accident happening by reason of a cart being left unattended in a street, said:

"It is then a matter strictly within the province of a jury deciding on the circumstances of each case. They would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a

noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established."

It has been recognised ever since, I think, that the principles which should be considered by a jury, and also by a judge if he is trying the case alone, are there rightly laid down. The present case shows that the nature and the actions, both of children and drivers of carts, have not altered very much in the ninety-three years which have elapsed since the decision in *Lynch v. Nurdin* (2). Those principles have been correctly applied in the present case by the learned judge, and, in my opinion, there was ample material which justified, and indeed demanded, the decision at which the learned judge arrived.

As to the point that there was a new or intervening circumstance which broke the chain of causation between the negligence of the defendants' servant and the accident to the plaintiff, the question essentially is: Was the negligence which has been established the cause of the accident? My answer is that the learned judge rightly arrived at an affirmative conclusion, because the negligence of the defendants' servant was the cause, and not merely the occasion, of both of the horses running away and of the necessity arising for the very proper intervention of the plaintiff.

With regard to the defence that the plaintiff was unable to recover by reason of the application of the maxim *volenti non fit injuria*, there was no evidence on which it could properly be held that the plaintiff assented or agreed to bear the risk in question. All that the plaintiff knew was that two heavy cart-horses attached to a large van were running away in a crowded street, and that, at any rate, one woman and a number of children were in great peril. Moved by a duty both legal and moral—and, if I may, I should respectfully agree with everything which MAUGHAM, L.J., said about the duties and position of the police—and not from any choice such as involved consent to take any risk on himself, the plaintiff acted, and in consequence sustained his injuries. He knew nothing of what had been done or by whom, and there was no material for choice or consent such as is contemplated and required by the maxim in question.

I further desire to add a few observations in the same sense as those which have fallen from the learned lords justices regarding *Cutler v. United Dairies (London), Ltd.* (1). On the actual decision of the Court of Appeal in that case it is neither proper nor profitable to comment; it is sufficient to say that the facts were entirely different from the facts of this case. The horse there in question was not at the material time running away and was not on a highway, but had come to a stop in an enclosed field and had apparently ceased to be a danger when the plaintiff was moved by a request from the driver to render him assistance in its management. The dictum of SCRUTTON, L.J., does not necessarily relate to a case on a highway, where danger from a runaway horse is obvious and imminent. Properly understood, I think it is an illustration relevant to the case then under consideration rather than the enunciation of a wider principle. If, however, the dictum is to be taken to lay down any general principle, then I desire to reserve consideration of the weight of the dictum until a case raising the necessary facts arises for decision. With regard to the dictum of SLESSER, L.J., the actual illustration given is one of a rescue due to parental affection. If it is sought to base on that illustration an inference that the right of action is limited to such a case, then this dictum also would, in my judgment, require further consideration. There would then have to be considered the decisions of the American courts in favour of extending this doctrine, as to which see the observations of CARDOZO, J., in *Wagner v. International Rail. Co.* (10). There would also fall to be considered statements of principle such as that laid down by LORD ATKIN in *Donoghue v. Stevenson* (11) ([1932] A.C. at p. 580). As I have already said, I am of opinion that in the case now under consideration the judgment of FINLAY, J., was correct on all points, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William Hurd & Son; Ponsford & Devenish.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re SIGSWORTH. BEDFORD v. BEDFORD

[CHANCERY DIVISION (Clauson, J.), October 3, 1934]

[Reported [1935] Ch. 89; 104 L.J.Ch. 46; 152 L.T. 329; 51 T.L.R. 9; 78 Sol. Jo. 735]

Administration of Estates—Murder of owner of property—Intestacy as to property—Disqualification of murderer from benefiting under intestacy.

The principle grounded on public policy which precludes a sane murderer from benefiting under his victim's will precludes him from claiming a benefit conferred on him by statute in the case of his victim dying intestate.

Notes. Considered: *Re Pollock*, *Pollock v. Pollock*, [1941] 1 All E.R. 360; *Re Callaway* [1956] 2 All E. R. 451. Referred to: *Re Beresford v. Royal Insurance Co.*, [1937] 2 All E.R. 243.

As to incapacity of a murderer to benefit from the estate of his victim, see 1 HALSBURY'S LAWS (3rd Edn.) 10, para. 15, and for cases, see 44 DIGEST 226.

Cases referred to:

- (1) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 12 Digest (Repl.) 271, 2082.
- (2) *Re Pitts*, *Cox v. Kilsby*, [1931] 1 Ch. 546; 100 L.J.Ch. 284; 145 L.T. 116; 47 T.L.R. 293; Digest Supp.
- (3) *Re Houghton*, *Houghton v. Houghton*, [1915] 2 Ch. 173; 84 L.J.Ch. 726; 113 L.T. 422; 31 T.L.R. 427; 59 Sol. Jo. 562; 18 Digest 18, 170.

Adjourned Summons

The testatrix, Mary Ann Sigsworth, by her will dated July 31, 1911, left all her property to her son, Thomas Bedford Sigsworth. The testatrix died some time between Sept. 17 and 21, 1933, and a coroner's jury on Sept. 23, 1933, found that she had been murdered by her son. The son died between Sept. 18 and 21, 1933, and the same coroner's jury found that he had committed suicide. The son had by his will left all his property to his father and mother. His father had predeceased him, and, therefore, as both of the only beneficiaries under his will had predeceased him, there was an intestacy with reference to his property. The son left him surviving his maternal uncle and maternal aunt and his paternal uncle and paternal aunt. A summons was taken out by the maternal uncle, to whom letters of administration of the son's estate had been granted, and it asked whether (a) the son had become entitled to the estate of the testatrix under her will; or if not (b) had become entitled to her estate of which she had died intestate.

L. W. Byrne for the plaintiff.

Trevor Roberts for the defendant, the maternal aunt of the son.

Milner Holland for the defendants, the paternal uncle and aunt of the son.

CLAUSON, J.—In my opinion, the findings of fact by the coroner's jury at the inquests held with regard to the deaths of the testatrix and her son are not admissible in this court as evidence of those facts. In the absence of such evidence as I can accept in this court, and in the absence of some of the parties interested, I am not prepared to decide either that Thomas Bedford Sigsworth murdered his mother or that she died before him, but I am willing, for the guidance of the administrator, to decide the question of law which arises on the assumption that Thomas Bedford Sigsworth murdered his mother and that she died before him. The administrator, if he acts on my decision, will take the risk that the assumption of fact may conceivably hereafter turn out to be erroneous.

There can be no question, nor has it been disputed, that the claim of the plaintiff, as the personal representative of the son, to the estate of the mother under her will is bound to fail by reason of the well-settled principle that public policy precludes a sane murderer from taking a benefit under his victim's will. The result of that must be

that the testatrix's estate which she left to her son was undisposed of at her death and passed, as upon her intestacy (subject to the question with which I proceed to deal), in accordance with the provisions of s. 46 of the Administration of Estates Act, 1925. A

The question, however, which I have to decide is whether the principle grounded on public policy which prevents a sane murderer from benefiting under the will of his victim applies with equal force to the case of the victim dying intestate so as to preclude the murderer (or his personal representative) from claiming, under the provisions of s. 46 B of the Act, the property in respect of which his victim died intestate.

In my judgment, the principle of public policy which precludes a murderer from claiming a benefit conferred on him by his victim's will precludes him from claiming a benefit conferred on him, in case of his victim's intestacy, by statute. The principle (to quote the language of *FRY, L.J.*) must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle C must be read and construed as subject to it. This view of the law is adopted by *FRY, L.J.*, in *Cleaver v. Mutual Reserve Fund Life Association* (1) and by *FARWELL, J.*, in *Re Pitts* (2), and must, in my judgment, prevail over the view taken by *JOYCE, J.*, in *Re Houghton* (3); and, whether or not the opinions so expressed are binding on me, I agree with them and adopt them as my own.

The further question may arise whether the effect of my so deciding will be that the son should be treated as struck out of the Act, with the result of letting in the testatrix's brother and sister as the persons entitled to her estate under s. 46 (1) (v) of the Act, or whether her estate passed as bona vacantia to the Crown. In the absence of His Majesty's Attorney-General that question cannot now be decided; but I will order that the plaintiff be at liberty to add the Attorney-General as a defendant to the summons for the purpose of enabling him to claim the mother's estate on behalf of the Crown. E

Solicitors: *C. V. Young & Cowper*, for *H. W. Faulkner*, Frome.

[Reported by *J. H. G. BULLER, Esq., Barrister-at-Law.*]

HARMAN v. OFFICIAL RECEIVER AND OTHERS

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Russell, Lord Macmillan and Lord Wright), February 15, 16, 1934] G

[Reported [1934] A.C. 245; 103 L.J.Ch. 158; 150 L.T. 501; 50 T.L.R. 238; 78 Sol. Jo. 192; [1934] B. & C.R. 25]

Bankruptcy—Appeal—Appeal to House of Lords—Need for leave of Court of Appeal—“Bankruptcy matter”—Appeal against refusal of Court of Appeal to extend time for complying with terms of order—Bankruptcy Act, 1914 (4 and 5 Geo. 5, c. 59), s. 108 (2) (b). H

By s. 108 (2) of the Bankruptcy Act, 1914, it is provided: “Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows. . . . (b) Where the order (not being an order on appeal from a county court) is made by the High Court, an appeal shall be to the Court of Appeal, and an appeal shall, with the leave of the Court of Appeal, but not otherwise, lie from the order of that court to the House of Lords. . . .” I

On Aug. 22, 1932, the appellant was adjudicated bankrupt. On Oct. 24 he appealed to the Court of Appeal who rescinded the order of adjudication on terms which were not fully complied with within the prescribed time. On Feb. 10, 1933, the appellant applied to the Court of Appeal for an extension of the time within which to comply with the terms of the order of Oct. 24. That application was refused, and the order of adjudication was restored. On Feb. 24 the appellant applied to the Court of Appeal for leave to appeal against that decision to the House

of Lords, but leave was refused. Nevertheless, the appellant appealed to the House of Lords.

Held: the order of the Court of Appeal of Feb. 10, 1933, was an order "in bankruptcy matters" within s. 108 (2) of the Bankruptcy Act, 1914, and, therefore, under para. (b) of the subsection, without the leave of the Court of Appeal no appeal lay from an order of that court to the House of Lords.

Chatterton v. City of London Brewery Co., Ltd. (1), [1915] A.C. 631, applied.

Notes. Referred to: *Everitt v. Everitt*, [1948] 2 All E.R. 545.

As to bankruptcy appeals, see 2 HALSBURY'S LAWS (3rd Edn.) 580 et seq., and for cases, see 4 DIGEST 524 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Chatterton v. City of London Brewery Co., Ltd.*, [1915] A.C. 631; 84 L.J.K.B. 667; 112 L.T. 1005; 59 Sol. Jo. 301; [1915] H.B.R. 112, H.L.; 4 Digest 166, 1552.

Appeal by Martin Coles Harman from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.).

Morris and Jones, Ltd., the second respondents, who were petitioning creditors, brought an action against the appellant, and recovered judgment for £145,563 against him. That judgment was subsequently affirmed by the Court of Appeal. An order of adjudication in bankruptcy was made against the appellant on Aug. 22, 1932. He appealed to the Court of Appeal from that order on the ground that the registrar had not duly considered a scheme which he had put forward for the benefit of the creditors. The appeal was allowed on Oct. 24, 1932, on the terms that the appellant should pay £20,000 into court before Nov. 24, 1932, and a further £100,000 before Jan. 16, 1933, and that he should not incur any fresh debts or charge or realise his assets except for the ordinary living expenses of himself and family, and the order of adjudication of Aug. 22, 1932, was discharged. In February, 1933, the appellant applied for an extension of the time for carrying out the scheme on the ground that the £20,000 had already been paid, but that there was difficulty in obtaining the further £100,000. On Feb. 10, 1933, the Court of Appeal, by an order purported to be made "in bankruptcy matters," dismissed the application for extension of time to comply with the conditions imposed by the order of the Court of Appeal of Oct. 24, 1932, and made the order, now appealed from, that the order of adjudication made against the appellant on Aug. 22, 1932, be restored and deemed to have effect as of that date. On Feb. 24, 1933, the Court of Appeal refused the appellant leave to appeal to the House of Lords against the order of Feb. 10, 1933.

The questions arising for decision were whether, having regard to s. 108 (2) (b) of the Bankruptcy Act, 1914, the appeal to the House of Lords would lie, and, secondly, whether the Court of Appeal had jurisdiction under s. 108 (1) of the 1914 Act to restore the order by which the appellant was adjudicated bankrupt.

By the Bankruptcy Act, 1914, s. 108:

"(1) Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction. (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows. . . (b) Where the order (not being an order on appeal from a county court) is made by the High Court, an appeal shall lie to the Court of Appeal, and an appeal shall, with the leave of the Court of Appeal, but not otherwise, lie from the order of that court to the House of Lords."

F. de Verteuil and *G. G. Beagley* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *C. Tindale Davis* for the first respondent, the Official Receiver.

W. N. Stable for the second respondents, the petitioning creditors.

Melford Stevenson for the third respondent, the trustee for the creditors.

A preliminary objection was taken by the Attorney-General under s. 108 (2) of the

Act of 1914, that no appeal lay to the House of Lords by reason of the fact that the Court of Appeal had refused to give leave to appeal. A

LORD TOMLIN.—This is an appeal from an order of the Court of Appeal made on Feb. 10, 1933, by which the appellant, Martin Coles Harman, was adjudicated bankrupt. There has been lodged by the Official Receiver, one of the respondents, a petition raising a preliminary objection to the appeal, basing the objection upon s. 108 of the Bankruptcy Act, 1914, and contending that the appeal is, by reason of the provisions of that section, incompetent. It is said by those who support the preliminary objection, putting it shortly, that this was an order “in bankruptcy matters” within s. 108 (2) of the Act which required, for appeal from the Court of Appeal to this House, the leave of the Court of Appeal; that that leave has been refused and, therefore, that an appeal to this House is incompetent. I ought to add that under s. 96 of the Bankruptcy Act, 1914, the courts having jurisdiction in bankruptcy are the High Court and the county courts. B C

In July, 1932, the appellant had an order made against him by the Court of Appeal. That order affirmed a judgment made against him in an action in the Chancery Division whereby he became liable to pay a large sum of money. The judgment creditors in those proceedings petitioned in bankruptcy against the appellant, and on Aug. 22, 1932, the appellant was adjudicated a bankrupt. On Sept. 12, 1932, he gave notice of appeal and on Oct. 24, 1932, the Court of Appeal allowed the appeal upon terms. An elaborate order was then made by the Court of Appeal to this effect: D

“Upon the appellant by his counsel undertaking to the court: (i) to procure the payment to the Official Receiver of a sum sufficient to defray the proper expenses of the Official Receiver incurred and to be incurred with regard to Lundy Island; (ii) not to incur any fresh debts or charge or realise his assets except for the ordinary living expenses of himself and family and the carrying of this order into effect,” E

it was ordered that the appeal be allowed, and that the order of adjudication of Aug. 22, 1932, be discharged; and it was ordered that the appellant lodge with the Official Receiver an amended proposal, within a certain number of days; that the Official Receiver call and hold a meeting of creditors to consider the amended proposal; and that the meeting be held and made effective before Dec. 1, 1932. It was further ordered F

“that the appellant make it a term of the amended proposal that the sum of £20,000 be lodged on or before Nov. 24, 1932, and a further sum of £100,000 be lodged on or before Jan. 16, 1933, both sums to be lodged in court.” G

Then it was also ordered that the application made pursuant to the provisions of s. 18 of the Bankruptcy Act, 1914—that was the application for adjudication—be adjourned until after the proposal had been submitted to the meeting of creditors, and that, if the proposal was accepted, the application was to be adjourned H

“until the application to the court to approve the composition shall have been approved or disapproved by the court”;

and after certain provisions about costs, there was liberty to apply reserved. On Dec. 8, 1932, the amended proposal was approved by the majority of the creditors. That proposal included the necessary provisions with regard to the lodgment of the two sums of £20,000 and £100,000. A lodgment of the £20,000 on Nov. 24, 1932, had been made pursuant to the terms. I

On Dec. 22, 1932, the appellant appealed to the House of Lords against the order of the Court of Appeal in the Chancery action—that is to say, against the order affirming the judgment giving rise to the judgment debt upon which the adjudication was based. The result of that seems to have been that those who were going to finance the appellant in relation to the deposit of £100,000 to be made on Jan. 16, 1933, did not see their way to find the necessary money, and thereupon, on Jan. 31, 1933, the deposit of £100,000 not having been made on Jan. 16, 1933, in accordance with the amended proposal, the

appellant moved the Court of Appeal to vary their order of Oct. 24, 1932. The court was moved

"for an order that the above recited order may be varied inasmuch that the sum of £100,000 or such sum as will provide a composition of five shillings in the pound in respect of the debtor's unsecured creditors ordered to be lodged in court on or before Jan. 16, 1933, shall not be lodged in court until the appeal to His Majesty the King in His Court of Parliament against the judgment of the Court of Appeal dated July 7, 1932, affirming the judgment of CLAUSON, J., dated March 5, 1932 . . . be heard or for such other order as may seem just to this court."

That motion was heard on Feb. 10, 1933, and the Court of Appeal then made the order against which it is now sought to appeal. That order rescinded the order of Oct. 24, 1932, and restored the order of adjudication of Aug. 22, 1932, so as to have effect as of Aug. 22, 1932. Certain directions were made as to costs, and it was directed

"that the sum of £20,000 paid into court . . . be dealt with by the registrar upon a proper application being made."

Against that order the appellant desired to appeal, and, accordingly, on Feb. 24, 1933, he applied to the Court of Appeal for leave to appeal to your Lordships' House. That leave was refused. Notwithstanding, he has appealed, and the point now raised is whether that appeal is competent.

The Official Receiver bases his objection to the appeal upon s. 108 (2) (b) of the Bankruptcy Act, 1914. He says that this is an appeal "in bankruptcy matters"; that the leave of the court has not been obtained; and that, therefore, the appeal is incompetent. Apart from the considerations which the appellant has placed before your Lordships' House, there is no doubt that this is an order "in bankruptcy matters." That accords with the view expressed by your Lordships' House in *Chatterton v. City of London Brewery Co., Ltd.* (1), where it was held that no appeal lies to your Lordships' House

"from an order of the Court of Appeal affirming a receiving order where the Court of Appeal refuses leave to appeal."

It is said, however, on behalf of the appellant that the appeal is competent because the order appealed against was made without jurisdiction, and that it was made without jurisdiction because the courts "having jurisdiction in bankruptcy," which under s. 108 (1) of the Bankruptcy Act, 1914, "may review, rescind or vary any order" made by them under their bankruptcy jurisdiction are, by the definition in s. 96 of that Act, confined to "the High Court and the county courts"; that the Court of Appeal has no power to exercise that jurisdiction of reviewing, rescinding or varying its order; that, therefore, in rescinding the order of Oct. 24, 1932, and making a new order whereby it revived the adjudication, it was acting without jurisdiction and the order was a nullity; and that, therefore (he urges), it was not an order "in bankruptcy matters." His difficulty, I think, is this. If it was a complete nullity it is difficult to see where the jurisdiction of your Lordships' House to deal with it lies; if it is to be regarded as an order of the Court of Appeal, and, therefore, *primâ facie* an order in regard to which there is a right of appeal to your Lordships' House under the Appellate Jurisdiction Act, 1876, it must also be treated as an order in the matter in respect of which it purported to be made. It, undoubtedly, purported to be made "in bankruptcy matters," and, indeed, the appellant so treats it in his petition of appeal; and, if it is in fact to be treated as an order made "in bankruptcy matters," it falls within the provisions of s. 108 (2) (b), which expressly limits the jurisdiction of your Lordships' House in respect of orders made "in bankruptcy matters."

For those reasons it seems to me that the appeal here is incompetent, and that, therefore, the appeal should be dismissed, and I move your Lordships accordingly.

LORD WARRINGTON.—I agree.

LORD RUSSELL.—I also agree.

LORD MACMILLAN.—I also agree. A

LORD WRIGHT.—I also agree.

Appeal dismissed.

Solicitors: *V. Reece-Jones; Solicitor to the Board of Trade; Bartlett & Gluckstein; Gilbert Samuel & Co.* B

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

Re ECCLESIASTICAL COMMISSIONERS FOR ENGLAND'S CONVEYANCE C

[CHANCERY DIVISION (LUXMOORE, J.), July 25, 26, 27, December 21, 1934] D

[Reported [1936] Ch. 430; 105 L.J.Ch. 168; 155 L.T. 281]

Sale of Land—Restrictive covenant—Running with the land—Separate covenant by purchaser with assigns of vendors, owners for the time being of adjoining or adjacent land—Original covenantees not parties to deed—Right to enforce—"Adjoining"—"Adjacent"—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 56 (1). E

By a conveyance of April 21, 1887, between the Ecclesiastical Commissioners for England, of the one part, and G., of the other part, a freehold house and land were conveyed to G., who covenanted for himself and his assigns, and to the intent and so as to bind, not only himself, but also all future owners and tenants of the said land thereby conveyed or any part thereof, and so that the obligations, provisions, and restrictions thereafter expressed and contained might run with and bind the said land and every part thereof into whosoever hands the same might come, with the commissioners and their successors, and also as a separate covenant with their assigns, owners for the time being of the lands adjoining or adjacent to the said land thereby conveyed to observe and perform certain restrictive covenants. No building scheme affected the house or surrounding land. Other plots of freehold land and houses adjoining or near the house had been conveyed by the commissioners to purchasers before the date of the said conveyance, and had subsequently been assigned by them. The present owners of the house and land by originating summons asked for a declaration that the house and land were no longer subject to any of the restrictive covenants contained in the conveyance of 1887, or, in the alternative, that it might be determined whether they or any and which of them were enforceable, and, if so, by whom. The respondents included the successors in title to the purchasers of some of the houses and land which had been sold by the commissioners before the date of the said deed, some of which adjoined the house and land, and others of which were near thereto. F

Held: restrictive covenants might be enforced if they were expressed to be for the benefit of a particular parcel, or particular parcels, of land which was, or were, expressly mentioned or clearly identified in the deed containing the covenants; the land mentioned in the present deed was land "adjacent to" the land conveyed, which meant land lying near, but not in actual contact with, the land conveyed; and under s. 56 (1) of the Law of Property Act, 1925, the owners of such adjacent land could sue on the covenants in question although the original covenantees, under whom they derived title, were not parties to the conveyance. G

Per LUXMOORE, J.: "Adjoining" in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin. H

I

Notes. Followed: *Re Foster, Hudson v. Foster*, [1938] 3 All E.R. 357. Referred to: *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; *Re Miller's Agreement, Uniacke v. Attorney-General*, [1947] 2 All E.R. 78.

As to restrictive covenants in a conveyance see 29 HALSBURY'S LAWS (2nd Edn.) 441 et seq., and for cases see 40 DIGEST 310 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 421.

Cases referred to:

- (1) *Re Sunnysfield*, [1932] 1 Ch. 79; 101 L.J.Ch. 55; 146 L.T. 206; Digest Supp.
- (2) *Bedford (Duke) v. British Museum Trustees, Sayers v. Collyer* (1882), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest 328, 2770.
- (3) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 48 W.R. 659; 16 T.L.R. 489; 44 Sol. Jo. 607, C.A.; 40 Digest 312, 2664.
- (4) *Forster v. Elvet Colliery Co.*, [1908] 1 K.B. 629; 98 L.T. 736; affirmed sub nom. *Dyson v. Forster, Dyson v. Seed, Quinn, Morgan, &c.*, [1909] A.C. 98; 78 L.J.K.B. 246; 99 L.T. 942; 25 T.L.R. 166; 53 Sol. Jo. 149, H.L.; 34 Digest 686, 799.
- (5) *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224; 100 L.J.Ch. 52; 144 L.T. 302; Digest Supp.
- (6) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 31 T.L.R. 399; 59 Sol. Jo. 439, H.L.; 12 Digest (Repl.) 234, 1754.
- (7) *Grant v. Edmondson*, [1931] 1 Ch. 1; 100 L.J.Ch. 1; 143 L.T. 749, C.A.; Digest Supp.
- (8) *Re Union of London and Smiths Bank, Ltd.'s Conveyance, Miles v. Easter*, [1933] Ch. 611; 102 L.J.Ch. 241; 149 L.T. 82; C.A.; Digest Supp.
- (9) *Wellington (City) v. Lower Hutt Borough*, [1904] A.C. 773; 73 L.J.P.C. 80; 91 L.T. 539; 20 T.L.R. 712, P.C.; 44 Digest 148, 158.

Originating Summons

The applicants, J. F. Mathieson and G. H. Hudson Lyall, the estate owners of a freehold house and land known as West Heath House, West Heath Road, Hampstead, asked pursuant to s. 84 (2) of the Law of Property Act, 1925, for a declaration (i) that the freehold hereditaments which were comprised in a conveyance dated April 21, 1887, and made between the Ecclesiastical Commissioners for England, of the one part, and one Henry G. Gotto, of the other part, were no longer subject to any of the restrictive covenants contained in the said conveyance; or (ii) in the alternative, that it might be declared whether the restrictive covenants, or any and which of them, were now enforceable, and if so by whom.

The facts appear in the judgment.

Roxburgh, K.C., and *J. N. Gray* for the appellants.—By the conveyance of 1887, H. G. Gotto covenanted with the vendors for himself and his assigns and to the intent and so as to bind not only himself (the covenantor), his heirs, executors and administrators, but also future owners and tenants of the said land thereby conveyed or any part thereof, and so that the obligations, provisions, and restrictions thereafter expressed and contained might run with and bind the said land and every part thereof into whosoever hands the same might come with the then vendors (the covenantees) and their successors, and also as a separate covenant with their assigns owners for the time being of the lands adjoining or adjacent to the said land thereby conveyed, subject to various restrictive covenants. These ran with the land. Their enforcement could only be effected by the original covenantees and their successors in title; as to the latter limited to those owners whose land belonged to the original covenantees at the time of the execution of the conveyance in 1887. A similar point arose in *Re Sunnysfield* (1). There is no building scheme, and change of the character of the houses in the neighbourhood need not be discussed (see *Bedford (Duke) v. British Museum Trustees, Sayers v. Collyer* (2)). They cannot be enforced by owners not either express assignees of the benefit of the covenants nor successors in title of the original covenantees as to the land purchased by them from the original vendors after the date of the deed. The words "owners for the time being of the lands adjoining or adjacent to the said land hereby conveyed" requires careful consideration (see *Rogers v. Hosegood* (3)).

C. J. Radcliffe for the respondent, *Mrs. L. Freeman*.—The benefit of a covenant running with the land may be taken advantage of by a successor in title of the original covenantee (*Dyson v. Forster* (4) (per MACNAGHTEN, L.J.); Real Property Act, 1845, s. 5 (now Law of Property Act, 1925, s. 56); NORTON ON DEEDS (2nd Edn.), p. 29; Law of Property Act, 1925, s. 78; WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES, vol. 1, p. 358).

J. A. Reid for the respondent, *Mrs. A. Wix*, referred to *Chatsworth Estates Co. v. Fowell* (5).

W. F. Waite for the Ecclesiastical Commissioners.

Roxburgh, K.C., replied, and referred to *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (6), *Grant v. Edmondson* (7) (per LAWRENCE and ROMER, L.JJ.), and *Re Union of London and Smiths Bank, Ltd.'s Conveyance* (8).

The relevant sections of the Law of Property Act, 1925, appear in the judgment.

Cur. adv. vult.

Dec. 21.—**LUXMOORE, J.**, read the following judgment: The applicants, *James Francis Mathieson* and *George Henry Hudson Lyall*, are the estate owners in fee simple of a freehold house and land situate in West Heath Road, Hampstead, in the parish of Hendon, and known as West Heath House. They are the successors in title of one *Henry Gaisford Gotto*, to whom the property was conveyed by the Ecclesiastical Commissioners for England by a conveyance dated April 21, 1887. This conveyance contains restrictive covenants.

By s. 84 (2) of the Law of Property Act, 1925, it is provided:

"the court shall have power on the application of any person interested—(a) to declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or (b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom."

The applicants have taken out an originating summons under the provisions of s. 203 (2) (a) of the same Act, asking for a declaration under s. 84 that West Heath House is no longer subject to any of the restrictive covenants contained in the conveyance of April 21, 1887. In the alternative, they ask for the determination of the question whether the restrictive covenants, or any and which of them, are now enforceable, and, if so, by whom. The respondents to the summons are the Ecclesiastical Commissioners for England, a *Mrs. Lucy Freeman*, and a *Mrs. Annie Wix*. *Mrs. Freeman* is the owner of freehold hereditaments situate in West Heath Road aforesaid, and known as *St. Margaret's*. This property is situate on the north side of West Heath Road immediately opposite West Heath House. *Mrs. Wix* is the owner of freehold hereditaments situate and being No. 546, Finchley Road, Hampstead. The two last-named respondents were added as the result of inquiries made by the applicants to give effect to the recommendations and suggestions made by *MAUGHAM, J.*, in *Re Sunnyfield* (1). The application in that case was also made under s. 84, the property there in question being situate on the south side of West Heath Road, and on the east side of West Heath House, but separated from it by two other houses. As the result of these inquiries, *Mrs. Freeman* notified the applicants that she desired to oppose their application, and *Mrs. Wix* was added as a respondent to represent the interests of a large number of owners of property situate in the Finchley Road. The Ecclesiastical Commissioners offer no opposition to the making of a declaration that the restrictions in the conveyance of April 21, 1887, are no longer enforceable.

The questions to be determined are: (i) Were any restrictions imposed on West Heath House before or by the conveyance of April 21, 1887? (ii) Were such restrictions imposed for the benefit of any, and what other hereditaments? (iii) Who are the persons, if any, now entitled to the benefit of such restrictive covenants? It is not contended by any of the parties that West Heath House forms part of a larger estate which has been subjected to what is usually referred to as a building scheme, and it is quite plain that

there is not sufficient evidence on which it could be argued with any hope of success that such a scheme existed.

The conveyance of April 21, 1887, contains covenants by Henry Gaisford Gotto in these words:

"The said Henry Gaisford Gotto doth hereby for himself and his assigns and to the intent and so as to bind not only himself his heirs executors and administrators but also all future owners and tenants of the said land hereby conveyed or any part thereof and so that the obligations provisions and restrictions hereinafter expressed and contained may run with and bind the said land and every part thereof into whosoever hands the same may come covenant with the said Ecclesiastical Commissioners and their successors and also as a separate covenant with their assigns owners for the time being of the land adjoining or adjacent to the said land hereby conveyed in manner following that is to say . . . (2) That no message or building which now is or may at any time hereafter be standing on the said land hereby conveyed or any part thereof shall be used for any purpose whatsoever other than as a private dwelling-house. (3) That nothing shall at any time hereafter be done or permitted upon the said land hereby conveyed or any part thereof which may be or tend to be a nuisance to the neighbourhood or grow to the injury or annoyance of the adjoining or adjacent property or any part thereof or the owners lessees or tenants thereof respectively. (4) That no building or erection shall at any time hereafter be erected or set up nor shall any addition to any building or erection be made on any part of the said land hereby conveyed without the previous licence in writing of the said Ecclesiastical Commissioners or their successors or assigns: Provided always that one or two (but not more) private dwelling-house or private dwelling-houses may be erected upon such part of the said land hereby conveyed as is coloured red in the said plan . . ."

Then follow a number of provisions as to the cost of such house or houses and as to the approval of the plans, designs and specifications thereof. No restrictive covenants other than those to which I have referred can be said to affect West Heath House. This answers the first question.

Having ascertained that restrictive covenants were imposed in respect of the West Heath House property, and that the form of the covenants is such as to make the burden of them run with the land, it is necessary to consider whether they were imposed for the benefit of any and what other hereditaments. For it is well settled that, apart from any building scheme, restrictive covenants may be enforced if they are expressed in the original deed to be for the benefit of a particular parcel or particular parcels of land, either expressly mentioned or clearly identified in the deed containing the original covenants. It was argued on behalf of the applicants that the right to enforce such covenants is limited to the original covenantees and their successors in title—the right in the case of the successors in title being limited to those whose land was the property of the original covenantees at the date when the covenants were imposed. It was also argued that the right to enforce the covenants did not extend to any owners of land who were neither express assignees of the benefit of the covenants, nor successors in title of the original covenantees in respect of land acquired by such successors from the Ecclesiastical Commissioners subsequent to the date of the deed by which the covenants were imposed. I think these arguments failed to give due consideration to the provisions of s. 5 of the Real Property Act, 1845, as repealed and re-enacted by s. 56 of the Law of Property Act, 1925. Section 5 of the Act of 1845 provides that under an indenture executed after October 1, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named as a party to the indenture. In *Forster v. Elvet Colliery Co.* (4) it was held that the condition or covenant referred to in the section must, in order to be enforceable by a person not a party to the deed, be one the benefit of which runs with the land of the person seeking to enforce it. The actual decision was upheld in the House of Lords under the name *Dyson v. Forster* (4), but MACNAGHTEN, L.J., expressed doubt whether the section ought to be so restricted. He refrained, however, from resolving the doubt,

because he agreed with the view that the covenants in the particular case ran with the land, and it was, therefore, unnecessary to do so. A

The position has not, I think, been affected so as clearly to limit the right of a person, not a party to a deed, to enforce covenants affecting land to those which run with the land, by the alteration which has been made in the verbiage of s. 5 of the 1845 Act by s. 56 of the 1925 Act, which replaces it. The material words are as follows:

"A person may take . . . the benefit of any condition . . . covenant or agreement . . . respecting land or other property, although he may not be named as a party to the conveyance or other instrument." B

It seems to me that the effect of these words is to enlarge the scope of the earlier words, for it extends the rights of a person not a party to a deed to covenants affecting every kind of property, personal as well as real. So far as every species of personal property other than leasehold is concerned, it is obvious that the covenants to be enforced cannot be restricted to those running with the property, for there are no such covenants. What it is necessary to consider is the true construction of the conveyance of April 21, 1887, in order to ascertain whether any persons, not parties thereto, are described therein as the covenantees, and whether such covenants are expressed to affect any and what hereditaments. To determine what is the true construction of that document it is necessary to consider the surrounding circumstances as they existed at the date when it was executed. C

[His Lordship referred to a plan showing a considerable area of land at Hampstead in the vicinity of the Finchley Road on which West Heath House was shown bounded on the north-west and north-east by West Heath Road, and lying between 200 ft. to 400 ft. to the east of Finchley Road. The plan showed certain land coloured blue on the further side of the Finchley Road, which was still owned by the Ecclesiastical Commissioners. The plan also showed land coloured green bounded on the west by Finchley Road and partly separated from West Heath House by intervening pieces of land. The land coloured green was leased by the Ecclesiastical Commissioners in 1877 for ninety-nine years and subsequently for 999 years. The plan also showed, surrounded by a red verge line, West Heath House, and the following plots of land which had been conveyed by the Ecclesiastical Commissioners before the conveyance of West Heath House to H. G. Gotto, as follows: Plot C 125,629, which faced Finchley Road and was separated from West Heath House by an intervening plot, was conveyed on the 6th August, 1868, to H. W. Burgess. Plot C 160,233, which adjoined West Heath Road on the side opposite to West Heath House, and Plot C 160,236, which adjoined West Heath House on the south-east side, were conveyed on April 3, 1873, to J. H. Dallmeyer. Plot C 205,311, known as "St. Margaret's," was immediately opposite West Heath House, from which it was separated by West Heath Road, and was conveyed to P. W. May on July 28, 1881, and at the date of the proceedings was owned by the respondent, Mrs. Freeman. Plot C 207,392 was also opposite to West Heath House, separated by West Heath Road, and was conveyed on Feb. 20, 1882, to the late W. Ambrose, Q.C. Plot C 214,071, which was separated from West Heath House by intervening land, was conveyed to Moses Bayliss on March 15, 1883, and Plot C 211,402, the south-west corner of which was opposite to the most easterly point of West Heath House, was conveyed on Aug. 28, 1883, to F. C. Mathieson. All these conveyances were subject to various restrictions which differed in some respects from the restrictions imposed upon West Heath House. His Lordship continued:] In the result, it is plain that at the date of the conveyance of West Heath House to Mr. Gotto the Ecclesiastical Commissioners had parted with all the rest of the land within the red verge line, and had leased the land coloured green for a term of 999 years. They remained the owners of the freehold reversion in the green land and the freehold of the land coloured blue. They owned no land adjoining West Heath House. D

The covenants in the conveyance of April 21, 1887, were entered into by Mr. H. G. Gotto with the Ecclesiastical Commissioners and their successors, and also as separate covenants with their assigns, owners for the time being of the lands adjoining or adjacent to the land thereby conveyed, that is, West Heath House. It is to be observed that in E

the case of the Ecclesiastical Commissioners and their successors, there is no limitation of the covenant at all, for I think the words "owners for the time being of the lands adjoining or adjacent to the land hereby conveyed" qualify the word "assigns" only, and cannot grammatically be read as qualifying the words "the Ecclesiastical Commissioners and their successors." It is true that the word "assigns" is in a dependent clause, but the clause is distinct from that which immediately precedes it. The object of the clause appears to have been to denote the particular hereditaments which were to be entitled to the benefit of the covenants. If it was intended that the covenants should only apply to land then belonging to the Ecclesiastical Commissioners, there was no necessity for any mention of "the assigns," for "the assigns" of such land or any part of it would have been entitled to the benefit of the covenant with the Ecclesiastical Commissioners and their successors under the provisions of s. 58 (1) of the Conveyancing and Law of Property Act, 1881. The clause in question provides that the persons entitled to the benefit of the covenant are to be owners of adjoining or adjacent land, and also assigns of the Ecclesiastical Commissioners—in other words, they must hold land which formerly belonged to the Ecclesiastical Commissioners.

The decision in *Forster v. Elvet Colliery Co.* (4) appears to me to support this construction. Further, the assigns must own lands which either adjoin or are adjacent to West Heath House. When used in conjunction with the word "land," the word "adjoining" in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin. Of necessity it connotes contiguity. The only land which in fact is adjoining West Heath House in this sense is the land numbered "C 160,236" on the plan; this land touches the West Heath House property on its south-east side, and was conveyed by the Ecclesiastical Commissioners to J. H. Dallmeyer by the conveyance of April 3, 1873. The word "adjacent," when used in contradistinction to the word "adjoining," means, I think, that which lies near, but is not in actual contact with land. The degree of proximity must depend on the circumstances of each case. As SIR ARTHUR WILSON said in *Wellington (City) v. Lower Hutt Borough* (9):

"'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances."

Bearing this in mind, and considering all the circumstances of this case, I think, on the true construction of the covenant, the land which is referred to as "adjacent" to West Heath House includes all those plots which are numbered "C 160,233," "C 205,311," "C 207,392," and "C 211,402," and does not include any part of the land coloured blue or green on the said plan. I am further of opinion that "the assigns" referred to as the covenantees are those persons who were the owners of the land which I have held to be "the land adjoining or adjacent" to West Heath House at the date of the conveyance to H. G. Gotto, for they were in each case the assigns of the Ecclesiastical Commissioners.

In my judgment, the original covenantees and the persons deriving title under them can still sue on the covenants in question, although the original covenantees were not parties to the conveyance of April 21, 1887, and I, therefore, hold that Mrs. Freeman, as the assignee of the plot numbered "C 205,311," called "St. Margaret's," is still entitled to enforce the covenants, as also are the present owners of the freehold of the plots "C 160,233," "C 207,392," "C 211,402," and "C 160,236."

It follows from what I have said that none of the persons entitled to any part of the land comprised in Plot "C 125,629" whose interests the respondent, Mrs. Wix, was added to represent, nor any of the persons now entitled to any part of the land coloured green is entitled to enforce the covenant. I will, therefore, make the appropriate declarations.

Declaration accordingly.

Solicitors: *Markby, Stewart, & Wadesons; Mills Jennings & Co., Arthur Benjamin & Cohen, E. F. Turner & Sons.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re LYONS. Ex Parte BARCLAYS BANK, LTD. v. THE TRUSTEE

[COURT OF APPEAL (Hanworth, M.R., Romer, L.J. and Goddard, J.), October 11, 1934]

[Reported 152 L.T. 201; 51 T.L.R. 24; 78 Sol. Jo. 754; [1934-5]

B. & C.R. 174]

Bankruptcy—Fraudulent preference—Onus of proof—Bankrupt aware of insolvency—Reduction of overdraft—Normal course of business—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 44 (1).

The father of the bankrupt had guaranteed the payment of the overdraft of the bankrupt whether on his business or private account up to £2,000, which was the permitted amount of overdraft by the bank. In March, 1932, the bankrupt was in obvious financial difficulties and was aware of his insolvency. The overdraft had been over £2,000, but by Sept. 12, 1932, it was reduced to just below that sum. After Sept. 12 the bankrupt drew cheques in favour of his creditors, but paid in cheques of greater amount. He carried on business until October 1932, but on Oct. 11 he gave notice that he was about to suspend payment, and on Oct. 22 a petition in bankruptcy was presented against him. On Nov. 23 a receiving order was made, and on Dec. 9 he was adjudicated bankrupt. At the date of the petition the bankrupt had reduced the total overdraft to £1,301 15s. 7d. In May, June, July and August, 1932, he had paid to trade creditors considerably larger sums than in September. The trustee in bankruptcy claimed that in reducing the overdraft after he knew he was insolvent, he had fraudulently preferred the bank and the guarantor to the general body of his creditors, and claimed that the difference of £698 4s. 5d. was payable to him, the trustee, on behalf of the other creditors.

Held: the onus was on those who claimed that there had been a fraudulent preference to establish that the debtor's real intention was to prefer, and, to establish that, a dominant intent to prefer must be shown, and where there was not direct evidence, but there was more than one explanation, the intent to prefer could not be inferred: *Peat v. Gresham Trust, Ltd.* (1), ante, p. 82, applied; it appeared from the evidence that after Sept. 12 the account continued to be operated in the ordinary way of business; and, therefore, the trustee had not discharged the onus which was on him of proving a fraudulent preference.

Notes. Considered: *Re Conley, Ex parte Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E.R. 127; *Re Singer & Co. (Hat Manufacturers), Ltd.*, [1943] 1 All E.R. 225. Distinguished: *Re Kushler, Ltd.*, [1943] 2 All E.R. 22.

As to avoidance of a fraudulent preference, see 2 HALSBURY'S LAWS (3rd Edn.) 553 et seq., and for cases, see 5 DIGEST 852 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re M. I. G. Trust Ltd.*, [1933] Ch. 542; 102 L.J.Ch. 179; 149 L.T. 56; 49 T.L.R. 299; [1933] B. & C.R. 91, C.A.; 10 Digest (Repl.) 817, 5310; affirmed: sub. nom. *Peat (Sir William Henry) v. Gresham Trust, Ltd.*, ante, p. 82; [1934] A.C. 252; 103 L.J.Ch. 173; 151 L.T. 63; 50 T.L.R. 345; [1934] B. & C.R. 33, H.L.; 10 Digest (Repl.) 1033, 7139.
- (2) *New, Prance and Garrard's Trustee v. Hunting and others*, [1897] 2 Q.B. 19; 66 L.J.Q.B. 554; 76 L.T. 742; 45 W.R. 577; 13 T.L.R. 397; 41 Sol. Jo. 511; 4 Mans. 103, C.A.; affirmed sub nom. *Sharp v. Jackson*, [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264, H.L.; 4 Digest 55, 112.
- (3) *Butcher v. Stead* (1875), L.R. 7 H.L. 839; 44 L.J.Bey. 129; 33 L.T. 541; 24 W.R. 463, H.L.; 5 Digest 899, 7393.
- (4) *Re Cohen, Ex parte Trustee*, [1924] 2 Ch. 515; 94 L.J.Ch. 73; 132 L.T. 540; [1924] B. & C.R. 143; sub. nom. *Re Cohen, Ex parte Trustee v. Snow (W.R.) & Co.*, 69 Sol. Jo. 35, C.A.; 22 Digest (Repl.) 511, 5670.

A **Motion** by the trustee in bankruptcy. By this motion the trustee asked for a declaration that payments by the bankrupt which reduced his overdraft at the respondent bank from £2,000 to £1,301 15s. 7d., namely, the total payment of the sum of £698 4s. 5d., constituted a fraudulent preference by the bankrupt of the respondents, the bank and a guarantor of the overdraft, and/or each of them, and for an order against them to repay that sum to the trustee.

B CLAUSON, J., held that there had been a fraudulent preference and ordered a repayment. The bank appealed.

Singleton, K.C., and Tindale Davis for the bank.

W. N. Stable for the trustee in bankruptcy.

C **LORD HANWORTH, M.R.**—This appeal must be allowed. It raises once more the point which has been before the court in a number of cases. It is unnecessary to go back over them all, but the explanation will be found in what was said in the Court of Appeal in *New, Prance and Garrard v. Hunting and others* (2), where LORD ESHER explains what is necessary for the purpose of showing that there was a fraudulent preference—"what had the bankrupt obviously in view when he executed the deed?" and so on. That decision was affirmed in the House of Lords in *Sharp v. Jackson* (2), in which LORD HALSBURY says ([1899] A.C. at p. 423):

"Nothing could have been easier than to have enacted, if the legislature had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage—I do not want to use the word 'preference,' because questions may arise as to the true construction of that word itself—but any advantage given by previous payment to one creditor, to which advantage all the other creditors were not a party, should of itself be a preference which should be void under the statute. Nothing, I say, could have been easier than to have made such an enactment, if that was intended; but, in my opinion, no such intention is to be gathered from the statute. On the contrary, as LORD CAIRNS said [in *Butcher v. Stead* (3) (L.R. 7 H.L. at p. 846)], subject to certain express alterations which it then made in the previous state of the law, it did intend to bring within it all those conditions which, certainly, for something more than a century, have been imputed to these transactions which must be regarded as fraudulent under the bankruptcy law."

G He goes on to use the other words, that there must be some evidence which necessarily brings the court to infer that there was something more in the creditor's mind. Whether you call it an intention or view, or object, does not matter much, but you have to have some evidence, apart from and beyond the mere result that, in fact, the creditor is preferred.

H There was a doubt suggested by the judgment of SARGANT, L.J., in *Re Cohen* (4), whether or not the statement that I have just read was correct, but I think that WARRINGTON, L.J., and I both accepted that proposition of law. In *Re M. I. G. Trust, Ltd.* (1), it is once more re-stated in the judgments which are there to be found; and now we have got the opinions of the learned law lords, who gave a decision on appeal in that case, and LORD TOMLIN, in his speech, has said this (sub nom. *Peat v. Gresham Trust, Ltd.* (1) (ante, p. 87):

I "In my opinion, in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence and there is room for more than one explanation it is not enough to say that, there being no direct evidence, the intent to prefer must be inferred."

To that statement of the law LORD WARRINGTON was an assenting judge.

What have we got here? We have got the case of a man who is a trader, whose business was in obvious difficulties as from March, 1932, and in consequence of his being

in difficulties, his business is carried on decrescendo right away from March to October, and on Oct. 11 the debtor gave notice to his creditors at a meeting that he was about to suspend payment. A petition was presented by Messrs. Buchanan, on Oct. 22, and it was in respect of that petition that a receiving order was made on Nov. 23, and he was adjudicated bankrupt on Dec. 6. A

The notice of motion asks that it should be held that there was a fraudulent preference in favour of the debtor's father, who had guaranteed his ordinary business account at the bank. The father had guaranteed an overdraft by the debtor, whether on the business account or on a private account which he had opened, up to a sum of £2,000. B
The claim that is made by the trustee is that, when you take the result of those two accounts together, you will find that there was, on Oct. 22, 1932, a sum due on the business account of £913 16s. 2d., and on the private account, as I will call it, of £387 19s. 5d. Add those together and you get £1,301 15s. 7d. The effect, therefore, is that both those accounts were below the overdraft allowed of £2,000, by a sum of C
£698 4s. 5d. Early in September the account was in debit beyond £2,000; it was in debit for a total sum of, I think, £2,191, and it is claimed that because later the overdraft had been reduced to a sum lower than £2,000, by £698 4s. 5d., there had been an intention to prefer the debtor's father by releasing him from the full burden of his guarantee and discharging a portion of his liability which would fall upon him, to the D
extent of £698 4s. 5d. But this was the ordinary business account into which cheques were paid, and from which cheques were drawn. When one looks at the account during September, one sees that sums were paid in and sums were paid out. For instance, on Sept. 14, I see a cheque was received, of £221 6s., and paid into the account, and on the 15th, 16th and 17th, a number of cheques are paid out to various persons, no doubt in the ordinary course of business. E
The learned judge says that the account was operated in such a way that the only inference that could be drawn was that an effort was being made to prefer the father and to reduce his liability to the bank. Is that the only possible inference to be drawn? You have got the statement made by the bank manager as to the letters which were being written to the bankrupt in September, and there is a definite statement on Sept. 7, that unless the overdraft is reduced to the sanctioned limit of £2,000, and not exceeded, as it then was, "we will be compelled to dishonour any F
cheques in future which would cause excess over the sanctioned limit." In other words, like many another business man, the debtor was having a contest with the complacency of the bank manager, which at that time seems to have reached breaking point, and it is in consequence certainly of that one fact that pressure was being put upon the debtor to reduce the overdraft. He went on using his banking account as he had used it previously, in March, in April, in May, in June and so on. G
He pays in the cheques that he receives; he draws cheques to pay his accounts as, I suppose, they fell due, if they were pressing; and to deduce from that that the dominant motive, the only inference, and the only explanation is, that the debtor was minded to relieve his father's liability, is, to my mind, to misread the evidence and not to take it in its proper perspective. H
It appears to me that in a matter of this sort where we have to consider whether or not the evidence is sufficient to establish that the dominant motive was to prefer, it is plain upon the facts, which are not in dispute, that the learned judge has overlooked the essential requisites of fraudulent preference as explained and laid down and indicated in the speech of LORD TOMLIN.

For these reasons the appeal must be allowed, and allowed with costs, and the motion to require the bank to replace the sum of £698 4s. 5d. must be discharged.

ROMER, L.J.—I agree, but would add a few words on my own behalf, as I am differing I
from the learned judge in the court below.

It is said that every payment made by the bankrupt into his banking account on and after Sept. 12, 1932, was a fraudulent preference, that is to say, was a payment made into the bank for the purpose of preferring the father, who was a guarantor of the bankrupt's overdraft. The bankrupt had a permitted overdraft of £2,000, and to that extent the father had guaranteed it. Why the payments made in after July 22, which was three months before the presentation of the petition, and between that date and Sept. 12, are not also attacked as fraudulent preferences of the father, is apparently

A because it was not until Sept. 12 that the overdraft was reduced to £2,000. It is said that from the moment that the overdraft was reduced to £2,000, the dominant intention of the bankrupt in paying these moneys into his banking account was to prefer his father. I am unable to arrive at that conclusion. The learned judge said, as, indeed, he was bound to say, if he was going to hold these payments to be a fraudulent preference, that, there being no direct evidence of any intention to prefer, an intention to prefer was the only explanation of the facts of the case. After stating that the dominant intention, in his opinion, was to make matters as easy as possible for the father, he says

B "that explanation fits the whole of the facts, and no other explanation has been tendered to me which appears to me to fit the facts at all."

The bankrupt, upon Sept. 12, continued to do what he had been doing for years

C before—that is to say, to pay into his banking account cheques that he received, and cheques which presumably were, for the most part, crossed cheques, which he could not deal with in any way except by paying them into a bank. It would seem that the most obvious explanation of the continuing to pay the cheques into the banking account after Sept. 12 was that he was continuing a course which had been adopted by him for some years and which was the only course in the circumstances a business man could pursue. If, at the time he paid these sums into the banking account, he did so with

D the fixed intention of never thereafter drawing a cheque on the bank in favour of any other creditor, I could understand it being suggested that his dominant intention, in paying the moneys into this bank, rather than opening another account with some other bank, was to prefer the father; but in point of fact, after he had begun paying these cheques in after Sept. 12, or rather, continued paying cheques in after Sept. 12,

E he did draw cheques on this account in favour of other creditors. If, therefore, there was any fraudulent preference in the case, that is to say, an intention to prefer, it must have been an intention formed by him at some time thereafter not to draw cheques in favour of other creditors.

What evidence is there that he ever did form such an intention, except the fact that he did not draw cheques to the full extent of the moneys that he had paid in? There is

F none. Is there no other explanation consistent with the fact of his not drawing other cheques? Is there no explanation consistent with that fact other than the explanation that he intended to prefer his father? Of course, there is another explanation. The explanation may well be that in the circumstances, he being in an insolvent condition, he was not prepared to run the risk of its being said that he was preferring other creditors. It may well have been his reason for not drawing further cheques on the account—I do not know; but I do, with respect, differ from the learned judge when he says that the

G only explanation of these facts, that is to say, the only explanation of the fact that he continued to pay the money into the banking account after Sept. 12 and did not draw cheques to the full amount of the moneys so paid in, was an intention to prefer his father. It seems to me there are other explanations, and that being so, we are not authorised, as the law stands, to infer such an intention, there being no direct evidence of an intention to prefer.

H For these reasons, I agree that this appeal must succeed.

GODDARD, J.—I agree.

Appeal allowed.

Solicitors: *Cooper Durrant, & Hambling; Redfern & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

Re GARRETT. CROFT v. RUCK

[CHANCERY DIVISION (Clauson, J.), March 6, 1934]

[Reported [1934] Ch. 477; 103 L.J.Ch. 244; 151 L.T. 194]

Trustee—Infant—Advancement—Advance to infant of capital to which infant contingently entitled on happening of two events—Need for consent of beneficiary with prior interest—Trustee Act, 1925 (15 & 16 Geo. 5, c. 19), s. 32 (1).

By the Trustee Act 1925, s. 32 (1): "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event . . ."

An infant was contingently entitled under the will of her grandfather to the capital of his residuary estate upon the happening of two events—the death of her mother and her attaining the age of twenty-one years. The testator's widow was entitled to an annuity under the will, and the infant's mother was entitled to the income of the moiety of the capital without power of anticipation. The infant's uncle was entitled to the income of the other moiety of the capital. The infant's mother took out a summons asking whether the trustees of the will were authorised, under the provisions of s. 32 (1) and upon the consent of the testator's widow and of the infant's mother, to make an advance to the infant of such part of her contingent interest as was necessary for the meeting of school and other incidental expenses. They also asked whether the obtaining of the consent of the infant's uncle was necessary before the advance could be made.

Held: (i) in enacting s. 32 (1) the legislature intended to enlarge the powers of trustees and the words "any other event" in the subsection were to be construed as meaning an event other than the mere single event of attaining a specified age and as not excluding the compound event of the attainment of a specified age and survivorship by an infant, and, therefore, the power of advancement conferred on the trustees by the subsection would be available in respect of the infant's interest in her grandfather's residuary estate.

(ii) the question whether the uncle's consent would be necessary would depend on whether his prior interest would be prejudiced by the proposed advance, for the ascertainment of which fact the matter would be referred back to chambers.

Notes. Restraints on anticipation attached to the enjoyment of property by a woman, except such a restraint as could have been attached to the enjoyment of that property by a man, were abolished by the Married Women (Restraint upon Anticipation) Act, 1949.

Considered: *Re Rees' Will Trusts, Lloyds Bank, Ltd. v. Rees*, [1954] 1 All E.R. 7. Referred to: *Re Shaw's Settlement Trusts, Shaw v. Shaw, Re Wisely's Settlement Trusts, Wisely v. Public Trustee*, [1951] 1 All E.R. 656.

As to advancement for the benefit of an infant, see 21 HALSBURY'S LAWS (3rd Edn.) 177 et seq., and for cases, see 28 DIGEST 250 et seq.

Cases referred to:

- (1) *Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101; 64 L.J.Ch. 174; 72 L.T. 190; 43 W.R. 462; 13 R. 13; 28 Digest 251, 1066.
- (2) *Re Hodgson, Weston v. Hodgson*, [1913] 1 Ch. 34; 82 L.J.Ch. 31; 107 L.T. 607; 57 Sol. Jo. 112; 28 Digest 253, 1086.
- (3) *Re Stimpson's Trusts, Stimpson v. Stimpson*, [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249; Digest Supp.

Adjourned Summons

Lesley Packer, an infant, was entitled under the will of her maternal grandfather, who died in 1930, to a share in the capital in the grandfather's residuary estate on the

A death of her mother, provided she had attained the age of twenty-one years. The infant's mother, Edith Croft, was entitled under the will to the income during her life of a moiety of the said capital without power of anticipation. This summons was taken out by the plaintiff, Edith Croft, and it asked that the trustees, with her consent and the consent of the testator's widow, who was entitled to an annuity under the will, should be authorised under s. 32 of the Trustee Act, 1925, to raise and pay out of the capital such portion of the infant's contingent share as was necessary for the meeting of school and other incidental expenses. It also asked whether the consent of Edith Croft's brother should also be obtained, he being entitled under the will of the testator to the income of the other moiety of the testator's residuary estate.

H. Ewins, for the plaintiff, referred to *Re Moody, Woodroffe v. Moody* (1), [1895] 1 Ch. 101.

G. D. Johnston, for the trustees, referred to *Re Hodgson, Weston v. Hodgson* (2), [1913] 1 Ch. 34 and *Re Stimpson's Trusts, Stimpson v. Stimpson* (3), [1931] 2 Ch. 77.

J. V. Nesbitt for the infant, a defendant.

Charles Harman for the defendant Reginald Garrett, Edith Croft's brother.

J. F. Bowyer for the testator's widow.

D CLAUSON, J., stated the facts and continued: By s. 43 of the Conveyancing and Law of Property Act, 1881, powers of maintenance were given to trustees in terms somewhat similar to those used in s. 32 of the Trustee Act, 1925; but, so far as I am aware, s. 32 is the first instance in which the legislature has seen fit to introduce into trust instruments a power for the trustees to make advances for the infant's benefit out of the capital of the share to which the infant is contingently entitled. The section is framed in the widest terms. [His Lordship read the section and continued:] The new powers which the section confers upon trustees are in addition to the powers contained in the trust instrument: see s. 69 of the Trustee Act, 1925. It has been argued by counsel for the defendant Reginald Garrett that the word "event" in the sentence "on the occurrence of any other event," being in the singular number, ought not to be construed so as to include a double or compound event, and that, even if it can be so construed, the event of attaining a specified age is altogether excluded by the use of the words "other event," and, therefore, cannot form part of a compound event. That may be a possible construction, but it is not a construction that I ought to adopt. The legislature, in enacting s. 32, intended to enlarge the powers of trustees, and, in my view, it will be in accordance with a more natural reading of the section to construe the words "other event" as meaning an event other than the mere single event of attaining a specified age and as not excluding the compound event of the attainment of a specified age and survivorship by an infant.

F The plaintiff, who is a person entitled to a prior interest in the money proposed to be paid and so may be prejudiced by the advance being made, but whose consent to the advance may be given under sub-s. (1) (c) of s. 32, is a married woman restrained from anticipation. It has been suggested that, owing to that restraint, she is incapable of giving her consent under the section. It has been pointed out, the powers given by the section have effect subject to the terms of the instrument creating the trust: see s. 69 (2) of the Trustee Act, 1925; and one of the terms of the will is that Mrs. Croft shall not anticipate the income of the share in question. But, in my judgment, Mrs. Croft has, notwithstanding the restraint, power to give her consent to the exercise by the trustees of their power of advancement under the section. That power must be taken to be incorporated in and read as part of the will, and Mrs. Croft's power of consenting is not, in my view, inconsistent with the restraint on anticipation imposed by the will. Further, it is to be observed that in this will there is no forfeiture clause, the presence of which might well make a difference and introduce matter for consideration.

I The question whether the consent of the defendant, Reginald Garrett, is necessary must depend upon whether in fact his prior interest will be prejudiced by the advancement proposed to be made. I can give no decision upon that question until I know whether his interest will be prejudiced. In every case the answer to such a question must depend upon the facts. I will make a declaration that, upon the proper construc-

tion of the testator's will and s. 32 of the Act, the power of advancement thereby conferred upon the trustees of the will is (subject to the proviso in that section contained) available in respect of the interest of the infant Lesley Packer in the residuary estate of the testator; and, further, that notwithstanding the restraint on anticipation imposed by the will on the interest of the plaintiff, Mrs. Croft, she is capable of giving a valid consent in writing to the exercise of such power within the meaning of the proviso in sub-s. (2) (c) of s. 32. Subject to this declaration the summons will be referred back to chambers.

Solicitors: *Culross & Co.; Stannard, Bosanquet, & Michaelson; Gery & Brooks; Butt & Bowyer; Marsden, Burnett, & Davy.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Re LANDAU. Ex Parte THE TRUSTEE v. BANKRUPT

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), April 27, May 11, 1934]

[Reported [1934] Ch. 549; 103 L.J.Ch. 294; 50 T.L.R. 403; 78 Sol. Jo. 430; [1934] B. & C.R. 84; 151 L.T. 190]

Bankruptcy—Appropriation of income—Maintenance of wife—Consent order of Divorce Court—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 51 (2).

By s. 51 (2) of the Bankruptcy Act, 1914: "Where a bankrupt is in receipt of a salary or income . . . the court, on the application of the trustee, shall . . . make such order as it thinks just for the payment of the salary or income . . . to the trustee, to be applied by him in such manner as the court may direct."

In 1926 the bankrupt obtained a decree absolute of divorce and an order, made by consent, that her husband should pay her £1,800 a year maintenance. On May 24, 1933, a receiving order in bankruptcy was made against her, and in June, 1933, she was adjudicated bankrupt. On an application by her trustee in bankruptcy under s. 51 (2) of the Bankruptcy Act, 1914, for an order directing that the bankrupt should pay to the trustee for the benefit of her creditors part of the maintenance of £1,800 a year, to be applied by the trustee in such manner as the court should direct.

Held: although the maintenance was not property of the bankrupt which vested in the trustee under s. 18 of the Act so as to be divisible among her creditors under s. 38, it was "income" within s. 51 (2), and the court had power under that subsection to order that there should be paid to the trustee such part of this income of the bankrupt as the registrar directed.

Notes. Applied: *Re Tennant's Application*, [1956] 1 All E.R. 425; [1956] 2 All E.R. 753. Considered: *Taylor (formerly Kräupl) v. National Assistance Board*, [1956] 2 All E.R. 455.

As to the appropriation of a bankrupt's income, see 2 HALSBURY'S LAWS (3rd Edn.) 456, 457; and for cases, see 5 DIGEST 927-930. For Bankruptcy Act, 1914, see 2 I HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Maidlow v. Maidlow*, [1914] P. 245; 84 L.J.P. 20; 112 L.T. 804, C.A.; 27 Digest (Repl.) 622, 5813.
- (2) *Hollinshead v. Hazléton*, [1916] 1 A.C. 428; 85 L.J.P.C. 60; 114 L.T. 292; 32 T.L.R. 177; 60 Sol. Jo. 139; [1916] H.B.R. 85, H.L.; 5 Digest 928, 7599.
- (3) *Re Shine, Ex parte Shine*, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 40 W.R. 386; 8 T.L.R. 279; 36 Sol. Jo. 295; 9 Morr. 40, C.A.; 5 Digest 927, 7594.

- (4) *Re Huggins, Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest 725, 6296.
- (5) *Re Hutton, Ex parte Benwell* (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 33 W.R. 242; sub. nom. *Ex parte Hutton*, 1 T.L.R. 148, C.A.; 5 Digest 928, 7600.
- (6) *Re Garrett*, [1930] 2 Ch. 137; 46 T.L.R. 464; 99 L.J.Ch. 341; 143 L.T. 402; [1929] B. & C.R. 177; Digest Supp.
- (7) *Smith v. Smith*, [1923] P. 191; 130 L.T. 8.
- (8) *Harrison v. Harrison* (1888), 13 P.D. 180; 58 L.J.P. 28; 60 L.T. 39; 36 W.R. 748; 4 T.L.R. 646, C.A.; 27 Digest (Repl.) 680, 6496.
- (9) *Re Saunders, Ex parte Saunders* (1834), 3 Deac. & Ch. 568, (t. of R.; 5 Digest 688, 6084.

Appeal by trustee in bankruptcy from an order of Mr. REGISTRAR MELLOR dismissing an application under s. 51 (2) of the Bankruptcy Act, 1914.

The facts are fully set out in the judgment of the Master of the Rolls.

Oscar Kean for the trustee.

C. Tindale Davis for the bankrupt.

Cur. adv. vult.

May 11. **LORD HANWORTH, M.R.**—This appeal from the registrar involves the consideration of what undoubtedly is an interesting point on which we have had an able argument from counsel on both sides. The facts that give rise to the question which we have to determine are these. The receiving order against Rose Bertha Landau was made on May 24, 1933, and she was adjudicated bankrupt on June 9, 1933. Her statement of affairs revealed that her liabilities amounted to £6,050 5s. 3d., while her assets were £5 and no more. The trustee made an application under s. 51 (2) of the Bankruptcy Act, 1914, for an order for the payment over by the bankrupt to the trustee for the benefit of her creditors in bankruptcy of a part of her income.

In 1926 the bankrupt took divorce proceedings against her husband, and on Feb. 11, 1926, an order was made dealing with considerable sums. It is an order which we have considered carefully and which we are satisfied was an order made by consent. I will read it:

"Upon hearing the solicitors for the petitioner and respondent and by consent it being agreed that the respondent do pay to the petitioner (a) the sum of £1,000 forthwith (in addition to and irrespective of the allowance now being made to her) as and by way of alimony pendente lite, and (b) the sum of £3,000 payable immediately after the making of the decree absolute herein; and the respondent undertaking to secure by deed to the satisfaction of the petitioner for her life in the event of the respondent predeceasing the petitioner after the making of the decree absolute herein (a) the annual sum of £1,250 per annum free of tax and (b) the proceeds of [two policies being for £5,000 and £2,500 respectively], it is ordered that the said respondent do pay to the said petitioner the sum of £1,800 per annum free of income tax payable during their joint lives as from the date of the decree absolute by way of maintenance,"

and then two additional yearly sums of £250 each, free of tax, which means (I have not calculated the super tax upon it) that she is in receipt of a gross sum of something more than £2,400 per annum. This order was made by consent and where an order is made by consent, by a decision of *Maidlow v. Maidlow* (1), that order is not one which is subject to variation by the court as it would be if it had been made under the terms of s. 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, where it is possible to order a weekly or monthly sum to be paid during the joint lives of the husband and wife.

The effect of that order made by consent is that the bankrupt is now in possession of a very substantial income. It would be a disastrous state of the law if in these circumstances she was able to say that her assets were nil, that nothing could be done to help the creditors to the amount of £6,050 and that she was entitled to receive her income

and leave her creditors in the lurch. Fortunately, the law does not stand in that position. A

We have had an able argument presented to us on behalf of the bankrupt, and her counsel raises two points. He says that under s. 38 of the Bankruptcy Act, 1914, what passes to the trustee is the property of the bankrupt. Section 51 of the Act enables certain income or certain recurring payments to be made available to the trustee to meet the liabilities in the bankruptcy. Section 51 (1) deals with the case where the bankrupt is an officer of the army or navy or engaged in the civil service of the Crown and the money that is received by those servants of the Crown is in part enjoyed for the purpose of the maintenance of their position, and in those cases, with the consent of the chief officer of the Department under which the pay or salary is enjoyed, a sum may be set aside for the satisfaction of creditors. None of that subsection applies to the present case. Then there is sub-s. (2), which says that: B

"Where a bankrupt is in receipt of a salary or income other than as aforesaid . . . the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary [or] income, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct." C

Counsel for the bankrupt says: That is all very well, but s. 51 is not to be taken out of its setting; it is to be read in the light of the other provisions of the Bankruptcy Act, and s. 38 catalogues the property which passes to the trustee; and more than that, by s. 167 there is a definition given of "property" which includes D

"money, goods, things in action, land, and every description of property, whether real or personal . . . also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined." E

He argues that, reading ss. 38 and 51 in the light of that definition of property, unless this income or salary is property within s. 38, no order can be made under s. 51 (2). It is to be observed upon that argument that if that condition to the operation of s. 51 is to prevail it would seem that much of the import of s. 51 is cut away; for, if what is to be dealt with under s. 51 is only such periodical payments as have already under the term "property" come within the control of the trustee, then it would appear that the ancillary power given by s. 51 is narrowed and limited to a very small extent. By reason of the authorities, to which I will refer in a moment, I cannot accept the view that s. 51 is controlled and limited by s. 38. The second point made by counsel is that, although s. 51 does deal with certain periodical payments, those periodical payments are cases of salary or income in the nature of salary, ejusdem generis with salary, and that this sum payable to the wife by the husband under a consent order of the Divorce Court is not either salary or income, but is a sum which stands outside and apart from the categories covered by either of those words. F

Most of the authorities deal with both points which have been raised. First of all, let me say that s. 51 is not a new section, unknown before; it is equivalent to s. 90 of the Bankruptcy Act, 1869, and, perhaps, the best statement of the sequence of these successive sections is to be found in LORD ATKINSON's speech in *Hollinshead v. Hazleton* (2) [1916] 1 A.C. at p. 434). He first deals with s. 90 of the English Bankruptcy Act of 1869, which is re-enacted in s. 53 (2) of the English Bankruptcy Act of 1883, and is again re-enacted in s. 51 (2) of the Act of 1914. It must be borne in mind what one means by salary or income. Is there any distinction? FRY, L.J., in the passage to which our attention was drawn by counsel for the bankrupt, attempted a definition of the word "salary," but I do not think that it was wholly successful, and it was not, and, indeed, it was not intended to be, exhaustive. It is to be found in *Re Shine, Ex parte Shine* (3) ([1892] 1 Q.B. at p. 531). G

Before we come to *Re Shine* (3) let me refer to an observation made by SIR GEORGE JESSEL in a case which has also received the approval of the House of Lords, *Re Huggins, Ex parte Huggins* (4) (21 Ch. Div. at p. 92), where he says, referring to s. 90 of the Act of 1869: I

"The present appellant's income is not a 'salary,' but it is 'income.' The word

1 'income' is as large a word as can be used." He was dealing with the case of a retired judge of a Crown Colony, but that observation, with which I respectfully agree, clearly indicates that we have not got to give a simple or alternative meaning to the words "salary or income," but we have got to enlarge "salary" by the larger word "income," which is found in s. 51 (2). Let me deal with *Re Hutton, Ex parte Benwell* (5), and it must be remembered that there the court were dealing with the prospective
2 earnings of a professional man, a bone setter; if he did not work he would not earn fees; if he was ill he would not receive fees. His income was precarious in the sense that it depended, like the income of other professional men, upon his health and his assiduity. As was pointed out by SIR BALLIOL BRETT, M.R., his earnings did not depend on any contract and were not property which passed to the trustee because they were not earnings which had been stored up; they were future earnings. He says this (14
3 Q.B.D. at p. 307):

"The court is empowered to deal with matters of this kind, though they are not comprised in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession. Section 90 goes further still, and enables the court to deal with 'a salary or income other than as aforesaid' of which the bankrupt is in the receipt. What is the meaning of the word 'salary' in the section?"

He deals with the word "salary," and continues: "'Income,' therefore, must mean 'income' in the nature of a 'salary'." That is quite true of income which has some regularity or a certain foundation from which it can be called an income and not precarious earnings. COTTON, L.J., in dealing with those professional earnings, says on the same page:

"It is quite different from the case of a bankrupt who is entitled under a contract entered into before the bankruptcy to receive money after the bankruptcy." [Then]: "In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt, and in such a case a part of it can be set aside for the benefit of his creditors."

Those passages, to my mind, explaining s. 90, are a sufficient guide to enable me to come to a conclusion in the present case, but the matter does not stop there. In *Ex parte Shine* (3) the question arose whether an order could be made to take the salary of an actor who had got an agreement for a term of two years under which he was to be paid a sum of 30s. 0d. weekly. A discussion on this point again arose, and LORD ESHER ([1892] 1 Q.B. at p. 527) says this:

"But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy. It follows, to my mind, that the income to which s. 53 refers must be income in the nature of a salary. I cannot doubt that the sum payable to the bankrupt under this agreement is a 'salary,' but at any rate it is 'income'."

Once more LORD ESHER is pointing out the distinction between property under s. 38 and the powers given to the court under s. 53 of the Bankruptcy Act, 1883 [which was reproduced by s. 51 of the Act of 1914], and FRY, L.J., gives his definition with regard to salary and income. That passage, to my mind, again is a guide which cumulatively is to be added to the indications given in *Re Benwell* (5). I come lastly to deal with *Hollinshead v. Hazleton* (2). That was a question whether or not a portion of the annual payment made to a member of Parliament could be taken, and some observations are made to which I will refer in the speech of LORD PARKER. He says ([1916] 1 A.C. at p. 460) this:

"Under these circumstances I confess I am unable to see any reason why [this payment] should not be held to be salary or income within the 51st section of the [Bankruptcy (Ireland) Amendment Act, 1872]."

That is to say, because he finds on consideration that it is a regular payment made to the bankrupt. LORD SUMNER ([1916] 1 A.C. at p. 463) catalogues the objections made, for instance, that s. 51 of the Act of 1872 is placed in antithesis to s. 319 of the Irish

Bankruptcy Act of 1857 and must be referring only to private salaries or incomes, in A
contradistinction to those derived from the State. Then he says this:

"The two sections read together clearly mean that all salaries or incomes not brought B
in by the first shall be comprehensively brought in by the second. I am not
satisfied that this salary has any analogy in fact to those payments, made for the
purpose of enabling a certain office of State to be maintained or of retaining the
future services of officers, which have been the subject of the decisions cited; but,
however this may be, the words of the statute, being clear, import that the legisla-
ture considered that the alienation of part of this salary under an order in bank-
ruptcy was consistent with public policy, a view which is supported by the explicit
application of similar provisions in other Bankruptcy Acts to various payments,
which probably would be inalienable at common law."

Those passages clearly, to my mind, exhibit the wide interpretation to be given to these C
words in s. 51 (2) of the Act of 1914, and that brings me to say that I find myself in
accord with the interpretation which was given by FARWELL, J., to these sections in
Re Garrett (6) and with the view he expresses. Following *Re Shine* (3) and the other
cases to which I have referred, he comes to the same result as that which I have indicated
in my judgment.

It appears to me for these reasons (and I say it with some satisfaction) that the D
hesitation which MR. REGISTRAR MELLOR felt does not prevail, and that an order ought
to be made for a sum to be taken from this accruing income of the bankrupt. The
quantum must be fixed by the registrar. The appeal will be allowed with costs and a
direction given that the registrar will consider what sum ought to be taken from this
income receivable by the bankrupt.

SLESSER, L.J.—I agree that this appeal succeeds. The first contention which is E
made by counsel for the bankrupt is that on the finding of the learned registrar that this
income secured by the order of the Divorce Court was not the property of the bankrupt
so as to vest in the trustee within the operation of s. 18 of the Bankruptcy Act, 1914,
there is no discretion left in him to make an order under s. 51. I think on consideration
that his finding that this income is not property within ss. 18 and 38 may possibly be F
supported in this sense, that being, as it appears to be, payable under an order made
under the Supreme Court of Judicature (Consolidation) Act, s. 190 (2), it is in ap-
propriate circumstances variable under the proviso on application to the court. If
that is right, it may well be that, in view of the observations, particularly those of
SCRUTTON, L.J., in *Smith v. Smith* (7) to the effect that the court never loses control of G
such a payment and can alter and take it away at any time, and the observations made
by FRY, L.J., in *Harrison v. Harrison* (8) where he points out that a sum payable under
the Matrimonial Causes Act, 1866, which is equivalent to sub-s. (2) of s. 190 of the Act
of 1925, should not be regarded as the permanent property of the wife, and other
observations in other cases to which counsel has drawn our attention, if the order was
made under sub-s. (2) of s. 190 it would not be such property. This appears to be a H
consent order, and it is made for the joint lives of the parties; and in *Maidlow v. Maid-*
low (1) it was held that a consent order was not variable because it was made for the
payment to the wife during her life. SWINFEN EADY, L.J. ([1914] P. at p. 249) said:

"It may well be that the parties consented to what would be a proper allowance, I
having regard to the means of the husband and wife, and it may well be that they
determined on a proper amount rebus sic stantibus. If, however, there should be
a material change of circumstances after the order has been made, even though by
consent, for the payment of the sum agreed upon for their joint lives, that fact
would not prevent an application being subsequently made, if circumstances
altered, for the sum to be increased or decreased."

He points out that the reason why in that case it was not possible to entertain an
application for an alteration was because the payments were not for the joint lives of
the husband and wife, but were to the wife during her life and, therefore, did not properly
fall within the section.

In the present case in part the order is for the wife's life and in part for the joint lives, and, therefore, it is not very certain exactly what the effect of the order is, but whether this be or not, property within s. 18, in my opinion, matters not, because the later authorities show clearly that even in the case of salary or income which is not within ss. 18 and 38, the court has jurisdiction to make an order under s. 51 where it is salary or income within that section.

The authorities for that proposition begin with *Re Hutton, Ex parte Benwell* (5), to which reference has been made, where SIR BALLIOL BRETT, M.R., makes it quite clear in his observations that property is not limited in the way in which counsel for the bankrupt argued, but that salary or income may be dealt with under s. 51, although it does not vest under s. 18. He says (14 Q.B.D. at p. 307):

"The court is empowered to deal with matters of this kind though they are not comprised in any of the previous sections of the Act, for the bankrupt is certain to have them, though they have not yet come into his possession,"

and COTTON, L.J., speaks to the same effect. That view has been followed in a number of later cases—in *Re Shine, Ex parte Shine* (3) and also in *Re Saunders* (9), and finally it was considered by FARWELL, J., in *Re Garrett* (6) which arose under s. 14 (1) of the Police Pensions Act, 1921, which in terms provided that a pension under that Act should not pass to any trustee or other person acting on the creditors' behalf; yet, nevertheless, his Lordship held that that did not prevent the court from making an order under s. 51 (2) for payment of all or part of the pension to the trustees for the creditors' benefit. So, that was a case where the statute in terms prevented a vesting under s. 18, and yet FARWELL, J., held that there was power to make an order under s. 51.

In my view, the decision of FARWELL, J., and the reasons given in his judgment and the authorities there cited, make it clear that the court has such a power. As I understand counsel in the present case, that important decision of FARWELL, J., was not brought before the attention of the learned registrar. It has been cited to us, and, in my opinion, it is consistent with all the authorities. The only question that remains, once it is decided that s. 51 does deal with matters other than property which would vest under s. 18, is whether the subject-matter in this case can properly be described as income. Of that matter I entertain no doubt at all. Moneys paid under a Colonial Act of Parliament, moneys paid under a contract, the salary of a Member of Parliament in *Hollinshead v. Hazleton* (2) paid under a resolution of the House of Commons, and, as I have said, the pension of a detective inspector in *Re Garrett* (6) paid under the Act of 1921 have all been held to be income within the meaning of s. 51. I think it is unarguable that money paid under an order of a competent tribunal by a husband for the maintenance of his wife is not income within the meaning of the section. Therefore, it is not necessary to express any concluded opinion upon whether the case is one where the order of the Divorce Court is variable on an application to the court under s. 190 of the Supreme Court of Judicature (Consolidation) Act, and, consequently, whether this be or be not property which vests under s. 18. That all turns on the exact construction of the order, which is, speaking for myself, very difficult to understand. It is immaterial in the present case because in any event the payments here are income, and, therefore, the proper subject of an order in the discretion of the registrar under s. 51.

ROMER, L.J.—I entirely agree, and I share the satisfaction expressed by the Master of the Rolls in thinking that we are able to make the order that has been asked for on this appeal. It would be a grave blot on our bankruptcy law if we were precluded from doing so.

It was held by FARWELL, J., in *Re Garrett* (6) that s. 51 of the Bankruptcy Act applies to property whether or not vested in the trustee. I entirely agree with him. FARWELL, J., said, and said truly, that that conclusion was amply justified by the decision of this court in *Re Shine, Ex parte Shine* (3). I agree with that too, but I would add that even in the absence of authority I should have arrived at the same conclusion without any hesitation whatsoever.

The only other question which remains is whether the payments in question in this

case can properly be described as income within the meaning of s. 51 (2). I confess A that, even after hearing the interesting argument of counsel for the bankrupt, I have not the least idea why this annual sum paid by the husband to the wife under the direction contained in the order of the Divorce Court is not her income. It is true that LORD ESHER in *Re Hutton, Ex parte Benwell* (5) said that income in s. 90 of the Bankruptcy Act, 1869, which corresponded to s. 51 (2) of the Act of 1914, was income ejusdem generis with salary; but, with all respect to that learned judge, I do not think such a B statement assists us very much unless it goes on to tell us to what genus the salary payment belongs. LORD ESHER did not go as far, but in the same case COTTON, L.J., did, and in the passage read by the Master of the Rolls (14 Q.B.D. at p. 308) said:

"In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt."

The £1,800 a year free of tax without any question whatsoever is a definite annual C amount coming to the bankrupt in the present case. That being so, it follows from the decision of *Ex parte Benwell* (5), if one wanted any authority for the proposition, that this sum is income within the meaning of s. 51 (2). For these reasons I agree that this appeal must be allowed.

Appeal allowed. D

Solicitors: Woolfe & Woolfe; Braby & Waller, for Reginald Harlley, Royston, Herts.

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

DAVIS v. SYMONS

[CHANCERY DIVISION (Eve, J.), March 28, 1934]

[Reported [1934] Ch. 442; 103 L.J.Ch. 311; 151 L.T. 96; 78 Sol. Jo. 297]

Mortgage—Redemption—Clog on equity—Postponement of redemption for twenty years—Mutuality.

In 1926 the plaintiff mortgaged certain premises and two policies on his own life for £2,750 at $£7\frac{1}{2}$ per cent. reducible to $£6\frac{1}{2}$ on punctual payment. The mortgagee G covenanted that he would not call in the loan for twenty years or the duration of the mortgagor's life, whichever first terminated, and the mortgagor covenanted that he would not redeem for the like period and would not sell the equity of redemption except to a responsible person. One of the policies would mature eight days and the other four years before the period fixed for redemption, and the H postponement of redemption made them in effect irredeemable. In a redemption action by the mortgagor against the mortgagee,

Held: the mere postponement of the date for redemption for twenty years might not, in the absence of other circumstances, avoid the contract, but the mortgage deed must be considered as a whole, and in view, particularly, of the fact that the policies were irredeemable and matured within the twenty years so that the mortgagee would receive substantial payments in respect of the mortgage within that time, and in view of the mortgagor's covenant as to the sale of the equity of redemption, there was little mutuality regarding the period of postponement and the mortgagor I was entitled to redeem.

Notes. Considered: *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E.R. 444; on appeal [1938] 4 All E.R. 618.

As to redemption of mortgages, see 23 HALSBURY'S LAWS (2nd Edn.) 300 et seq., and for cases, see 35 DIGEST 343 et seq.

A Cases referred to:

- (1) *Fairclough v. Swan Brewery Co., Ltd.*, [1912] A.C. 565; 81 L.J.P.C. 207; 106 L.T. 931; 28 T.L.R. 450, P.C.; 35 Digest 353, 958.
- (2) *Teevan v. Smith* (1882), 20 Ch.D. 724; 51 L.J.Ch. 621; 47 L.T. 208; 30 W.R. 716, C.A.; 35 Digest 301, 509.
- (3) *Morgan v. Jeffreys*, [1910] 1 Ch. 620; 79 L.J.Ch. 360; 74 J.P. 154; 26 T.L.R. 324; 35 Digest 301, 510.
- (4) *Cowdry v. Day* (1859), 1 Giff. 316; 29 L.J.Ch. 39; 1 L.T. 88; 5 Jur. N.S. 1199; 8 W.R. 55; 65 E.R. 936; 35 Digest 356, 990.
- (5) *Lawless v. Mansfield* (1841), 1 Dr. & War. 557, I.R.; 35 Digest 641.
- (6) *Re Hone's Estate* (1873), 8 I.R. Eq. 65-I.R.; 35 Digest 356, k.
- (7) *Biggs v. Hoddinott, Hoddinott v. Biggs*, [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504, C.A.; 35 Digest 356, 993.
- (8) *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A.C. 25, 53; 83 L.J.Ch. 79; 109 L.T. 802; 30 T.L.R. 114; 58 Sol. Jo. 97, H.L.; 35 Digest 241, 20.
- (9) *Noakes & Co., Ltd. v. Rice*, [1902] A.C. 24; 71 L.J.Ch. 139; 86 L.T. 62; 66 J.P. 147; 50 W.R. 305; 18 T.L.R. 196; 46 Sol. Jo. 136, H.L.; 35 Digest 241, 19.
- (10) *Samuel v. Jarrah Timber and Wood Paving Corp., Ltd.*, [1904] A.C. 323; 73 L.J.Ch. 526; 90 L.T. 731; 52 W.R. 673; 30 T.L.R. 536; 11 Mans. 276, H.L.; 39 Digest 353, 957.
- (11) *Re Fortesque's Estate*, [1916] 1 I.R. 268; 39 Digest 356, l.
- (12) *Gossip v. Wright* (1863), 32 L.J.Ch. 648; affirmed (1869), 21 L.T. 271; 17 W.R. 1137, H.L.; 39 Digest 246, 63.

E Action

By a mortgage dated Nov. 25, 1926, a message and premises, No. 15, Swain's-lane, St. Pancras, together with an endowment life policy for £2,250, effected by the plaintiff (the mortgagor) on his life were mortgaged to secure an advance of £2,750 with interest at $7\frac{1}{2}$ per cent., reducible on punctual payment to $6\frac{1}{2}$ per cent. per annum. It was provided, by cl. 6:

"The lender hereby covenants with the borrower that if on either of the quarter days hereinbefore fixed for payment of interest or within fourteen days next after such day and continuously during the period of twenty years from the date hereof or until the death of the borrower whichever shall first happen there shall be paid to the lender interest on the principal sum hereby secured and all premiums on the said policy shall be paid, and there shall be no breach of covenant, then the lender will not before the expiration of the said twenty years or the earlier death of the borrower require payment of the principal sum or of any part thereof. And the borrower hereby covenants with the lender that the whole of the principal sum hereby secured shall be allowed to remain on this security until the expiration of the said twenty years or the death of the borrower whichever shall first happen."

The plaintiff gave a further charge, dated Aug. 5, 1927, to the defendant over the above-mentioned premises and another policy for £750 on his life, to secure a further advance of £500, and all covenants in the mortgage were made applicable to the charge.

The effect of the covenants was to postpone redemption until Nov. 25, 1946. The policy for £2,250 comprised in the mortgage matured on Nov. 18, 1946, eight days before the expiration of this period. The other policy, for £750, matured in 1942, and by the further charge it was provided that if the mortgagor survived the date of maturity the policy moneys with profits were to be paid to the mortgagee. The mortgage also contained a special covenant by the mortgagor not to sell the equity of redemption except to a responsible person.

The plaintiff brought this action for redemption on the ground that the terms constituted a clog on the equity from which he was entitled to relief. This the defendant denied.

L. W. Byrne, for the mortgagor.—The covenants are a clog on the equity of redemption, and void: see per LORD MACNAGHTEN in *Fairclough v. Swan Brewery Co., Ltd.* (1).

The case is otherwise for a reasonable period such as five or seven years (*Teevan v. Smith* (2)), cf. *Morgan v. Jeffreys* (3), a period of twenty-eight years, *Cowdry v. Day* (4). See also *Lawless v. Mansfield* (5), *Re Hone's Estate* (6), *Biggs v. Hoddinott* (7), *Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.* (8), *Noakes & Co., Ltd. v. Rice* (9), *Samuel v. Jarrah Timber and Wood Paving Corp., Ltd.* (10) and *Re Fortesque's Estate* (11).

J. V. Nesbitt, for the mortgagee.—Redemption postponed merely for a term of years is not a clog on redemption unless there has been some other extraneous fact. In *Morgan v. Jeffreys* (3) the decision would have been the other way if the covenants had been mutual as here. *Fairclough v. Swan Brewery Co., Ltd.* (1) and *Noakes and Co., Ltd. v. Rice* (9) are not relevant.

L. W. Byrne, in reply.

[*Gossip v. Wright* (12) was also referred to.]

EVE, J.—In this, as in every other case where a party to a contract seeks to be relieved from a term of the contract, it is incumbent upon him to satisfy the court that he has made out a case for such relief.

The plaintiff is a mortgagor under a mortgage of Nov. 25, 1926, and a further charge of Aug. 5, 1927. The mortgaged premises are a freehold messuage known as No. 15, Swain's-lane, St. Pancras, and two endowment policies for £2,250 and £750 respectively, effected on the plaintiff's life with the National Mutual Life Association of Australasia, Ltd. The mortgage debt is a sum of £2,750, bearing interest at 7½ per cent., reducible on punctual payment to 6½ per cent. The defendant is the mortgagee.

By cl. 6 of the mortgage the mortgagee covenanted that he would not until the expiration of twenty years from the date of the deed or the death of the borrower, whichever should first happen, require payment of the principal sum thereby secured or any part thereof, and the mortgagor covenanted that the whole of the principal sum thereby secured should be allowed to remain on the security until the expiration of the said period of twenty years or his death, whichever should first happen. By the further charge, which is dated Aug. 5, 1927, it is provided that

"All covenants and provisions contained in and subsisting in relation to the principal deed (except the covenant for payment of principal and interest but including the provision for reduction of interest to 6½ per cent. per annum on punctual payment) shall be applicable for securing the payment of the said sum of £500"—[that was the further advance]—"and the interest thereon and for enforcing and defining the rights of the parties under the security hereby constituted as if the said sum of £500 and interest thereon had formed part of the principal money and interest thereon respectively payment whereof is secured by the principal deed and as if the further policy hereby assigned had been comprised in the principal deed."

The effect of the deeds so far is to postpone the mortgagee's right to require payment and the mortgagor's right to redeem to Nov. 25, 1946, or the mortgagor's earlier death. The mortgagor asserts that this provision is of an oppressive and unreasonable nature, and claims a declaration to that effect and an immediate judgment for redemption in the ordinary form. The mortgagee admits that the mortgagor is not entitled to redeem the said mortgage and further charge prior to Nov. 25, 1946, or the earlier death of the plaintiff, but he denies that that is wrongful, and in these circumstances the question between the parties resolves itself into whether the provision of the deeds whereby the date of redemption is postponed to 1946 is reasonable and binding on the plaintiff, or whether it is an unreasonable fetter upon his right to redeem.

The authorities, to all of which my attention has been drawn in the course of the arguments, establish undoubtedly that the mere postponement of the date for redemption for a moderate and reasonable period does not, in the absence of other circumstances, avoid the contract.

In *Teevan v. Smith* (2), SIR GEORGE JESSEL states the law in these terms:

"Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem' are inserted."

A In *Cowdry v. Day* (4) the opinion was expressed that twenty years' postponement might be too long, and in Ireland, eight years and ten years have been treated as permissible: see *Re Hone's Estate* (6); *Re Fortesque's Estate* (11). In *Morgan v. Jeffreys* (3), JOYCE, J., regarded a proviso against redemption for twenty-eight years as beyond all reasonable limits, but it is to be noted that in this last case, and in some of the others cited to the court, the absence of a reciprocal covenant on the part of the mortgagee not
B to call in his money for a like period had been regarded as an important consideration in estimating the reasonableness of the fetter imposed on the right to redeem. In *Cowdry v. Day* (4), and in *Morgan v. Jeffreys* (3), there were certainly other relevant matters to which the attention of the court was directed and which of themselves would seem to have been sufficient to warrant the conclusions at which the court arrived.

C I do not think any of the cases where there is an absence of mutuality assist very much in determining what is reasonable in cases where both parties are bound to a fixed term. In determining the simple question whether any particular postponement is extravagant and oppressive the absence of a corresponding restraint on the mortgagee must be regarded as an important factor, but in cases where it is not suggested that there has been any over-reaching, where there are mutual covenants binding on mortgagor and mortgagee, and where each party may be regarded as of an age and competency
D to decide what was most beneficial to himself, I do not see why one of them should be allowed to escape from his contract merely because the postponement is a long one and, as events have turned out, he would have been better off had he adopted a different attitude at the date of the mortgage. I am not prepared to say that in the absence of other relevant factors the court would, in circumstances such as I have just referred to, regard a period of twenty years as unreasonable; no doubt the longer the suspensory
E period the more incumbent it is to consider whether there are any provisions in the contract calculated to make the ostensible mutuality more apparent than real.

In other words, the question whether the contract is reasonable or not cannot be decided without a full examination of the whole deed. Counsel for the mortgagor, adopting that procedure on behalf of his client, invites the court to take into consideration the fact that the two policies are irredeemable. They constitute an important part
F of the mortgagee's security and both mature during the twenty years—the larger one some eight days and the smaller one some four years before the twenty years' period expires. Moreover, the smaller one maturing in 1942 stands as security for the old loan, and there is a provision in the further charge under which if the mortgagor survives the maturity of the policy in 1942, the policy moneys are to be paid to the mortgagee. The
G money will represent the £750, for which the policy was effected, plus any profits which may have accrued in the long period since it was effected. At the date when it becomes payable, those profits may represent a considerable sum. So that, although the mortgagor may not redeem for twenty years, the mortgagee is put in this position, that notwithstanding the covenant that he will not call in the principal money during twenty years, he must, in fact, if matters proceed according to the contract, receive a considerable sum in payment off of part of the mortgage four years before the suspensory period
H comes to an end. It is true that this was the covenant made, and I am not saying that it may not have been quite right, but it is a position which has to be considered as one which results from the postponement of the right to redeem.

The other policy, in like manner, will have been paid off eight days before the plaintiff's right to redeem arises and, in substance, the policies are irredeemable, and in the case of the smaller one, the mortgagee gets a distinct benefit by reason of the fact that in the
I currency of the twenty years during which it is covenanted that the money shall not be repayable he will in fact receive the considerable sum payable on the maturity of that policy.

There is another provision which is not usual in mortgages. It is, no doubt, a useful one from the mortgagee's point of view, but it must, I think, hamper the mortgagor to an unreasonable extent. It is a special covenant on the part of the mortgagor whereby he covenanted not to sell the equity of redemption except to a responsible person. It may well be that this was inserted owing to the fact that the mortgagor covenanted to pay the premiums on the policies.

Counsel's argument pressing the consideration of the whole contract compels me to hold that there is very little mutuality in the respective covenants dealing with the period of postponement, and that the contract is not one on which the mortgagee can insist. If the twenty years' period had stood alone, unaffected by these other matters, I am not sure that I should not have felt justified in saying that the contract was binding; but as those who have preceded me have done, I must take into account all the facts, and having done so I think the plaintiff is entitled to succeed. There will be a declaration that the plaintiff is at liberty to redeem, on six months' notice, with liberty to apply. By consent, there will be no order as to costs.

Judgment for the plaintiff.

Solicitors: *Blakeney & Co.; King-Hamilton & Green.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re GODWIN. THE TRUSTEE v. M. E. MORRIS

[CHANCERY DIVISION IN BANKRUPTCY (Luxmoore and Farwell, JJ.), October 29, 30, November 19, 1934]

[Reported [1935] Ch. 213; 104 L.J.Ch. 189; 152 L.T. 392; 51 T.L.R. 118; 78 Sol. Jo. 930; [1934] B. & C.R. 101]

Bankruptcy—Execution—"Benefit of execution"—Right of creditor to retain—Debt paid in full by debtor—Unconditional withdrawal by sheriff—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40 (1).

On June 1, 1932, a judgment creditor obtained judgment against the bankrupt for £111 1s. and costs. On June 16 he caused execution to be levied against the bankrupt's goods for £121 6s. 6d. and the costs of execution, and the sheriff went into possession. Between July 2 and July 22 the bankrupt paid to the judgment creditor the full amount under the judgment with costs of execution. On Aug. 3 the judgment creditor instructed the sheriff to withdraw, which he did, his costs being paid by the creditor. No part of the debt or costs then remained outstanding, and, the withdrawal being unconditional, no power of re-entry was, or could be, reserved. On Nov. 21 the debtor filed his petition in bankruptcy and a receiving order was made. On Dec. 6 he was adjudged bankrupt. On a motion by the trustee in bankruptcy for an order directing the creditor to repay the moneys received as aforesaid on the ground that the execution had not been completed within the meaning of the Bankruptcy Act, 1914, s. 40 (1),

Held: on the true construction of s. 40 (1) the phrase "the benefit of the execution" referred solely to the protection obtained by an execution creditor by reason of the issue of the writ of fi. fa. and its delivery to the sheriff, and did not describe any payment to an execution creditor, whether by the sheriff or by the judgment debtor, and, therefore, the subsection related only to executions which were in existence at one or other of the dates mentioned therein (e.g., the date of the receiving order) and had no reference to an execution which had been unconditionally withdrawn long before any of those dates, and the trustee was not entitled to the order which he claimed.

Notes. Considered: *Re Samuels, Ex parte Trustee v. Tee (J. H. S.)*, post, p. 148. Followed: *Re Andrews, Official Receiver (Trustee) v. Standard Range and Foundry Co.*, [1936] 2 All E.R. 750. Referred to: *Re Love, Ex parte Official Receiver v. Kingston-upon-Thames County Court Registrar*, [1951] 2 All E.R. 321.

As to the rights of creditors under executions, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq., and for cases, see 5 DIGEST 808 et seq. For Bankruptcy Act, 1914, s. 40, see 2 HALSBURY'S STATUTES (2nd Edn.) 376.

Cases referred to:

- (1) *Re Godding, Ex parte Trustee*, [1914] 2 K.B. 70; 110 L.T. 207; 58 Sol. Jo. 221; sub. nom. *Re Godding, Ex parte Partridge*, 83 L.J.K.B. 1222; 21 Mans. 137; 5 Digest 812, 6920.
- (2) *Re Fairley*, [1922] 2 Ch. 791; 92 L.J.Ch. 141; 38 T.L.R. 893; [1922] B. & C.R. 127; 21 Digest 521, 961.
- (3) *Re Evans, Ex parte Salaman*, [1916] H.B.R. 111; 5 Digest 812, 6921.
- (4) *Figg v. Moore Brothers*, [1894] 2 Q.B. 690; 63 L.J.Q.B. 709; 71 L.T. 232; 10 T.L.R. 490; 1 Mans. 404; 10 R. 549; 5 Digest 812, 6915.
- (5) *Burns-Burns' Trustee v. Brown*, [1895] 1 Q.B. 324; 64 L.J.Q.B. 248; 71 L.T. 825; 43 W.R. 195; 11 T.L.R. 114; 39 Sol. Jo. 152; 2 Mans. 23; 14 R. 119, C.A.; 5 Digest 812, 6916.
- (6) *Re Jenkins, Ex parte Trustee* (1904), 90 L.T. 65; 20 T.L.R. 187, D.C.; 5 Digest 818, 6955.
- (7) *Re Pollock and Pendle, Ex parte Wilson and Mathieson, Ltd.* (1902), 87 L.T. 238; 18 T.L.R. 794; 46 Sol. Jo. 701, D.C.; 5 Digest 812, 6919.
- (8) *Re Kern (P.E. & B.E.)*, [1932] 1 Ch. 555; 146 L.T. 570; 101 L.J.Ch. 257; [1931] B. & C.R. 150; Digest Supp.
- (9) *Re Brelsford*, [1932] 1 Ch. 24; 146 L.T. 160; 100 L.J.Ch. 365; [1931] B. & C.R. 21; Digest Supp.
- (10) *Johns v. Pink*, [1900] 1 Ch. 296; 69 L.J.Ch. 98; 81 L.T. 712; 48 W.R. 247; 16 T.L.R. 70; 21 Digest 573, 1500.
- (11) *Re Ford, Ex parte Official Receiver*, [1900] 1 Q.B. 264; 69 L.J.Q.B. 74; 81 L.T. 648; 48 W.R. 173; 44 Sol. Jo. 75; 7 Mans. 14, D.C.; 5 Digest 812, 6918.
- (12) *Re Pearson, Ex parte West Cannock Colliery Co.* (1886), 3 Morr. 187, D.C.; 5 Digest 816, 6941.

Re Godwin, The Trustee v. The British Reinforced Concrete Engineering Co., Ltd. on similar facts was included in the judgment.

Appeal from the county court of Staffordshire holden at Hanley and Stoke-upon-Trent.

The facts sufficiently appear from the judgment.

Tindale Davis, for the trustee, referred to: *Re Godding, Ex parte the Trustee* (1), *Re Fairley* (2) and *Re Evans* (3), *Figg v. Moore Brothers* (4), *Burns-Burns' Trustee v. Brown* (5), *Re Jenkins* (6), *Re Pollock and Pendle* (7), *Re Kern* (8), *Re Brelsford* (9), *Re Johns v. Pink* (10).

O. Kean, for the respondent Morris, referred to *Re Ford* (11).

Tindale Davis in reply.

Cur. adv. vult.

Nov. 19.—**LUXMOORE, J.**, read the following judgment of the court.

These appeals raise a question with regard to moneys paid direct by a judgment debtor to his creditor after execution had been issued and goods seized by the sheriff. In each appeal the point for decision is precisely the same. There is no dispute of fact.

Both appeals arise out of the bankruptcy of one Thomas Harold Godwin. He carried on business as a builder in the Potteries. For a long time before he filed his petition in bankruptcy he was in serious financial difficulties. There were, we have been told, some 130 executions levied against his property between Jan. 1 and Nov. 21, 1932. On the last-mentioned date he filed his own petition, and a receiving order was made against him on the same day. He was adjudicated bankrupt on Dec. 6, 1932.

On June 1, 1932, one M. E. Morris obtained a judgment against the bankrupt for £111 ls. and costs. On June 16, 1932, the judgment creditor caused execution to be levied against the bankrupt's goods for £121 6s. 6d. and the costs of execution. The sheriff went into possession. On July 2, 1932, the bankrupt paid to the judgment creditor the sum of £60 on account of the judgment debt; he paid a further sum of £60 on account on July 8, 1932; and on July 22, 1932, he paid to him a further sum of £13 9s. 3d., making in all the total sum of £133 9s. 3d., being the full amount due under

the judgment, together with the costs of the execution. On Aug. 3, 1932, the judgment creditor instructed the sheriff to withdraw, which he did on the same date, his costs being paid by the judgment creditor. It is admitted that no part of the judgment debt, or of the costs, remained outstanding on this date. The withdrawal was unconditional, and no power of re-entry was, or could in the circumstances, have been reserved. A

So far as the other case is concerned, the British Reinforced Concrete Engineering Co., Ltd., recovered judgment against the bankrupt for the sum of £301 10s. 3d. and costs on Jan. 19, 1932. Execution was levied against the bankrupt's goods on Feb. 13, 1932, for £316 17s. and the costs. The sheriff entered into possession and remained in possession until May 7, 1932. On March 5, 1932, the bankrupt paid to the judgment creditor the sum of £140. Further sums were paid on account as follows: £100 on March 23, 1932; £22 10s. on April 20, 1932; £17 10s. on April 21, 1932, and £54 9s. 4d. on May 7, 1932. These payments amount in the aggregate to £334 9s. 4d., being the full amount due under the judgment, together with the costs of the execution. On May 7, 1932, the sheriff was directed by the judgment creditor to withdraw, and he withdrew, his costs being paid by the judgment creditor. In this case, too, the withdrawal was unconditional, and no power of re-entry was, or could have been, reserved. B

In neither case was any return made to the writ by the sheriff, nor was any payment made to him by the bankrupt, all the payments being made direct to the judgment creditor. C

Although the payments to the judgment creditor were in each case sufficient to extinguish all liability under the judgments, and although the last payment was made in one case more than six months, and in the other more than four months, before the presentation of the bankruptcy petition, the trustee in bankruptcy instituted proceedings in the county court of Staffordshire, Holden at Hanley and Stoke-upon-Trent, for the recovery of the whole of the moneys paid by the bankrupt to these two judgment creditors. He based his claim in each case on a particular construction of the provisions of ss. 40 and 41 of the Bankruptcy Act, 1914, and relied upon a number of decided cases in support of that contention. The county court judge dismissed each application, and ordered the trustee in bankruptcy to pay the costs. The trustee in bankruptcy now appeals to this court from the decision of the county court judge. D

Sections 40 and 41 of the Bankruptcy Act, 1914, so far as material, are in the following terms. By s. 40 (1): E

"Where a creditor has issued execution against the goods . . . of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale." F

Section 41 (1): G

"Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion . . . by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made . . . the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver," H

and provision is made for the costs of the execution. Subsection (2): I

"Where, under an execution in respect of a judgment for a sum exceeding £20, the goods . . . are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution . . . and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the

balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

It is argued on behalf of the trustee in bankruptcy that the judgment creditor, having been paid the full amount due under the judgment, has in each case obtained the benefit of the execution because he has been paid the full amount due under his judgment, and that he is not entitled to retain the moneys so paid because the execution was not completed before the appropriate date. It is said that s. 40 (1) imposes a statutory limitation on the right of a judgment creditor, who has issued execution against the goods of a judgment debtor, to retain as against the trustee in the subsequent bankruptcy of the debtor anything recovered or received under the execution, unless the execution is completed, and that, subject only to the operation of the Statutes of Limitation, this applies no matter how long before the date of the subsequent bankruptcy the amount was recovered or received.

It is further said that the completion of the execution has an exhaustive statutory definition, and that under it an execution is not completed unless (i) the goods seized are sold, or (ii) the full amount for which the execution was issued is recovered or received by the sheriff. It was also said, although no great reliance was placed on this part of the argument, that in each of these cases an execution is incomplete unless the sheriff makes a return to the writ stating either that the goods have been sold and the amount has been recovered, or that it has been withdrawn on payment in full of the amount claimed, and the costs.

The argument is certainly startling, for if it is right, an execution creditor who has received the full amount of his debt direct from the judgment creditor is liable to return that sum to the trustee in a subsequent bankruptcy, although the money was received and the execution unconditionally withdrawn many years before the adjudication, the only limitation on the liability being the expiration of the period prescribed by the appropriate Statutes of Limitation. It was not rendered less startling when it was admitted by counsel supporting it that if the payments in this case had been made by the judgment debtor to the sheriff instead of to the execution creditors direct, the amounts paid could not have been recovered, and that the position would be the same if the payments had been made without any writ of *fi. fa.* having been issued.

The first question which arises on the construction of the section is what is the meaning of the phrase "the benefit of the execution"? On the argument put forward on behalf of the appellants, "the benefit of the execution" was assumed to cover any benefit resulting to the creditor which might be attributed to the issue of the writ of *fi. fa.* It seems to us that the whole foundation of the argument fails if this assumption is incorrect. It is to be observed that the phrase is "the benefit of the execution," not "any benefit from the execution," or "any benefit arising out of the execution"; and further, that there is no suggestion anywhere in this or the succeeding section of any repayment of money to the trustee in bankruptcy by the execution creditor.

Before considering the question of construction of these sections it is necessary to bear in mind what is the legal effect of the issue of a writ of *fi. fa.* and its delivery to the sheriff, and also to consider how the provisions of the sections in question have been developed from the earlier enactments, and, in doing so, to ascertain what was the object of the developments, and to what particular defect or defects in the earlier enactments they were directed. First, what is the position at common law and apart from the statutory provisions in Bankruptcy Acts when an execution creditor issues a writ of *fi. fa.* and delivers it to the sheriff. From the moment of its delivery, the goods of the judgment debtor are bound for the benefit of the execution creditor. If his writ is the only writ, or, if it is the first writ delivered to the sheriff, the execution creditor has the first right to the resulting charge on the goods. This charge puts the execution creditor in a better position than the other creditors of the judgment debtor. When the sheriff has seized the goods, no one else can deal with them so long as the execution remains in force. This result can properly be described as the benefit of the execution from the execution creditor's point of view. Certain limitations on those rights have been imposed by Parliament.

The latest development of these limitations is to be found in the sections which we have to construe. Section 40 (1) and (2) is for all practical purposes in the same form as s. 45 (1) and (2) of the Bankruptcy Act, 1883. Before the last-mentioned Act was passed, the only limitation on the execution creditor's common law rights under a writ of fi. fa. was imposed by s. 87 of the Bankruptcy Act, 1869. This section provided that where the sheriff had seized and sold a judgment debtor's goods, he should hold the proceeds for fourteen days after the sale; if during that period bankruptcy proceedings supervened—we need not refer in detail to the particular events enumerated in the section—the sheriff was to hold the proceeds of sale, after deducting his expenses, on trust for the trustee in bankruptcy of the judgment debtor. There was no express provision for the vacation of the execution and the handing over of the goods to the trustee where there had been no sale by the sheriff. This provision was retained in the Bankruptcy Act, 1883, and certain additional limitations were added. Section 45 (1) contained for the first time the provision to be found in substantially the same terms in s. 40 (1) of the Act of 1914. It stated in general terms that an execution creditor cannot retain the benefit of the execution against the judgment debtor's trustee in bankruptcy unless the execution has been completed. There was no provision that the execution creditor was to repay anything he had already received. If the execution was not in force at the date of the bankruptcy because it had been withdrawn unconditionally by the execution creditor, whether because his debt and costs had been paid in full, or not, there was no embargo on the debtor's goods, and nothing to prevent them being taken by the trustee in his bankruptcy for the benefit of the general body of creditors. The case was different if there was a subsisting execution in which no sale had taken place, for in that case unless the benefit which the execution creditor had obtained by the issue of his writ of fi. fa. was extinguished, the creditor would obtain an advantage over the general body of the creditors. This was the only point aimed at by the section. There was no hardship on the general body of creditors if, before the bankruptcy, the execution creditor was either paid out by the debtor in order to prevent his goods being sold under the execution, or was satisfied out of the proceeds of sale of the goods seized.

We are satisfied that on the true construction of s. 45 (1) of the Act of 1883 "the benefit of the execution" refers to the charge on the debtor's goods obtained by the execution creditor by the issue of his writ, and was not intended to include, and does not include, any payment which might have resulted directly or indirectly by reason of the writ having been issued.

After the Act of 1883 was passed a question arose with regard to moneys paid by the judgment debtor to the sheriff in order to avoid sale. An attempt was made on behalf of a trustee in bankruptcy to recover these from the sheriff on the ground that the transaction operated as a sale by the sheriff to the judgment debtor of the goods which were released in consequence of the payment. The question came before a Divisional Court constituted by POLLOCK, B., and CAVE, J., in *Re Pearson* (12). The claim of the trustee in bankruptcy was negatived. The ground of the decision was that the money was paid to prevent the execution being completed, and that there was no attempt to retain the benefit of the execution, for the creditor no longer wanted it. Section 11 of the Bankruptcy Act, 1890, was apparently passed to meet this decision, and to place moneys paid to the sheriff in order to avoid a sale under an execution on the same footing as the proceeds of sale under an execution. There is no ground for supposing that it was intended to have any retrospective effect on moneys received under an execution which, although not resulting in payment in full of the judgment debt and costs, had been withdrawn unconditionally long before the subsequent bankruptcy.

Section 11 of the Bankruptcy Act, 1890, provides by sub-s. (1) that

"where any goods of a debtor are taken in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver,"

and provision is made for the costs of the execution. It seems that the object of this

section was to provide in express terms for the handing over in the cases set out of all goods seized and unsold by the sheriff to the trustee in bankruptcy, and also for the handing over in the like manner of all money received by him in part satisfaction of the execution. The subsection expressly states that the provisions are not applicable to the case where the sheriff has recovered the full amount of the judgment debt and costs by sale of the goods seized, or has received the same amount. In each of those cases the execution has become ineffective and of no further use to protect the execution creditor.

Subsection (2) provides that

“where under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor.”

This subsection contains a reference for the first time to money paid to the sheriff to avoid a sale under the execution, and places it in precisely the same position as the proceeds of sale of goods seized under the execution.

The provisions of s. 11 of the Act of 1890 are, together with the provisions of ss. 45 and 46 of the Act of 1883, embodied in ss. 40 and 41 of the Act of 1914.

In our judgment, having regard to the nature of the protection obtained at common law by an execution creditor, and to the manner in which, and the purpose for which, the provisions of ss. 40 and 41 have been developed, and to the further fact that there is no mention in either of the sections of any payment by the execution creditor to the trustee in bankruptcy, the phrase “the benefit of the execution,” on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of *fi. fa.* and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other of the appropriate dates mentioned in the section, and to have no reference to an execution which has been unconditionally withdrawn long before any of those dates.

On this view of the construction there is no need to consider what is the meaning of the phrase “completion of the execution,” for there was in fact no subsisting execution of which the execution creditor was seeking to retain the benefit, and consequently no liability on either of the respondents to pay the sums claimed or any part of them to the trustee in bankruptcy. Reliance was placed during the argument on behalf of the trustee in bankruptcy on a number of decided cases. None of them was directed to the consideration of the phrase “the benefit of the execution,” and in each of them there was either an execution subsisting at the date of the bankruptcy or the payment which was impeached had been made to the sheriff or to the execution creditor within the fourteen days referred to in s. 41 (2) of the Act of 1914 in such circumstances as would have rendered it liable to be paid to the trustees in the judgment debtor’s subsequent bankruptcy by the sheriff if it had been paid to him instead of to the creditor.

In the view we have taken of the construction of s. 40, these cases have no bearing on the present case, and for that reason we do not think it necessary to refer to any of them except to *Re Godding* (1). Great reliance was placed on this decision for the purpose of supporting the argument that completion of an execution could only take place either by seizure and sale or by payment in full to the sheriff. HORRIDGE, J., appears to have assumed, without any argument being directed to the point, that the phrase “benefit of the execution” was used in s. 40 of the Act of 1914 in the wide sense as referring to any beneficial result flowing directly or indirectly from the fact that the creditor had issued execution, and without regard to whether the execution had been withdrawn conditionally or unconditionally. This view was unnecessary to the decision, and we think

it can therefore properly be treated as dictum. If, however, it was necessary to the decision, it is not binding on this court, and we find ourselves unable to agree with it.

What we have said with regard to the construction of ss. 40 and 41 applies only to cases where the execution has been unconditionally withdrawn, and has no application to those cases where the execution has only been withdrawn conditionally, and is therefore still in force at the appropriate dates if bankruptcy subsequently occurs.

We have deliberately refrained from saying anything with regard to that position.

In our judgment, the decision of the county court judge was right, and each of the appeals fails and must be dismissed. The appellant must pay the costs of each appeal.

Appeals dismissed.

Solicitors: *Sharpe, Pritchard, & Co.*, for *Kent & Jones*, Longton; *Gregory, Rowcliffe, & Co.*, for *Batterbee, Jones, & Jones*, Portmadoc, *Leonard Tubbs & Co.*, for *H. Wallace*, Copland.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re SAMUELS. Ex Parte THE TRUSTEE v. J. H. S. TEE (TRADING AS TEE BROTHERS & CO.)

[CHANCERY DIVISION (Farwell, J.), December 3, 4, 1934]

[Reported [1935] Ch. 341; 104 L.J.Ch. 197; 152 L.T. 454; 51 T.L.R. 169; [1934] B. & C.R. 158]

Bankruptcy—Execution—"Benefit of execution"—Right of creditor to retain—Debt paid partly by debtor—Withdrawal of sheriff reserving right of re-entry—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40 (1).

The Bankruptcy Act, s. 40 (1), provides: "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

A judgment creditor had seized the goods of the judgment debtor under a writ of fi. fa. Subsequently the judgment creditor and the debtor made an arrangement whereby in order to prevent a sale the debtor agreed to pay certain sums by instalments in payment of the judgment debt. In pursuance of such an arrangement the sheriff withdrew, but reserved a right of re-entry. The debtor paid several sums to the creditor in accordance with the arrangement. After the payment of such sums and before the whole debt was paid the debtor filed his own petition and a receiving order was made against him.

Held: a payment made by a debtor to avoid an execution before the date of the receiving order is not "the benefit of the execution" within s. 40 (1), and, therefore, the sums paid by the debtor were not for the "benefit of execution" within the subsection and the judgment creditor was entitled to retain them as against the trustee in bankruptcy.

Re *Godwin* (1), ante, p. 140, applied.

Notes. Followed: *Re Andrews, Official Receiver (Trustee) v. Standard Range and Foundry Co.*, [1936] 2 All E.R. 750. Referred to: *Re Love, Ex parte Official Receiver v. Kingston-upon-Thames County Court Registrar*, [1951] 2 All E.R. 321.

As to rights of creditors under executions, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq., and for cases, see 5 DIGEST 808 et seq. For Bankruptcy Act, 1914, s. 40, see 2 HALSBURY'S STATUTES (2nd Edn.) 376.

Case referred to:

- (1) *Re Godwin*, ante, p. 140, [1935] Ch. 213; 104 L.J.Ch. 189; 152 L.T. 392; 51 T.L.R. 118; 78 Sol. Jo. 930; [1934] B. & C.R. 101, D.C.; Digest Supp.

Motion by the trustee in bankruptcy asking for a declaration that certain sums, amounting altogether to £740 paid by the bankrupt to the respondent, a judgment creditor, on various dates before the date of the receiving order, formed part of the property of the bankrupt, and that the judgment creditor should pay those sums to the trustee in bankruptcy.

W. N. Stable for the trustee.

G. F. Kingham for the judgment creditor.

FARWELL, J.—The receiving order in this case was made on Jan. 28, 1932, the bankrupt having presented his own petition. The adjudication was on the same date. On Feb. 10 of the same year the trustee was appointed. On March 10, 1931, the judgment creditor had issued a writ against the bankrupt for a sum of £1,141 2s. 3d., being the balance due for goods sold and delivered. On May 12, 1931, an order was made in the action that the judgment creditor be at liberty to sign final judgment against the bankrupt for the amount claimed on the writ and costs, including certain other costs, to be taxed if not agreed. The order further provided that judgment was not to be entered if the bankrupt paid the debt and costs by certain instalments. Those instalments were £250 down, and the balance by £150 per month as from the date of the order. If any instalment should be in arrear for more than seven days, judgment was to be entered for the whole amount due at the date of default. The bankrupt further undertook to obtain the guarantee of his wife, or some other responsible person, guaranteeing payment in the event of any default of payment by him. There was no final judgment ever signed in that action. The order was a Master's order setting out the terms which I have mentioned. The £250 which was the sum to be paid down was duly paid by the bankrupt and two instalments of £150 each were paid at or about the due dates. On July 16 of the same year the judgment creditor issued a further writ against the bankrupt, suing him in his trade name and claiming the sum of £208 16s. 4d., being the price of goods sold and delivered. On Aug. 6, 1931, the respondent recovered judgment in that action for £208 16s. 4d., and £11 costs. On that judgment the judgment creditor issued execution on Aug. 8, and the sheriff entered under a writ of *fi. fa.*, but on or about Aug. 12 he withdrew from possession, as a result of an arrangement which was made between the bankrupt and the judgment creditor. That arrangement was that the amount of the last-mentioned judgment and costs, namely £219 16s. 4d., was to be added to the balance outstanding under the order dated May 12, and the monthly instalment increased from £150 to £200. As I have said, the sheriff went out of possession, but he reserved a power of re-entry under the writ. What precisely is the effect of the reservation of a power of re-entry is a matter which may be open to some doubt, but it seems reasonably plain that, at any rate, it operates to protect the sheriff and the creditor in the event of the sheriff re-entering under the original writ. On Aug. 12, in part performance of the agreement, the bankrupt paid to the judgment creditor an instalment of £200, together with a sum of £21 2s., the costs of the execution and the sheriff's fees, so that the costs of the sheriff in connection with the original execution were paid by the bankrupt. Further payments were made on Sept. 18, the sum of £200, and on Oct. 26 and 31 two further sums of £100 and £50. On Nov. 28, the bankrupt having failed to keep up payment of the agreed instalments of £200, the judgment creditor appropriated or, as it is suggested, purported to appropriate the whole of the instalments paid by the bankrupt up to that date in reduction of the original claim in respect of which there had been a Master's order, and he then sued the bankrupt and signed judgment against him for a sum of £72 2s. 8d., made up of the balance of the debt after such appropriation and costs.

It is said on behalf of the trustee that the judgment creditor had no right to make the appropriation which he made, or purported to make, in respect of the sums so paid. I am unable to appreciate on what grounds it is suggested that the judgment creditor

was not entitled so to treat the money which he received. As a result of the arrangement which was made in August, 1931, there was nothing, so far as I can see, which prevented such appropriation. The fact that the money had been so treated by the judgment creditor must have been known to the bankrupt, if not before, at any rate as soon as the judgment creditor sued him for the balance of the debt under the order of May 12, because, unless there had been such an appropriation, there is no possible explanation of the claim for that particular sum. The judgment creditor having obtained judgment for the £72 2s. 8d., on the same day a writ of fi. fa. was issued and the sheriff entered under the writ. He also entered under the writ of Aug. 8 in respect of which a power of re-entry had been reserved. On Dec. 2 the sheriff went out of possession under both executions, reserving the right to re-enter. The arrangement under which the sheriff went out of possession was this. The bankrupt paid the judgment creditor £90, £10 1s. of that was in respect of the sheriff's costs, and the balance, £79 19s., was credited on account of the amounts due under the two judgments herein referred to. It is suggested, in an affidavit filed on behalf of the judgment creditor, that the sum of £79 was appropriated towards the original debt; but I do not think, having regard to the correspondence to which my attention has been called, that that is substantiated, and the money must be taken to have been paid and to have been received on account of both debts. On or about Jan. 1, 1932, the bankrupt paid a further sum of £100 on account of the two judgment debts, leaving a balance of £123 1s., or thereabouts, outstanding and unsatisfied at the date of the bankruptcy. In those circumstances, the trustee claims that the two sums of £90 and £100 paid by the bankrupt to the judgment creditor, on Dec. 2 and Jan. 1, are the benefit of an incomplete execution, and that, accordingly, those sums are payable by the judgment creditor to the trustee.

The question what is the meaning of the term "the benefit of the execution" as used in s. 40 of the Bankruptcy Act, 1914, has recently been considered and decided by the Divisional Court in *Re Godwin* (1). Judgment was delivered on Nov. 19 of this year. It is unnecessary for me to refer in any detail to that judgment; it is sufficient to say that in the judgment is to be found this statement: "We are satisfied that on the true construction of s. 45 (1) of the Bankruptcy Act, 1883"—for this purpose there is no difference between that Act and the present Act—"the benefit of the execution' refers to the charge on the debtor's goods obtained by the execution creditor by the issue of his writ, and was not intended to include, and does not include, any payment which might have resulted directly or indirectly by reason of the writ having been issued." It is, however, right to say that the question of the effect of a right of re-entry being reserved was expressly left open, and, therefore, that decision may not be conclusive in this case. In my judgment, however, whatever may be the effect of reserving a right of re-entry, the sums of £90 and £100 in this case cannot be treated as being the benefit of the executions, and, therefore, repayable to the trustee. If and so far as the sum of £79 19s. could have been properly appropriated towards payment of the balance of the original debt, that debt, at any rate, would have been completely discharged, and the case to that extent would come within the decision of the Divisional Court and there could be no question of the benefit of the execution. But, even if that be not so, and, as I say, I do not think the evidence is sufficient to satisfy me that there was any such appropriation, in my judgment, a payment made to prevent a seizure and sale and to get rid of the execution in that way is not the benefit of the execution within the meaning of the words as used in s. 40 of the Act. Whatever the effect of reserving the right of re-entry may be, in my judgment a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act. Counsel for the trustee practically abandoned his claim to the very much larger sum which was asked for by the notice of motion, and, in my judgment, having regard to the facts in this case, the trustee is not entitled to repayment of any of the sums in question, and, accordingly, the motion fails and must be dismissed with costs.

Solicitors: *J. N. Nabarro; Robbins, Olivey, & Lake, for Sampson, Horner, & Co., Bradford.*

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

LINDSAY v. LINDSAY

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION] (Sir Boyd Merriman, P.), May 14, 1934]

[Reported [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; sub. nom.
L. v. L., 50 T.L.R. 441; 78 Sol. Jo. 472]

Divorce—Estoppel—Res judicata—Wife's undefended petition for divorce and custody of child—Issue of paternity not raised by husband in divorce suit—Decree nisi and order for custody—Husband's attempt to deny paternity in subsequent maintenance proceedings—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 190, 193—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), ss. 12 (1), 19, 26 (1).

In a wife's undefended suit for the dissolution of her marriage it was alleged that there was a child of the marriage, the husband raised no issue as to paternity, and a decree nisi was granted, with an order for custody of the child. In subsequent maintenance proceedings the husband pleaded the alleged misconduct of the wife and raised an issue as to the paternity of the child.

Held: the issue as to paternity could not be raised in the maintenance proceedings, and evidence as to paternity would not be received because the fact that the child was issue of the marriage between the parties was a fact directly in issue in the divorce suit, was actually decided there and appeared from the judgment itself to be the ground on which the judgment (as to custody) was based, and was, therefore, *res judicata*.

Dictum of LORD MERRIVALE in *Green v. Green* (1), ([1929] P. 101, at p. 104, followed. *Woodland v. Woodland* (2), [1928] P. 169, approved and applied.

Notes. Sections 183 (1), 190, and 193 (1) of the Supreme Court of Judicature Act, 1925, have now been repealed and replaced by ss. 12 (1), 19, and 26 (1), respectively, of the Matrimonial Causes Act, 1950.

Applied: *Duchesne v. Duchesne*, [1950] 2 All E.R. 784. Distinguished: *W. v. W.*, [1953] 2 All E.R. 1013. Referred to: *Robinson v. Robinson*, [1943] 1 All E.R. 251.

As to matters which are *res judicata* in maintenance proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 435, para. 978, and for cases on the subject, see 27 DIGEST (Repl.) 613–14, 5745–5748. For the Matrimonial Causes Act, 1950, ss. 12 (1), 19, and 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) pp. 399, 407, 413, respectively.

Cases referred to:

- (1) *Green v. Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; 45 T.L.R. 7; 73 Sol. Jo. 111; Digest Supp.
- (2) *Woodland v. Woodland* (otherwise *Belin or Barton*), [1928] P. 169; 97 L.J.P. 92; 139 L.T. 262; 44 T.L.R. 495; 72 Sol. Jo. 303; Digest Supp.
- (3) *Restall v. Restall*, [1930] P. 189; 99 L.J.P. 123; 143 L.T. 225; 46 T.L.R. 398; 74 Sol. Jo. 319, C.A.; Digest Supp.
- (4) *The Delta, The Erminia Foscolo* (1876), 1 P.D. 393; 45 L.J.P. 111; 35 L.T. 376; 25 W.R. 46; 3 Asp. M.L.C. 256; 11 Digest (Repl.) 550, 1579.
- (5) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; Digest Supp.
- (6) *Mould v. Mould*, [1933] P. 76; 102 L.J.P. 21; 148 L.T. 499; 49 T.L.R. 242; 77 Sol. Jo. 117; Digest Supp.
- (7) *Ord v. Ord*, [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 39 T.L.R. 437, D.C.; 27 Digest (Repl.) 234, 1882.
- (8) *Howlett v. Tarte* (1861), 10 C.B.N.S. 813; 31 L.J.C.P. 146; 9 W.R. 868; 142 E.R. 673; 21 Digest 146, 96.
- (9) *Re Hilton, Ex parte March* (1892), 67 L.T. 594; 9 Morr. 286; 21 Digest 177, 293.
- (10) *Humphries v. Humphries*, [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14, C.A.; 21 Digest 177, 294.

- (11) *Kingston's (Duchess) Case* (1776), 1 Leach, 146; 1 East, P.C. 468; 20 State Tr. 355; 2 Sur. L.C. 713; 168 E.R. 175; 27 Digest (Repl.) 692, 6623. A
- (12) *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585; 7 Jur. 54; 62 E.R. 1028; 21 Digest 165, 232.

Summons, adjourned into court for argument, by the respondent husband, after decree absolute granted to the wife petitioner, for leave to adduce aliunde evidence of non-access in support of his plea that he was not the father of a child the custody of whom had been granted to the wife. B

The parties were married in January, 1920. In July, 1930, the wife filed a petition for judicial separation on the ground of alleged desertion. She averred that there was issue of the marriage one child, a daughter, born in November, 1927, and prayed for an order for custody. The husband's answer was a bare denial of desertion. In February, 1931, the wife filed a supplemental petition charging the husband with adultery, and praying for dissolution of the marriage, in the exercise of the court's discretion, and for the custody of the child of the marriage. The wife admitted her adultery with a man on a single occasion during a voyage to South Africa in 1927. The husband did not file an answer to the supplemental petition, and on July 1, 1931, a decree nisi was pronounced and an order made giving the wife the custody of "the child issue of the marriage." The decree was made absolute on Jan. 15, 1934. Meanwhile the wife had filed a petition for maintenance, and in his answer the husband raised the issue of the wife's conduct, under s. 190 (1) of the Supreme Court of Judicature Consolidation Act, 1925, and also sought to dispute the paternity of the child. The present summons was for leave to admit aliunde evidence of non-access. C

By s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, "The court may, if it thinks fit . . . order that the husband shall . . . secure to the wife such . . . sum of money . . . as having regard . . . to the conduct of the parties, the court may deem to be reasonable." D

By s. 193 (1) the court is empowered to E

"make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings." F

Bayford, K.C. (with him *A. Richard Ellis*), for the respondent husband.—In the principal suit it was not a matter of concern to the husband that the wife should be granted the custody of the child of whom he considered he was not the father. The husband is now entitled to raise the issue of the conduct of the petitioner as wife on her application for maintenance, and he is at liberty to allege that the child in respect of whom maintenance was asked was not his, on the authority of *Restall v. Restall* (3). *Res judicata* cannot be set up in bar in this suit, as shown in *The Delta* (4). The only effect of a decree absolute is to debar the respondent from raising the question whether adultery has been committed or not. A petition for maintenance is a separate proceeding. The order for custody in the decree nisi was not a final judgment with regard to the child but merely a step in a *lis pendens*, and therefore the question can be raised on the issue of the wife's conduct; and there is no estoppel. G

Clifford Mortimer, for the wife petitioner.—I do not contend that it is inadmissible to raise the question of the wife's conduct on her petition for maintenance, but the affidavits which it is proposed to admit are directed solely to the question whether this was a child of the marriage. The husband is estopped from raising that issue in the maintenance proceedings in respect of the claim for the child. An order for the maintenance and education of children is based on an order for custody, and s. 193 was worded so as to meet the case of children of parents whose marriages were void. Though there is no specific Matrimonial Causes Rule as to uncontroverted allegations being regarded as admitted, the court is thrown back by r. 97 [now r. 82 of the 1957 Matrimonial Causes Rules] on the Rules of the Supreme Court, Order XIX, rr. 13, 17, and 19, which provide that facts not denied are to be taken as admitted. Part of the order on a decree nisi deals with the dissolution of the marriage and part with the future of the children of the marriage. The order for custody in the decree nisi specifically referred to the child H

issue of the marriage between the petitioner and the respondent. The averment of the husband in para. 7 of his further answer to the petition for maintenance seems to be a breach of the rule in *Russell v. Russell* (5). Moreover, an order for custody is a conclusive finding of legitimacy, as indicated by LORD MERRIVALE in *Green v. Green* (1); and HILL, J., held in *Woodland v. Woodland* (2) that where a petition for restitution of conjugal rights was not resisted the validity of the marriage could not subsequently be disputed by means of a petition for nullity.

Counsel for the wife referred to *Mould v. Mould* (6), *Ord v. Ord* (7), *Howlett v. Tarte* (8), *Re Hilton* (9), *Humphries v. Humphries* (10) and the *Duchess of Kingston's Case* (11). *F. S. H. Bryant* for the child.

SIR BOYD MERRIMAN, P.—This is a summons taken out by a husband, who is the respondent to a petition for maintenance filed on behalf of the wife, for leave to file certain affidavits putting in issue the paternity of a child born during the marriage. The summons was adjourned into court for argument on the questions of law. On July 17, 1930, the wife filed a petition for judicial separation on the ground of desertion. This petition included an allegation "that there is living issue of the said marriage one child," namely, the child in question "born on Nov. 21, 1927," and contained a prayer for the custody of the child.

On Dec. 13, 1930, the husband, by his answer, denied only that he was guilty of desertion, and prayed for the rejection of the petitioner's prayer and the dismissal of the petition on that ground. On Feb. 6, 1931, the petitioner filed a supplemental petition alleging adultery on the part of the husband and praying the court to exercise discretion in her favour, in spite of her own adultery, and to decree that the marriage might be dissolved, and that she might have "the custody of the child of the marriage." To this petition the husband filed no answer. On July 1, 1931, a decree nisi was pronounced, and the wife was awarded the custody of the said child. I shall refer more particularly to the terms of this decree later.

On Oct. 5, 1931, the wife presented the present petition for maintenance. By para. 2 of this petition she recited that she had been given the custody "of the only child of the marriage," namely, the said child; and prayed that such provision might be made as the court deemed proper "with regard to the maintenance of the said child of the marriage." On Jan. 15, 1932, a decree absolute was pronounced.

The husband now wishes, in answer to the petition for maintenance, to dispute the paternity of the said child, with the object of persuading the court to make a smaller award of maintenance on the grounds that the conduct of the wife in giving birth to another man's child during the coverture is a matter to be taken into account under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and that no maintenance should be allowed in respect of a child of which he is not the father. The wife's counsel admits, of course, that her conduct is a material element for consideration, but it is submitted that, as between these spouses, the paternity and legitimacy of this child is *res judicata*, and that the husband is absolutely precluded from putting before the court on the issue of maintenance any evidence directed to establish that he is not the father of the child.

The actual point of conflict between these two contentions will be seen when I add to the facts already stated that, in her statement in support of her prayer for discretion, the wife admits a single act of adultery with a named man, in the course of a voyage to rejoin her husband at Cape Town, which voyage began in February, and ended in March, 1927; that she had confessed this misconduct to her husband, but that they continued to live together; and that the child was born on Nov. 21, 1927. It is obvious, therefore, that this admission would support the suggestion that the other man was the father of the child, while not being inconsistent with the husband being the father. It is not contested that any evidence connected with the wife's misconduct is admissible, and I so hold; the objection is to the admission of any evidence directed solely to the question of paternity.

Counsel for the husband argues that a maintenance petition is a wholly separate proceeding from the petition for dissolution, raising separate issues and leading to a separate judgment. The issues in this petition, he says, are the respective incomes of

the spouses and the conduct of the parties in all respects which might be relevant to the decision whether any, and what, maintenance should be awarded. On the other hand, he says that an order for the custody of the child made upon the main petition does not operate as an estoppel, as there was no need for the husband to object to the wife being given the custody of a child of which he knew that he was not the father. If necessary, he would be prepared to support this contention, even if the order for custody were contained in the decree absolute; but he points out that in this case it is contained in the decree nisi, and that the maintenance petition was filed before the decree absolute. He contends, therefore, that at the material time there was only an order for custody in a pending suit, and that this does not amount to *res judicata*: (see *The Delta* (4)).

It is quite clearly laid down by the Court of Appeal in *Restall v. Restall* (3) that in exercising its discretion as to the award of maintenance it is essential that the court should have before it all the relevant evidence of the conduct of the parties both before and after the marriage. It is obvious that evidence that the wife has given birth to another man's child during the marriage is, of itself, relevant evidence on this point, if the evidence is, in the circumstances, admissible. In *Mould v. Mould* (6), BATESON, J., held that the rule laid down in *Restall v. Restall* (3) extended to a case of dissolution of marriage in which there had been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer if pleaded. Speaking for myself, I should desire to consider the matter further before holding that that result followed from the decision in *Restall v. Restall* (3). I would point out that that was a nullity suit based upon the consanguinity of the parties. It is manifest, therefore, that misconduct on the part of the petitioner would not of itself have afforded any answer; and, in fact, no question of estoppel arose in that case.

In considering the doctrine of *res judicata* the distinction is to be borne in mind between those cases in which a party, who has had an opportunity of proving a fact in support of his claim or defence, and has not chosen to rely on it, is afterwards precluded from putting that fact before any tribunal, as, for example, *Howlett v. Tarte* (8), *Re Hilton* (9) and *Humphries v. Humphries* (10), and a case in which the very fact itself has been judicially determined. The principles relating to both these classes of case are very fully dealt with in the judgment of LUSH, L.J., in *Ord v. Ord* (7). The present case is, indeed, one of the former class, inasmuch as the husband deliberately abstained from putting in issue the paternity of the child in his answer to the wife's original petition, and made no answer to the supplemental petition. Although the Matrimonial Causes Rules, 1924, do not deal in terms with the effect of the failure of a respondent to deny specific allegations in the petition, as is the case in Order XIX, rr. 13, 17, and 19, of the Rules of the Supreme Court, I think that it is plain that Matrimonial Causes Rules 21 and 22 (A), coupled with the form of answer given in Appendix No. VI to the Matrimonial Causes Rules, have the same effect. The specimen form indicates that the matrimonial offences charged should be specifically denied; that any counter-charge should be pleaded, with a note in these words:

"In like manner respondent is to state connivance, condonation, or any other matters relied on as ground for dismissing the petition."

The practice of this court is to treat as being admitted any material fact alleged in the petition which is not expressly stated in the answer to be denied or not to be admitted.

If the matter depended solely on this branch of the doctrine of *res judicata*, I should have wished to consider further whether, as was held by BATESON, J., in *Mould v. Mould* (6), there is anything in the decision in *Restall v. Restall* (3) which obliges this court to receive on a maintenance petition evidence of facts which would have afforded a defence to the petition for divorce, but which the respondent spouse deliberately refrained from raising in answer to that petition. In my opinion, however, the matter would stand on a mere failure by the respondent to raise the issue when he had the opportunity of doing so. This is essentially one of the class of cases in which, as between these parties, a fact directly in issue in the case has actually been decided by the court and appears from the judgment itself to be the ground on which it was based—to use

the words taken from SIR FITZJAMES STEPHEN'S DIGEST OF EVIDENCE, which are quoted by LUSH, J., [1923] 2 K.B. at page 440 of the judgment in *Ord v. Ord* (7). I do not think that this is merely a case of a matter coming collaterally in question, or of a matter incidentally cognizable, or of a matter to be inferred by argument from the judgment, see the *Duchess of Kingston's Case* (11) and the passage from the judgment of KNIGHT BRUCE, V.-C., in *Barrs v. Jackson* (12), quoted, [1923] 2 K.B. at page 441 of the judgment of LUSH, J., in *Ord v. Ord* (7).

Agreeing, as I do, with the decision of BATESON, J., in *Mould v. Mould* (6) that a petition for maintenance is a proceeding separate and distinct from the original petition for a dissolution, I think, nevertheless, that it clearly appears from s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that the petition for maintenance is dependent on the pronouncement of a decree for divorce or nullity of marriage. In other words, this particular petition can only be brought as incidental to the matrimonial suit between the same parties. Section 193 (1) lays down that in any proceeding for divorce the court may make such provision as appears just with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings; and that it may do so from time to time, either before, or by, or after the final decree. It thus appears that the jurisdiction of the court, both with regard to custody and maintenance of children, is limited to children the marriage of whose parents is the subject of the proceedings. It is, of course, for this reason that the wife's original petition in this suit contains, as is invariably the case, the allegation as to the child of the marriage, which I have already quoted.

Counsel for the husband says that the decree nisi is merely an interim or inchoate order, depending for its effect on the pronouncement of decree absolute. It is true that if, for any reason, such as a successful intervention by the King's Proctor, the decree nisi were rescinded and the petition dismissed, an order for custody made on the decree nisi would go with the rest. This seems necessarily to follow by virtue of s. 193 (1) from the dismissal of the petition. In no other sense, however, is the order for custody dependent upon the decree absolute. By s. 183 (1) of the Act it is laid down that the decree for a divorce shall, in the first instance, be a decree nisi, not to be made absolute until after the expiration of six months, but, as I have already pointed out, s. 193 (1) enables the court to make an order for the custody or maintenance of the children, either before, or by, or after the final decree in the suit itself. In this case, in accordance with the section, and following the general practice, the court, by the decree nisi, decreed that the marriage be dissolved

"by reason that since the celebration thereof the respondent has been guilty of adultery, unless sufficient cause be shown to the court why this decree should not be made absolute within six months from the making thereof";

and ordered that (naming her)

"the child, issue of the marriage between the petitioner and the respondent, do remain in the custody of the petitioner until further order of the court, but it is directed that such child be not removed out of the jurisdiction of the court without its sanction."

The decree absolute refers to the terms of the decree nisi, and concludes with the words:

"And no such cause having been shown, the court, by application of the said petitioner, by final decree pronounced and declared the said marriage to be dissolved."

There is no reference whatever in the decree absolute to the order for the custody of the child. Thus it appears that the order for custody in the decree nisi is the substantive order, and that it precedes the petition for maintenance. The fact that the child is issue of the marriage between the petitioner and the respondent is the fact directly in issue is actually decided and appears from the judgment itself to be the ground on which it was based, as must necessarily be the case if the court is to have jurisdiction to make the order.

In these circumstances, I am of opinion that, whatever the truth may be about the

petitioner's evidence alone, it is not possible to hold collusion, the wife has given evidence, and the judge has said that while disbelieving some of it, he has accepted other parts of it, and that might well have meant that he accepted that part which received corroboration from the written evidence. The wife's evidence is quite plain that she had made an agreement with the husband that she would supply the hotel evidence sufficient to enable him to get a divorce without bringing in Mr. Johnstone, and that evidence received confirmation from the fact that, when she found that the petition had been amended so as to make Mr. Johnstone a co-respondent, she took the step of going to see her husband at Huddersfield. There was, therefore, evidence to justify the judge in holding that there was collusion, and the cross-appeal must be dismissed.

The question then arose what was the effect of the collusion upon the petition and supplemental petition. It is clear that the President endeavoured to avoid circuitry of proceedings and expense, and, in order to do so, merely dismissed the prayer of the petition and gave the petitioner relief on the supplemental petition. If, however, the prayer of a petition is dismissed the whole petition must be dismissed. Part of the petition cannot be dealt with separately in that way. It was, however, then said that the supplemental petition still stood of its own power, *proprio vigore*, and gave the right to the relief asked for by the petitioner. There is no ground for such a contention. The supplemental petition could not be severed from the petition. It is stated in the textbooks that supplemental petitions are not referred to in the rules, but are governed by case law and practice. The practice is laid down in certain directions of the registrar, and direction No. 69 which states:

"Supplemental and amended petitions must bear the proper notice to any person not previously named. Orders giving leave to amend the petition or to file a supplemental petition must, where there has been an appeal, state the time allowed for filing or amending an answer (Jan. 14, 1924)"

treats a supplemental petition in the same way as an amended petition, and direction No. 7 provides:

"An application to file a supplemental petition made prior to service of the original petition should be refused and a new petition containing all the charges should be filed (Sept. 11, 1911)"

—that means that you cannot make the supplemental petition stand alone. And direction No. 74 has the same effect, making it clear that the petition and the supplemental petition were treated as one petition. Direction 74 provides that where a petition for restitution of conjugal rights has been filed, an application to file a supplementary petition praying for dissolution of marriage should be refused. The restitution petition should be dismissed, and fresh proceedings instituted (July 28, 1931).

There is also no distinction made between the petition and supplemental petition in the cases. *Smith v. Smith* (7) shows that proceedings are based on one citation and one only. In *Schira v. Schira and Sampajo* (8) it was held that, where a husband petitioned for dissolution of marriage on the ground of his wife's adultery, and she in answer prayed for a judicial separation on the ground of desertion, the Court would not, at the husband's instance (the wife opposing), terminate the suit by dismissing the petition. That was once more going back to the root namely, the original petition. *Borham v. Borham and Brown* (1) and *Lapington v. Lapington* (2) are also authorities for that view. Therefore it is impossible to hold that the supplementary petition was anything but part of and an addition to the original petition, and stood by virtue of the citation on which the original petition was founded. The supplemental and original petitions accordingly cannot be separated for the purposes of granting relief. The petition in this case comes on a petition as amended and supplemented, and as the petition has been found to be by collusion the result is that the whole of the original petition, as amended, and the supplemental petition come to ruins.

The appeal must be allowed, and therefore the verdict of the jury fails. The damages awarded are of large amount, but no doubt the jury were influenced by the fact that in spite of Mr. Johnstone's letter promising never to see the wife again nevertheless he again lived in adultery with her against the honour of his own written word. This

court, therefore, throws no doubt nor raises any question as to the amount of the damages awarded. The appeal will be allowed with costs, and the petition, and with it the supplemental petition, be dismissed. The verdict against Mr. Johnstone for damages cannot therefore stand. No variation will be made in the order as to the costs of the proceedings before the President except that that part of it which ordered the co-respondent to pay the costs of the supplemental petition must be discharged.

SLESSER, L.J.—In this case the learned President has found that the petition of March of 1933 was prosecuted in collusion with the respondent, and so far as that petition is concerned he has exercised the duty imposed upon him under s. 178 of the Judicature (Consolidation) Act, 1925, and has dismissed the petition. In April, 1933, however, a supplemental petition was entered by the petitioner alleging further acts of adultery on the part of the respondent which extended from April 10 to April 15, 1933. In respect of that supplemental petition there is no finding of collusion, and the learned judge has found himself able to give damages against the co-respondent in respect of the matters alleged, the adulteries, in that supplemental petition. He has gone further and increased the damages sought in the supplemental petition by amendment, by incorporating in them some of the damages claimed in respect of the matters which strictly were within the ambit of the original petition.

The primary question of law in this case is whether the learned judge was right, having found that there was collusion in the presentation and prosecution of the petition, in holding that that wrong did not in fact make void the supplemental petition, so that he ought to have dismissed the supplemental petition too. There appears to be no doubt that if an altogether new petition is presented, a finding of collusion in an earlier petition will not necessarily disqualify the later and independent petition, and this court has to consider now what is the legal position of what has been called in the directions and in the authorities a supplemental petition. The words "supplemental petition" find no place either in the Judicature Act, s. 178, or in its ancestor, ss. 29 and 30 of the Matrimonial Causes Act, 1857. Therefore, when we read the words "the petition" in the statute, which requires a petition to be dismissed where collusion is proved, we are not told by the statute itself whether those words, "the petition," do or do not include a supplemental petition. That is the question which we have here to decide.

The purpose of a supplemental petition is clear when the history of the matter is once considered. It is a general rule at the common law that matters which arise subsequently to the issuing of a writ cannot be pleaded in that particular action, but in the ecclesiastical courts, before the passing of the Act of 1857, it was otherwise. The question arose in the case of *Webb v. Webb* (9). There, after the citation, the mover for the citation discovered misconduct which was subsequent in date to the date of the citation, and the question arose whether such additional evidence was or was not properly includable in the subject-matter of the libel following upon the citation; and DR. LUSHINGTON said this:

"It has been correctly stated that the practice of the ecclesiastical court is to allow facts of adultery that may have come to the knowledge of a party even after publication—[that is publication of the libel]—to be pleaded,"

and he did permit the additional plea; but I cite that case as showing that at that time it was quite clear that the additional plea was a part of and incorporated in the original libel and was by no means a separate suit. That was the position under the old ecclesiastical law.

The matter next came up in 1870 in the case of *Borham v. Borham and Brown* (1). The question which was raised in that case was: notwithstanding the ecclesiastical practice, whether the language of s. 30 of the Act of 1857, which says that

"in case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed"

—that is, alleged before the time of the petition, because of course under the Act of 1857 the old system of citation and libel was done away with and the petition was substituted—whether the new words in s. 30, dealing with petition and not with citation, libel

owners of part of the property affected, and without giving the applicants an opportunity of challenging or testing such communications. A

The following facts were set out in the affidavit of Mr. J. G. L. Pattie, the applicants' solicitor. On May 26, 1932, the medical officer of health for the borough of Jarrow made a representation to the borough council in accordance with s. 1 of the Act, recommending the demolition of all buildings in the area in question. On Feb. 23, 1933, the borough council made the clearance order, and on April 13 gave notice of it to the Minister of Health and to the owners of the property affected. On April 26 the applicants gave notice of objection to the order. On May 31 a public local inquiry was held by an inspector of the Ministry. Evidence was then given on behalf of the applicants that part of the property in the clearance area could be made fit for habitation by the execution of certain repairs, and that they were willing to perform such repairs. On Sept. 6, 1933, the inspector called a meeting between the medical officer of health and the applicants, at which he endeavoured to get the parties to agree on the repairs which ought to be executed, and eventually they did so. The borough council, however, were still of opinion that the area should be cleared, and wrote letters to that effect to the Minister, in one of which they set out the views of the borough engineer, who had not been called as a witness at the inquiry. On Jan. 23, 1934, three officials of the Ministry visited Jarrow. They inspected the clearance area, and discussed the matter with members of the council. No notice of the visit was given to the applicants, and they had no opportunity of being present at any part of it or of disputing any statements made thereat. On March 27, 1934, the Minister confirmed the clearance order. B

By the Housing Act, 1930, s. 1, power is given to the local authority to declare an area to be a clearance area. By s. 2 (1) it is provided that such orders must be confirmed by the Minister before becoming operative. By s. 2 (2) the provisions of Sched. I to the Act shall have effect with respect to the making, submission and confirmation of clearance orders. By Sched. I, para. 4: C

"If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification. . . ." D

SWIFT, J., in his judgment said: Whether the Minister was right in doing what he did or whether he was wrong seems to me to be dependent upon the view which one takes of the position of the Minister acting under the Housing Act of 1930. Is he a judge trying a *lis inter partes*, or is he an administrative officer whose duty is to inform his mind before he orders action to be taken and who may, so far as I know, inform his mind in any way he likes? If he is a judge deciding some issue between two parties who are brought before him, nothing can be clearer than that he must not hear one word from one party without the other party being present to listen to it, to test it by cross-examination, and, perhaps, to contradict it, but if he be an administrative officer merely having to perform a statutory duty which is imposed upon him by the legislature for the benefit of the community, if he has merely to decide whether, as a matter of administration, he shall or shall not confirm an order which somebody under his control has made, then, provided that he acts within the terms of the Act of Parliament, and complies with all the requirements which Parliament has laid down to govern his conduct, it seems to me that he may arrive at his decision in any way which seems good to him. Parliament has said about his duties three things: If there be no objection, then you may confirm the order; if there be objectors, then you must (i) hold a public inquiry, and (ii) consider the objections and the report of the inquiry; but it does not say: And you must not go on and hear for yourself statements as to the financial position of the local authority or statements as to their capability of providing houses, or statements of the opinion of their borough engineer. So far as I can see he may hear anything he likes. . . . I find it is impossible to say that what has been done in this case is not within E

the Act, or that any requirement of the Act has not been complied with. For these reasons, in my opinion, this application must be dismissed.

The applicants appealed.

Blanco White and *J. Charlesworth* for the applicants.

The Solicitor-General (Sir Donald Somervell, K.C.) and *Bowstead* for the Minister of Health.

GREER, L.J.—This is an appeal from an order of *SWIFT, J.*, given under s. 11 of the Housing Act, 1930, by which he gave effect to a decision that he ought not to, and would not, make an order quashing an order of the Minister of Health confirming a clearance order which was made by the borough council of Jarrow. The order is concerned with certain buildings in what is called the No. 1 area, and the applicants are concerned with certain properties in it.

The powers of the Minister are contained in the Act and the first schedule thereto. Under those powers he could, if no objection had been taken on behalf of the persons interested in the property, have made an order confirming the order made by the council on Feb. 23, 1933. In so far as the Minister deals with the matter in the absence of objection by the owners, it is clear to me, and I think to the other members of the court, that he is acting in a ministerial or administrative capacity, and is entitled to make such inquiries as he thinks necessary to enable him to make up his mind whether it is in the public interest that the order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. In deciding whether the order shall be made in spite of the objections which have been raised by the owners it seems to me reasonable that the Minister should be regarded as exercising quasi-judicial functions. The effect of the order, if confirmed, would be greatly to diminish the value of the property owned by the objecting parties. The decision of the Minister is a decision relating to the rights of the objecting parties, and a decision in respect of which he is exercising quasi-judicial functions. I will deal with the decisions and the law on the question after shortly stating the facts.

On Feb. 23, 1933, the clearance order was made by the council. On April 13 notice was published in accordance with the provisions of the Act, and on April 26 objections were made by the applicants:

"We hereby give notice that our clients object to the above-mentioned clearance order made by the mayor, aldermen, and burgesses of Jarrow on Feb. 23, 1933, on the following grounds: 1. The dwelling-houses in the area are in good repair and sanitary condition and fit for human habitation."

With objections 2 and 3 we are not concerned. No. 4 runs:

"The expense to the local authority if the order is confirmed will be more than the town can bear at the present time,"

and No. 5:

"The local authority cannot provide or secure the provision of accommodation for the persons of the working classes who will be displaced by the clearance of the area within the time specified in the order for the premises to be vacated, nor does such accommodation already exist."

No. 6 states:

"In any event the demolition of all the buildings in the area is not the most satisfactory method of dealing with conditions in the area."

So far as they presented their objections at the public hearing by the inspector appointed by the Minister, the applicants relied mainly on grounds Nos. 1 and 6. But grounds Nos. 4 and 5 were never withdrawn, and, consequently, were matters which had to be considered by the Minister before he made his final decision.

During the course of the inquiry held on May 31 and June 1, 1933, counsel who represented the borough council of Jarrow, in supporting the order which the council had made, suggested that the situation was one which might be adequately met by an

it in the present case. I agree that the order which the Master of the Rolls has indicated must be made. A

Appeal allowed.

Cross-appeal dismissed.

Solicitors: *Bulcraig & Davis; Beyfus & Beyfus.*

[Reported by WILLIAM LATEY, Esq., and GEOFFREY P. LANGWORTHY, Esq.,
Barristers-at-Law.] B

LIDDLE v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL C

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.J.J.), April 10, 11, 12, 23, 1934] D

[Reported [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P.
319; 50 T.L.R. 377; 78 Sol. Jo. 349; 32 L.G.R. 241]

*Child—Negligence—Trespasser—Liability of landowner—No act likely to injure child—
Obvious danger.*

To make a landowner liable for injury to a child on his land it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with the knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable. E

The defendant council were carrying out certain road improvement works in their district which involved taking some adjoining land into the highway and building a retaining wall between the new edge of the highway and the adjoining land. In the course of the work a large quantity of soil was excavated, and, until it could be cleared away, was banked up against the retaining wall on a grass verge which had been made between the wall and the actual carriageway. The heap of soil thus created gave easy access to the top of the wall. Children living in the neighbourhood played round the works when the workmen were not there, but they were always warned off when the workmen saw them. On a Saturday afternoon, after the workmen had left, the plaintiff, a boy of seven years, who had previously been warned off, when passing along the road, saw two of his companions sitting on the wall, and climbed up the heap of soil and joined them. In showing them how bees flew about he gesticulated, waving his arms, with the result that he lost his balance, fell backwards on to the land beneath the wall, and received serious injuries. In an action in which the plaintiff claimed damages from the defendant council in respect of his injuries on the grounds of negligence, or, alternatively, nuisance, F

Held: (i) the plaintiff had no right to go on that part of the verge where the earth had been heaped as it was still being used for the defendants' works and had not been dedicated to the public, and so he was a trespasser; the danger of falling off the wall to anyone who climbed on it was an obvious danger, and the heap of earth against the wall could not be called a trap; the plaintiff had been warned not to go near the works; and, therefore, the defendant council were not liable in negligence for his injuries; G

(ii) even if the plaintiff were a licensee, the danger was an open and not a concealed danger, and the defendants would not be liable to him; H

(iii) nor were the defendants liable to the plaintiff as for a nuisance on the highway since (a) the verge on which the heap of earth was had not been dedicated and so was not part of the highway, and the heap did not constitute a nuisance to the plaintiff or anyone else using the highway, and (b) if the heap were treated as a danger adjoining the highway, it did not cause the accident.

Notes. Considered: *Morley v. Staffordshire County Council*, [1939] 4 All E.R. 92; *Williams v. Cardiff Corpn.*, [1950] 1 All E.R. 250. Referred to: *Coates v. Rawtenstall Borough Council*, [1937] 1 All E.R. 333; *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Gould v. McAuliffe*, [1941] 1 All E.R. 515; *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; *Adams v. Naylor*, [1944] 2 All E.R. 21; *Buckland v. Guildford Gas Light and Coke Co.*, [1948] 2 All E.R. 1086.

As to the duty towards children, see 23 HALSBURY'S LAWS (2nd Edn.) 584-586, 613, 614, and for cases, see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

- (1) *Excelsior Wire Rope Co., Ltd. v. Eileen Callan and others*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 35 Com. Cas. 300; 28 L.G.R. 543, H.L.; Digest Supp.
- (2) *Mourton and another v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; 35 Com. Cas. 308; 94 J.P. 190; 46 T.L.R. 256; 74 Sol. Jo. 170, Digest Supp.
- (3) *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214, H.L.; Digest Supp.
- (4) *Latham v. Richard Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, 262.
- (5) *Hayward v. Drury Lane Theatre, Ltd. and Moss Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, 255.
- (6) *United Zinc and Chemical Co. v. Britt* (1922), 258 U.S. Rep. 268.
- (7) *Rail. Co. v. Stout* (1873), 17 Wallace (U.S.) 657.
- (8) *Cooke v. Midland and Great Western Rail. Co. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, 590.
- (9) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 38 T.L.R. 102; 20 L.G.R. 205, H.L.; 36 Digest (Repl.) 119, 597.
- (10) *Hardy v. Central London Rail. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 T.L.R. 843; 64 Sol. Jo. 683, C.A.; 36 Digest (Repl.) 120, 603.
- (11) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, 419.
- (12) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J. Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
- (13) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; 102 L.J.K.B. 270; 148 L.T. 333; 49 T.L.R. 125; 77 Sol. Jo. 30; 36 Digest (Repl.) 109, 547.
- (14) *Harrold v. Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, 577.
- (15) *Campbell v. Ord and Maddison* (1873), 1 R. (Ct. of Sess.) 149; 11 Sc.L.R. 54; 36 Digest (Repl.) 136, *1041.
- (16) *Gavin v. Arroll & Co.* (1889), 16 R. (Ct. of Sess.) 509; 26 Sc.L.R. 370; 36 Digest (Repl.) 19, *65.
- (17) *Cass v. Edinburgh and District Tramways Co., Ltd.* 1909 S.C. 1068; 46 Sc.L.R. 734; 1909 1 S.L.T. 513; 36 Digest (Repl.) 124, *920.
- (18) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, 100.
- (19) *Bird v. Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, 808.
- (20) *Harrison v. Duke of Rutland and others*, [1893] 1 Q.B. 142; 62 L.J.Q.B. 117;

repairs and alterations to the buildings. Whether the surveyor was one of the officials or whether the borough engineer was we do not know, but we do know that by a letter of Feb. 24, which was sent by the town clerk to the Ministry of Health, the views of the borough engineer were put in front of the Minister before the Minister gave his decision. The borough engineer had not been called at the public inquiry. Those who represented the owners had not had the opportunity of cross-examining him, testing the value of his opinion, and representing to the Minister, through the inspector, that no weight should be attached to it. The view of the borough engineer is expressed in a letter from the town clerk to the Ministry on Feb. 24, 1934, as follows:

"In any event this does not arise, as the engineer advises that the foundations and structure of the houses, generally speaking, preclude the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation."

That is a view which is hardly consistent with the view expressed on behalf of the borough council by the barrister who appeared for them at the inquiry. It is an additional reason being urged by the council, on the advice of the borough engineer, in order to support the stress which they had said they were going to put on the Ministry to confirm the order which they had made.

I think it clear on the authorities that, if this were a case not affected by the special legislation contained in s. 11 of the Act of 1930, certiorari would have been granted to quash the confirming order. I take that to be the law as laid down by LORD HALDANE, L.C., and LORD PARMOOR in *Local Government Board v. Arlidge* (1) ([1915] A.C. at pp. 133-34, and 141), affirming the view which had been expressed by LORD LOREBURN, L.C., in *Board of Education v. Rice and others* (2) ([1911] A.C. at p. 182). There are also the judgments in *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd. and others* (3), giving the history of the extension of the powers of interfering by certiorari, not merely with inferior courts but with individuals who are given quasi-judicial functions. I think those observations are specially applicable to this case, where the quasi-judicial function was of a character to deprive the applicants of important rights which they held as citizens with their common law rights of property. It is said that certiorari will not lie by reason of the statute which contains special provisions with regard to what the judge may consider. Section 11 of the Act provides:

"(1) The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation. (2) So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form. . . (3) If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—

"(i) may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and

"(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant."

It is said by counsel for the applicants that the court ought to be satisfied that the order is not within the powers of the Act or, alternatively, that the interests of the appellants had been substantially prejudiced by a requirement of the Act not having been complied with.

To see what the requirements of the Act are one must look to the first schedule, para. 4 of which provides:

"If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification."

That part of the section does not apply, because the objections were not withdrawn. Then follow these words:

"But in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification."

It seems to me that that involves the proposition that the matters there mentioned are the only matters which he is entitled to consider. If, instead of directing his mind solely to those matters, he also considers evidence which might have been, but had not been, given at the public inquiry, but was given *ex parte* afterwards without the applicants having any opportunity whatever to deal with it, it seems to me that the confirming order was not one made within the powers of the Act. It is admitted that, though the draftsmanship of the section is not perfect, the order there referred to is the confirming order and not the original order. In my judgment, it is true to say that an order made by a quasi-judicial officer based on materials which are not those referred to in Sched. I, para. 4, is an order which is not within the powers given by the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do it in accordance with the rules of natural justice—that is to say, he must hear both sides and must not hear one side in the absence of the other.

For these reasons I have come to the conclusion, though the point is not free from difficulty, that we ought to reverse the order which has been made by the learned judge and quash the confirming order made by the Minister of Health.

MAUGHAM, L.J.—I am of the same opinion. The important question which arises on this appeal is one of law with regard to the position of the Minister of Health in confirming an order establishing a clearance area, under the Housing Act, 1930. The Act, by s. 1, gives the local authority power to declare an unhealthy area to be a clearance area, but the order is not binding on anyone until it has been approved or confirmed by the Minister of Health.

The local authority have to be satisfied, as the Solicitor-General pointed out in his argument, on four matters. The first is a question of fact—whether the dwelling-houses in the area are, by reason of disrepair or sanitary defects, unfit for human habitation, or, by reason of other circumstances mentioned in the section, dangerous or injurious to the health of the inhabitants of the area. The second is whether the most satisfactory method of dealing with the conditions of the area is the demolition of all the buildings in the area. The usual alternative is that of reconditioning the houses in the area. It is to be noted in connection with these two qualifications that the authority, in defining the area on a map, have to exclude from the area any building which is not unfit for human habitation, or dangerous, or injurious to health, so that, if there were in the area some buildings which at small expense could be rendered perfectly proper, they would, I think *prima facie*, have to be excluded from the area. The third qualification is that suitable accommodation is available for the persons displaced by the clearance, and the fourth, that the resources of the authority are sufficient for the purpose of carrying the resolution into effect.

It is apparent that those are four very widely different qualifications. The first, as I have said, is a pure question of fact. The second is also, I think, a question of fact in the sense that it does not involve any question of law. It is a question for the discretion of the person who has to satisfy himself on the matter, and depends on weighing the relative advantages and disadvantages of dealing with the area in the way of demolition or by the alternative method of reconditioning the houses in it. I may add, however, that the second qualification, being very largely one of discretion, is naturally one with regard to which people would form very different views, because, if the first qualification

steps to prevent the boy from being tempted and so led into danger. The question is whether the facts can possibly justify this conclusion. The position of an adult who suffers injury while on the land of another depends on which of one of three classes he falls into: (i) a trespasser, who has no right on the land; (ii) a licensee, whether bare or with an interest; (iii) an invitee, who may be in a better position if he pays for his entrance. The duties owed by the landowner to an adult are to be found discussed at length by LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3) ([1929] A.C. at pp. 364 and 365); by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4) ([1913] 1 K.B. at p. 410), and by myself in *Hayward v. Moss Empires, Ltd.* (5) ([1917] 2 K.B. at p. 913).

In the present case it was agreed that, if the plaintiff had been an adult, he would have no cause of action. The danger of falling off the wall was, in daylight, obvious; the heap would have nothing to do with the fall; whether the grown-up man was a trespasser or a licensee, the owner of the wall had, on the facts, no legal obligation to him. But the plaintiff was a child of six years. "English law has been very ready to find remedies for their injuries"—i.e., of children: per HAMILTON, L.J., in *Latham's Case* (4) ([1913] 1 K.B. at p. 413). HOLMES, J., whose views on English as well as on United States law are entitled to the most respectful consideration, has said, in *United Zinc and Chemical Co. v. Britt* (6) (258 U.S. Rep. at p. 275):

"Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon the landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle, if accepted, must be very cautiously applied."

Again, on the following page he says:

"There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

From that case, where the Supreme Court of the United States decided by six votes to three in favour of the landowner and against the child, it appeared that there was some conflict both in the United States and in England between a view which may be called the "humanitarian" view, that a child which has no knowledge or discretion to make it capable of contributory negligence must be guarded by the landowner on whose ground it is allowed or tempted to enter, and the "hard" or "Draconian" view, that a child must trespass at its own risk, and if it is so young as not to appreciate what it is doing it is for its parents, and not for the landowner on whose land it enters without invitation, to protect it.

I agree with the view of SALMOND, J., in his work on TORTS, where he says (7th Edn. at p. 472):

"The humanitarian impulse which prompts such decisions as that of *Rail. Co. v. Stout* (7) and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company."

I also agree with the passage in POLLOCK ON TORTS (13th Edn. at p. 544), where he says:

"Some decisions in America have gone to great lengths in favour of infant licensees and even trespassers, and have been much discussed. In England they have been followed only to this extent, that an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them."

Confusion was temporarily introduced into the law of England by the decision of the House of Lords in *Cooke v. Midland and Great Western Rail. Co.* (8), where a small child recovered against a railway company damages for injuries received by its playing on an accessible and movable turntable which the railway company knew was frequented by children, and as to which it did nothing to prevent them from coming to the danger. I think it is now established by the judgment in *Latham's Case* (4) and the explanation of *Cooke's Case* (8) by LORD ATKINSON in *Glasgow Corpn. v. Taylor* (9) ([1922] 1 A.C. at p. 53), that *Cooke's Case* (8) must be treated as the case of a child impliedly licensed to use a plaything which was for a child a trap.

In *Hardy v. Central London Rail. Co.* (10) this court dismissed the claim of a child of five who, being taken, not for the purpose of travelling, by an older boy into a station where there was an escalator, from which children were driven away whenever they were seen, caught his fingers in the band of the escalator. He was treated by the court as a trespasser. In that case I stated the position of a child trespasser thus ([1920] 3 K.B. at p. 473):

"If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

LORD HAILSHAM, L.C., in the House of Lords in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), citing my words, said ([1929] A.C. at p. 367):

"My Lords, I believe that that sentence accurately summarises the English law." In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with the knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

If that is the law, do the facts in this case fall within it? The defendants were doing road repairs and might lawfully exclude the public from the portion of the road being repaired. In the case of new construction, not repair, the public had no right to go on the land on which the road was constructed till it was dedicated, and while under construction it was not dedicated. In my view, the child, in going up the heap left there in course of construction of the road, and in sitting on the wall, was a trespasser. When the jury answered the question, "Was the infant plaintiff lawfully using the highway?" by saying "Yes," they had no direction on this point at all, and I cannot think that to walk up a heap left there during road construction and sit for a talk on a four-and-a-half-foot wall could be reasonably held to be lawful use of the highway. Again the jury were asked: "Were the defendants negligent in leaving the heap of soil next the wall?" Negligence involves a duty which is not complied with, and the jury got no direction as to what the duty of the defendants was; and I see no evidence that the judge ever considered what the duty was, except that he says:

"Would a reasonable man, knowing the neighbourhood and what children are, have left the heap there?"

That, if applied to the escalator, might be answered against the railway company. The accident was in broad daylight on work not yet completed, and the defendants warned the children off whenever they were seen. I do not think there is any evidence on which a reasonable jury could answer "Yes" to that question.

Another set of questions was: "(ii) Were the acts of the defendants an allurement or invitation to the plaintiff to go on the wall?; (iii) Was the heap of soil a trap to the infant plaintiff? (iv) Did the heap of soil and the wall constitute a thing dangerous in itself if meddled with?" I can only deal with this group of questions in the way in which HAMILTON, L.J., dealt in *Latham's Case* (4) with a heap of building rubbish which crushed the hand of an infant plaintiff. The jury had found that the defendants ought

each house. These schedules are to be submitted by them to respective owners, and the owners are to be asked to give undertakings to carry out all the work specified within a reasonable time and to agree to closing orders being made in respect of parts of the houses."

According to the report, the next statement was:

"If the owners will not give undertakings to do reasonable reconditioning, the Minister will confirm the order so far as those properties are concerned,"

not, be it observed, with regard to those areas as to which the owners will not give an undertaking. I accept that, coming from the source it did, and having been drawn up at the time as a fair account of what took place between the officials of the corporation and the officials of the Ministry.

The next event was that the housing committee of the town council and the town council wholly disagreed with the view which had been taken on their behalf at the inquiry and with the proposals suggested by the Ministry; and not being at all in agreement, they had recommended on Sept. 19, "that the council's decision that this area should be a clearance area be again stressed upon the Ministry." At a later date there was a proposal that some of the officials should wait upon the Ministry, that being done at the request of the Ministry of Health. On Dec. 19 there is the report that the committee received from the officials who visited the Ministry of Health, and, having received that report, they

"recommend that the Minister be asked to receive a deputation consisting of your chairman and Councillor Symonds to reiterate again your submission that the demolition of all the houses in this area is the only effective method of dealing with the area."

That was after the Ministry of Health had once more dealt with the question of reconditioning, without in any way suggesting that reconditioning was not the best way of dealing with it, and, indeed, the implication was that at that time they thought it was. I agree that it may well be that the Ministry at this time were in favour of the course of reconditioning, because they were impressed with the financial position of Jarrow and had at the backs of their minds the question whether the resources of the authority were sufficient for the purposes of carrying out the clearance order. Therefore, I do not want to lay too much stress upon the view, which I think anybody would immediately take on reading the documents to which I have referred, namely, that at this time the Ministry were in favour of reconditioning rather than demolition. It may be that they were in favour of reconditioning only because they thought the resources of the authority were insufficient, but what followed is the matter which so much exercises my mind in dealing with the facts of this case.

On Jan. 3, 1934, the town clerk wrote to the Ministry of Health—and I am here going to read very short paragraphs—stating that the council, notwithstanding the views of the Ministry or the recommendation of the Ministry,

"are still of opinion that the only satisfactory way of dealing with the property is by its inclusion in a clearance area, and they submit that the order should be confirmed."

Then they asked, in support of those submissions, that the Minister should receive a deputation, consisting of the chairman of the housing committee and two councillors, together with the appropriate officials. The reply on Jan. 10, 1934, was the reply of Mr. Kerwood, which has already been read on behalf of the Ministry. He begins by saying:

"I think it will be better to write to you semi-officially in reply to your letter of Jan. 3. In view of the quasi-judicial function which the Minister has to exercise, there would be considerable difficulty in the way of receiving a formal deputation representing one side only."

I think he was perfectly right in that view, and it encourages me to think that in deciding that some of the functions of the Minister are, at any rate, quasi-judicial, I am not giving

a shock to the officials in the Ministry of Health. On Jan. 11, 1934, there was a reply which was described as a semi-official reply. It contains this paragraph:

"When the officials reported to the council the result of the interview in London"—[which was to the effect that the Ministry were pressing an agreement between the owners and the borough officials with regard to reconditioning]—"the council would not permit them to proceed on the lines suggested, the council still being of opinion that the only satisfactory way of dealing with the property was by its inclusion in a clearance area."

This took place at the meeting in December, and at that meeting also, the council resolved to ask the Ministry to receive the deputation mentioned in the previous letter. Upon that Mr. Kerwood wrote back on Jan. 17, and he noted that the council decided "that their officers should not proceed on the lines agreed at the recent interview at this office." I think there is some importance to be attached to the word "agreed." The letter continues:

"It so happens that Mr. Francis, who, as you are no doubt aware, is the Principal Assistant Secretary in charge of Housing, has arranged to visit with Mr. Collin and myself various towns in the north of England next week. We could spend at Jarrow the afternoon and early evening of Tuesday, Jan. 23, and it would, I think, be of advantage if you could arrange for the members of the council and the officers who were to form the proposed deputation to this office to meet us then and discuss the matter."

I think that was an error of judgment. I think the right course, having regard to the view I take and Mr. Kerwood himself had taken, who had pointed out that the functions of the Ministry in this respect were quasi-judicial, would have been to suggest that in addition to those people one or two representatives of the other side should also be present. However, that was not done, and on Jan. 23, 1934, this ex parte perambulation of the district took place, followed as it was by a meeting at the town hall at which further suggestions were made with regard to the main point, namely, the question whether reconditioning was a course which might not be better than demolition.

On Feb. 24, 1934, the matter being still not yet decided by the Minister under his powers, the town clerk wrote to Mr. Kerwood a letter in which he says:

"The council . . . resolved to adhere to the order, and to request its confirmation." [Then, he says]: "At the same time, to meet the wishes of the Minister, they resolved to give their undertaking to review the five year slum clearance programme in the light of their financial resources."

Then: "The grounds on which the council reiterate their request for the confirmation of the order are as follows," and there follow the four qualifications, which I mentioned as qualifications in s. 1 of the Housing Act, 1930. There follows this paragraph:

"In connection with reasons (1) and (2)—[(2) being the question whether demolition or reconstruction was the best plan]—"the council are advised by the engineer that it is not practicable, even if it were right to do so, to deal with the houses individually by way of closing order, as to reconstruct the houses would require the total vacation of the houses by the inhabitants."

I should imagine, in the absence of evidence, that that is a thing upon which opinions might differ,

"In any event this does not arise, as the engineer advises that the foundations and structure of the houses, generally speaking, precludes the possibility of their reconstruction into dwelling-houses reasonably fit for human habitation."

That is an entirely fresh point, a matter that had never been raised on the public inquiry. The engineer is said—I agree it is hearsay—to have formed that opinion, and instead of the Ministry writing back and deprecating matters of that sort being stated to them without the presence of the other side and without any opportunity for the other side to cross-examine to such a statement, or to call evidence on the other side, one gets the final letter from Mr. Kerwood saying:

thing dangerous in itself, or if meddled with?—(A) Yes. (v) Did the negligence of the defendants cause the plaintiff's injuries?—(A) Yes. (vi) Was the infant plaintiff lawfully using the highway?—(A) Yes. (vii) Was the heap of soil so placed against the wall a nuisance on the highway?—(A) Yes. (viii) Was such nuisance the cause of the infant plaintiff's injuries?—(A) Yes. (ix) Damages?—(A) £1,500. A

It was contended on behalf of the defendants that on the proved facts the infant plaintiff was a trespasser at the time when he fell from the wall, or that he was, if not a trespasser, at most a licensee. If he was a trespasser they were clearly not liable, as they had not constructed the dangerous place with a view of causing an injury to him or, indeed, in contemplation of him at all. They contended also that, even if he were a licensee, the danger was an obvious and not a hidden danger, and the only obligation on the defendants was, so far as licensees were concerned, not to subject them to a hidden danger without warning them. This argument was supported by reference, *inter alia*, to the following authorities: *Latham v. Richard Johnson & Nephew, Ltd.* (4), *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), *Hardy v. Central London Rail. Co.* (10), and *Donovan v. Union Cartage Co., Ltd.* (13). B C

For the plaintiffs it was contended that the "arrangement or contraption," as it was called, consisting of a mound of soil alluring children to climb up to the wall and sit or play on it, was, within the authorities, such a state of circumstances as raised a duty on the defendants to take reasonable care to see that infant children doing what every reasonable person would expect them to do came to no harm. They contended that the plaintiff was not a trespasser, or, indeed, merely in the position of a licensee, but was lawfully using the highway when sitting on the wall. In support of their arguments they relied on *Lynch v. Nurdin* (12), *Cooke v. Midland and Great Western Rail. Co.* (8), *Harrold v. Watney* (14) and *Excelsior Wire Rope Co., Ltd. v. Callan* (1). D E

In my judgment, this appeal must succeed. I can quite understand the force of the argument that in a case such as this the law ought to cast a duty on the defendants to exercise reasonable care to prevent damage happening to infant children at a place adjoining a high road which they have left in a state which is likely to allure children into a position of danger, and at one time I was inclined to think that the law as laid down by LORD DENMAN, C.J., in *Lynch v. Nurdin* (12), and by LORD MACNAGHTEN in *Cooke v. Midland and Great Western Rail. Co.* (8), would support such a proposition, but I am satisfied, on going further into the authorities, that the modern cases make it necessary to hold that the law imposes no such duty on people in the situation of the defendants in this case. F

The rules of law applicable to claims by adults or infants for damage occasioned through alleged negligence on the part of the owner or occupier of the land or property on which the injured person was at the time he received his injuries have been often considered by the courts. The decision of the House of Lords in *Cooke v. Midland and Great Western Rail. Co.* (8) seemed to have cast doubt on the well-established principles applicable to such cases, and to have extended the liability of owners or occupiers to infant licensees and to infant trespassers. The decision in that case must, of course, be treated as decisive of the propositions of law necessarily involved in it, but it is now certain that some of the observations in the speech of LORD MACNAGHTEN cannot be accepted as accurate statements of the law. In the course of his speech LORD MACNAGHTEN is reported to have said ([1909] A.C. at p. 234): G H

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?" I

Later decisions of the Court of Appeal and the House of Lords make it necessary for us

to treat the observations quoted above as dicta going beyond what was necessary for the decision of the case.

The law has now been stated in unmistakable language by LORD HAILSHAM, L.C., and LORD DUNEDIN in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3) and by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4).

There are three categories, and only three categories, in which any person meeting with an accident causing personal injuries on the land or property of another can be placed for the purpose of determining a claim against the latter for damages for negligence. Such a person may be an invitee, a licensee, or a trespasser. Children have not by law been placed in a different category. Their rights and the liabilities of the landowner or occupier fall to be determined by deciding in which of the three categories the proved facts place them. The law applicable to claims by children in each of these categories is stated by LORD HAILSHAM, L.C., in *Addie's Case* (3) as follows ([1929] A.C. at p. 364):

"The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

I have no doubt about the category in which the plaintiff in the action under appeal must be placed. When he fell off the wall he was a trespasser. It was not, and could not be contended, that he was an invitee—that is, a person invited to come on to the wall for some purpose in which the defendants and the plaintiff were both interested. To justify anyone to be treated as an invitee he must be on the land for some purpose in which he and the proprietor have a joint interest: see per LORD DUNEDIN in *Addie's Case* (3) ([1929] A.C. at p. 371).

Was the plaintiff a licensee? Was he on the wall with the express or tacit permission of the defendants' servants in charge of the task of reconstructing the road? It seems to me quite certain that he was not. This is not like the cases in which the courts have drawn the inference of tacit permission from the defendants' knowledge of continuous resort to their property without any real objection by them. So far from tacitly permitting children to play on the wall and its approaches while their work was in progress, the defendants' servants drove them away when they had an opportunity of doing so. The plaintiff's two friends admitted this, and the only evidence as to the plaintiff himself was the unchallenged statement of Linton that he had warned the plaintiff not to come on this part of the work. It is impossible to hold that the plaintiff was a licensee.

"When a proprietor protests and goes on protesting, turning away people when he meets them . . . and giving no countenance in anything that he does to their presence there, then I think no court has a right to say that permission must be implied."

I quote those words from LORD DUNEDIN's speech in *Addie's Case* (3) ([1929] A.C. at p. 372).

In my judgment, there was no evidence to be left to the jury that the plaintiff was either an invitee or a licensee. The defendants owed no duty to him except the duty

MAXWELL v. THE DIRECTOR OF PUBLIC PROSECUTIONS

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Wright), May 31, June 1, 28, 1934]

[Reported [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; 50 T.L.R. 499; 32 L.G.R. 335; 24 Cr. App. Rep. 152; 30 Cox, C.C. 160]

Criminal Law—Evidence—Prisoner giving evidence—Cross-examination—Question regarding previous charge and acquittal—Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), s. 1, proviso (f).

In general, in a criminal trial where the prisoner gives evidence in his defence, no question as to whether he has previously been convicted or acquitted of, or charged with, an offence should be asked unless it helps to elucidate the particular issue which the jury is investigating or goes to credibility, i.e., tends to show that the prisoner is not to be believed on his oath. Indeed, such a question ought not to be admitted if there is any risk of the jury being misled into thinking that it goes, not to credibility, but to the probability of his having committed the offence with which he is charged.

Where, therefore, it appeared on the evidence that the fact that the prisoner had been charged with, and acquitted of, a previous offence of the same kind as that with which he was then charged afforded no proof that he had committed the latter offence, nor did it go to his credibility,

Held: that the fact of the previous charge and acquittal was irrelevant, and, accordingly, no question regarding it should be put to the prisoner in cross-examination.

Notes. Distinguished: *R. v. Waldman* (1934), 24 Cr. App. Rep. 204. Considered: *R. v. Sugarman* (1935), 79 Sol. Jo. 966. Followed: *R. v. Savory* (1942), 29 Cr. App. Rep. 1. Considered: *Noor Mohamed v. R.*, [1949] 1 All E.R. 365. Referred to: *Stirland v. D.P.P.*, [1944] 2 All E.R. 13.

As to evidence in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436 et seq., and for cases, see 14 DIGEST (Repl.) 401 et seq. For Criminal Evidence Act, 1898. see 9 HALSBURY'S STATUTES (2nd Edn.) 613.

Cases referred to:

- (1) *R. v. Barron* (1913), 9 Cr. App. Rep. 236; 110 L.T. 350; 78 J.P. 184; 24 Cox, C.C. 83; 30 T.L.R. 187, C.C.A.
- (2) *Makin and Wife v. Attorney-General for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, 4094.
- (3) *R. v. Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, 4091.

Appeal from an order of the Court of Criminal Appeal.

The appellant, William Maxwell, was convicted at York Assizes on Feb. 27, 1934, on two counts of an indictment charging him with the manslaughter of a woman and with using an instrument with intent to procure miscarriage, and he was sentenced to twenty months' imprisonment. At the trial he was asked whether on a previous occasion he had been charged with a similar offence and whether that charge had resulted in an acquittal. He appealed to the Court of Criminal Appeal against his conviction and asked for leave to appeal against sentence.

By s. 1 (f) of the Criminal Evidence Act, 1898:

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character, unless . . . (ii) he has

personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

LORD HEWART, C.J., giving the judgment of the Court of Criminal Appeal, said: The questions which were asked were questions on the point whether the appellant had been previously charged with some offence other than that wherewith he was then charged. The argument of his counsel is that the mere fact that a charge had been made against the appellant, seeing that that charge terminated in an acquittal, ought not to have been made the subject of cross-examination, for the reason that it left a doubt whether the acquittal was or was not right. If that argument is correct, it would seem that in no circumstances can room be found for the words in s. 1 (f) of the Criminal Evidence Act, 1898, "been charged with" as distinguished from the words "committed" or "been convicted of." It seems, indeed, a bold argument to allege that it is more prejudicial to an accused person to be asked whether he has been charged and acquitted than to be asked simpliciter whether he has been charged. No doubt, as counsel for the appellant has said, if counsel for the prosecution had merely asked whether the appellant had been charged with the other offence, it would have been the duty of counsel for the defence immediately to make clear in re-examination that that charge had terminated in an acquittal.

It seems to us that that which was done here was clearly within the terms of para. (f) of the proviso to s. 1 of the Act of 1898. It is said that so to decide involves the over-riding or ignoring of the decision of this court in *R. v. Barron* (1), but that case and the present case are not at all in *pari materia*. There the complaint was that inadmissible evidence had been given, namely, evidence of another alleged offence of which the appellant was innocent. What was there said was that in those circumstances to offer evidence affirmatively relating to the other offence might well have left a lingering doubt in the minds of the jury whether the appellant was guilty of that offence of which *ex hypothesi* he was innocent. That case did not turn on the construction of the proviso to s. 1 of the Act of 1898. The court is, therefore, of opinion that the cross-examination which took place in the present case was admissible, and that the appellant has no grievance on the ground of having been asked the questions which have been read.

The appeal was dismissed, and the appellant appealed to the House of Lords under a certificate given by the Attorney-General under s. 1 (6) of the Criminal Appeal Act, 1907, on the ground that there was involved a point of law of exceptional public importance and it was desirable in the public interest that a further appeal should be brought.

C. Paley Scott, K.C., and *W. H. Macfarlane* for the appellant.

Willoughby Jardine, K.C., and *James Alan Bell* for the Crown.

The House took time for consideration.

June 28. The following opinions were read.

LORD SANKEY, L.C.—The appellant, William Maxwell, was convicted at York Assizes of the manslaughter of a woman called May Holliday, and also of using on her an instrument with intent to procure miscarriage. In effect he was found guilty of causing the woman's death by performing on her an illegal operation, and was sentenced to twenty months' imprisonment with hard labour. He appealed from that conviction to the Court of Criminal Appeal, who dismissed the appeal. From their decision he has now appealed to your Lordships' House under a certificate given by the Attorney-General under the Criminal Appeal Act, 1907, on the ground that there is involved a point of law of exceptional public importance and in his opinion it was desirable in the public interest that a further appeal should be brought. The question is whether it was permissible in the particular facts of the case under the Criminal Evidence Act, 1898, s. 1 (f), for the prosecution to ask the prisoner whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal.

plaintiff as a passenger upon the highway to leave it, even in its wider extent, and seat himself for purposes of amusement upon the retaining wall. In the language of LOPES, L.J., in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 154):

"If a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired he is a trespasser. The easement acquired by the public is a right to pass and re-pass at their pleasure for the purpose of legitimate travel."

In *R. v. Pratt* (21), ERLE, J., said (4 E. & B. at p. 867):

"I take it to be clear law that, if in fact a man be on land where the public have a right to pass and re-pass, not for the purpose of passing and re-passing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston v. Payne* (22)."

It may well be, as LORD ESHER, M.R., said in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 146):

"Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

An example of such reasonable use is given by A. L. SMITH, L.J., in *Hickman v. Maisey and another* (23) ([1900] 1 Q.B. at p. 756), in the case where "a man, while using a highway for passage, sat down for a time to rest himself by the side of the road"; and I think that in the present case, if the plaintiff could have shown that he sat upon this wall for the purpose of resting himself as a passenger, it would have been difficult to say that he was a trespasser; but the evidence is otherwise. The plaintiff himself was not called, but it is clear from the evidence of the boys who were called, who were with him at the time of the accident, that they went upon the mound and upon the wall to play and not to rest in their passage along the highway; and the question of intent is material, for as COLLINS, L.J., says in *Hickman's Case* (23) ([1900] 1 Q.B. at p. 758):

"If a person is found using a highway in a manner which is altogether outside the purpose for which it was dedicated, that raises the question with what intention he went on the highway; for the law judges by his subsequent action what his original intent was."

The case of *Earl of Coventry and others v. Willes* (24) seems to suggest that there would be no general right to stay upon a road in order to witness races on Newmarket Common, and, indeed, the only question occasioning any doubt on this matter is the extent to which acts done upon the highway may or may not be reasonably incident to its user. It is to be observed that in *Hickman v. Maisey and another* (23) A. L. SMITH, L.J., seems to think that, if a man took a sketch from a highway, no reasonable person would treat the act as an act of trespass, whereas in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 156) KAY, L.J., suggests that:

"If by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind."

LORD ESHER in the same case indicates (at p. 147):

"Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose."

A person leaning up against a fence by the side of the highway need not necessarily be a trespasser: per A. L. SMITH, L.J., in *Harrold v. Watney* (14) ([1898] 2 Q.B. at p. 322).

In the present case the accident took place by the plaintiff falling off a wall by the

side of the highway, a wall which was itself the property of the appellant local authority, but such a wall would come within the principles laid down in *Turner v. Ringwood Highway Board* (25), where it was decided that trees growing by the side of the highway belonged to the owner of the soil. Thus, by reason of the effect of user for purposes unconnected with passage, if the wall be treated as part of or incident to the highway, or if the conclusion, as I think it should be, is that the wall was not part of the highway, in any event the plaintiff, in getting upon it, was unlawfully trespassing upon the property of the appellant county council. It was not suggested that there was any direct intention to injure, but it is said, and so found by the jury, that the presence of the mound and the wall in conjunction constituted an allurement or a trap. This is not a case of an allurement arising after the child has entered upon the wall with leave or as of right, but is the contrary case mentioned by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4) ([1913] 1 K.B. at p. 416) of a child that

"will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so."

The finding of the jury, therefore, that the heap of soil placed against the wall was in the nature of a trap or allurement will not avail him if he was a trespasser, unless such trap was put there with intention to injure, which is not suggested in the present case. This is clear from the judgment of this court in *Hardy v. Central London Rail. Co.* (10), where the matter is thus put by SCRUTTON, L.J. ([1920] 3 K.B. at p. 473):

"If the children were trespassers the landowner was not entitled intentionally to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

It may be said that this view is inconsistent with the decision of the House of Lords in the well-known case of *Cooke v. Midland and Great Western Rail. Co.* (8); but when that case is examined it is clear, as appears in the speech of LORD ATKINSON ([1909] A.C. at p. 239), that the children there were on the railway company's land with the leave and licence of the defendants.

The distinction between a child who is a trespasser and one who is not in this matter is made finally clear by LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), where he says ([1929] A.C. at p. 366):

"The decision in *Cooke's Case* (8) rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap; it therefore throws no light upon the question as to any duty owed by the occupier of premises to a trespasser."

His Lordship goes on to express full agreement with the judgment of HAMILTON, L.J., in *Latham Case* (4), where, as I have pointed out, the distinction is clearly made. He cites many other cases to the effect that, where the children were trespassers, it is necessary to show an intention to injure, and says that there are none to the contrary effect; nor do there appear to be any, unless we find such authority in *Lynch v. Nurdin* (12) where judgment was given for the plaintiff, although he was a trespasser on the defendant's cart. Although *Lynch v. Nurdin* (12) remains an authority on the question of contributory negligence of children, the present state of the law seems to me to justify me in declining to think that it binds me to-day to say that the defendants are liable when they do not put a trap intentionally or intend to injure if the plaintiff is a trespasser.

The Divisional Court, in the recent case of *Donovan v. Union Cartage Co., Ltd.* (13) seeks to distinguish *Lynch v. Nurdin* (12) on the ground that in *Donovan's Case* (13) the children climbed upon an unhorsed van and that there was no inherent danger therein, whereas in *Lynch v. Nurdin* (12) the cart had a horse attached to it; but they do not seek to support their finding for the defendants on the ground that the children were trespassers, though ACTON, J., quotes ([1933] 2 K.B. at p. 73) the speech of LORD ATKINSON in *Cooke's Case* (8) ([1909] A.C. at p. 237), who extends the possibility of

prosecution had merely asked whether the appellant had been charged with the other offence, it would have been the duty of counsel for the defence to make it clear in re-examination that that charge had terminated in an acquittal."

On the appeal to your Lordships' House, your Lordships came to the conclusion, after hearing the argument on both sides, that the appeal should be allowed, and made an order accordingly, but announced that at a later date the reasons for that course would be given. These I now proceed to give.

It must first of all be stated that it has been admitted throughout that the appellant in saying that he had lived a good, clean, moral life, has put his character in issue, and had in the words of the proviso (f) (ii) "given evidence of his good character." The first question here is, what consequences follow from that. This involves the proper construction of s. 1 (f) of that Act. We start with the hypothesis that the prisoner has given evidence of his good character. It will be remembered that it was not until the year 1851 that the parties to a civil case were entitled to give evidence on their own behalf. But the prisoner could not give evidence on his own behalf at his trial until the coming into operation of the Criminal Evidence Act, 1898, except in a few cases, of which the most important were of certain offences under the Offences against the Person Act, 1861 (24 & 25 Vict., c. 100), specified in s. 20 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), under s. 1 of the Law of Evidence Act, 1877 (40 Vict., c. 14), and under s. 20 of the Act of 1885. When Parliament, by the Act of 1898, effected a change in the general law and made the prisoner in every case a competent witness, it was in an evident difficulty, and it pursued the familiar English system of a compromise. It was clear that if you allowed a prisoner to go into the witness-box, it was impossible to allow him to be treated as an ordinary witness. Had that been permitted, a prisoner who went into the box to give evidence on oath could have been asked about any previous conviction, with the result that an old offender would seldom, if ever, have been acquitted. This would have offended against one of the most deeply rooted and jealously guarded principles of our criminal law, which, as stated by LORD HERSHELL, L.C., in *Makin and Wife v. Attorney-General for New South Wales* (2) ([1894] A.C. at p. 65), is that:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

Some middle way, therefore, had to be discovered, and the result was that a certain amount of protection was accorded to a prisoner who gave evidence on his own behalf. As it has been expressed, he was presented with a shield, and it was provided that he was not to be asked and that, if he was asked, he should not be required to answer, any question tending to show that he had committed or been convicted of or been charged with any offence other than that wherewith he was then charged, or was of bad character. Apart, however, from this protection, he was placed in the position of an ordinary witness in an ordinary civil case. The laws of evidence were not otherwise altered by the Criminal Evidence Act, 1898, and the prisoner who was a witness in his own case could not be asked questions which were irrelevant or had nothing to do with the issue which the court was endeavouring to decide. As has already been pointed out, the prisoner in the present case threw away his shield and, therefore, the learned counsel for the prosecution was entitled to ask him, and he could be required to answer, any question tending to show that he had committed or been convicted of or been charged with an offence, but subject to the consideration that the question asked him must be one which was relevant and admissible to the case of an ordinary witness. The Act does not in terms say that in any case a prisoner may be asked or required to answer questions falling within proviso (f), or impose any such affirmative or absolute burden upon him.

I think this conclusion is confirmed by a study of the words of the statute. In s. 1 (e) it has been enacted that a witness may be cross-examined in respect of the offence

charged, and cannot refuse to answer questions directly relevant to the offence on the ground that they tend to incriminate him: thus if he denies the offence, he may be cross-examined to refute that denial. These are matters directly relevant to the charge on which he is being tried. Proviso (f), however, is dealing with matters outside, and not directly relevant to, the particular offence charged. Such matters, to be admissible at all, must in general fall under two main classes. One is the class of evidence which goes to show, not that the prisoner did the acts charged, but, if he did these acts, he did them as part of a system or intentionally, so as to refute a defence that, if he did them, he did them innocently or inadvertently, as, for instance, in *Makin and Wife v. Attorney-General for New South Wales* (2), where the charge was one of murder. Another illustration of such cases is *R. v. Bond* (3). This rule applies to cases where guilty knowledge or design or intention is of the essence of the offence. The other main class is where it is sought to show that the prisoner is not a person to be believed on his oath, which is generally attempted by what is called cross-examination to credit. Closely allied with this latter type of question is the rule that, if the prisoner by himself or his witnesses seeks to give evidence of his own good character, for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character, so that he may fairly be cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined to show the contrary.

All these matters are dealt with in proviso (f). The substantive part of that proviso is negative in form and as such is universal and is absolute unless the exceptions come into play. Then come the three exceptions, but it does not follow that when the absolute prohibition is superseded by a permission, the permission is as absolute as the prohibition. When it is sought to justify a question it must not only be brought within the terms of the permission, but also must be capable of justification according to the general rules of evidence and in particular must satisfy the test of relevance. Exception (i) deals with the former of the two main classes of evidence referred to above, that is, evidence falling within the rule that where issues of intention or design are involved in the charge or defence, the prisoner may be asked questions relevant to these matters, even though he has himself raised no question of his good character. Exceptions (ii) and (iii) come into play when the prisoner by himself or his witnesses has put his character in issue, or has attacked the character of others. Dealing with exceptions (i) and (ii), it is clear that the test of relevance is wider in (ii) than in (i). In the latter, proof that the prisoner has committed or been convicted of some other offence can only be admitted if it goes to show that he was guilty of the offence charged. In the former (exception (ii)) the questions permissible must be relevant to the issue of his own good character and if not so relevant cannot be admissible. But it seems clear that the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune. It seemed to be contended on behalf of the respondent that a charge was per se such evidence that the man charged, even though acquitted, must thereafter remain under a cloud, however innocent: I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue, namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined.

It does not result from this conclusion that the word "charged" in proviso (f) is otiose. It is clearly not so as regards the prohibition; and when the exceptions come into play there may still be cases in which a prisoner may be asked about a charge as a

thereof," and that the nuts were, therefore, property divisible among the creditors in accordance with s. 52 (2) (c) of the Presidency Towns Insolvency Act, 1909 (which corresponds with s. 38 (c) of the English Bankruptcy Act, 1914).

Held: the official assignee was entitled to the proceeds of sale because (i) the railway receipts were documents of title to the goods within the meaning of s. 178: *Ramdas Vithaldas Durbar v. S. Amerchand & Co.* (1) (1916), L.R. 43 Ind. App. 164, applied; (ii) the owner of the goods may be "a person who is in possession of any goods or of any bill of lading" within the meaning of s. 178: s. 3 of the English Factors Act, 1889, distinguished; (iii) the pledge of the documents amounted to a pledge of the goods, and the ground nuts had, therefore, been validly pledged to the lenders: *Ramdas, etc. v. S. Amerchand* (1) applied; (iv) the lenders, in handing over the fourteen receipts on Feb. 7, 1929, parted only with their custody, and did not part with possession of the goods or receipts in such a way as to affect the pledge; *North Western Bank v. Poynter and others* (2), [1895] A.C. 56, followed; *Re David Allester, Ltd.* (3), [1922] 2 Ch. 211, approved; (v) the letters of hypothecation constituted a good equitable charge of the nuts which was binding between the borrowers and the lenders, even though no notice of it had been given to the railway company, and was equally binding on the official assignee who merely stood in the borrowers' shoes; *Re Slee, Ex parte North Western Bank* (4) (1872), L.R. 15 Eq. 69, and *Re Hamilton, Young & Co., Ex parte Carter* (5), [1905] 2 K.B. 772, approved and applied; *Brandt & Co. v. Dunlop Rubber Co.* (6), [1905] A.C. 454, followed; (vi) even if the railway receipts were regarded as merely tokens of an authority to receive possession, their transfer for value by way of security for advances raised an equity as between transferor and transferee, entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts; (vii) the goods were not property divisible among the creditors by virtue of s. 52 (2) (c), because, having been validly pledged, they were not in the possession of the borrowers; *Fakeerappa v. Thippanna* (7) (1913), I.L.R. 38 Mad. 664, approved; (viii) the general course of business and the relationship of the interested parties to the consignments, and, in particular, the purpose for which the borrowers had custody of the fourteen receipts, were inconsistent with any reputation of their ownership within the meaning of s. 52 (2) (c): dictum of LORD SELBORNE in *Re Couston & Co., Ex parte Watkins* (8) (1873), 8 Ch. App. 520, at p. 528, applied.

Observations as to the English law as to the pledge of goods by delivery of documents of title.

Notes. Followed: *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52.

As to delivery of pledges, see 25 HALSBURY'S LAWS (2nd Edn.) 7-8, paras. 12-13, and for cases on the subject, see 37 DIGEST 4-7, 8-25.

As to reputed ownership in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 438-447, paras. 864-884, and for cases on the subject, see 5 DIGEST 793-801, 6785-6844.

As to creation of an equitable charge, see 23 HALSBURY'S LAWS (2nd Edn.) 239, para. 353, and for cases on the subject, see 35 DIGEST 265, 248-249.

For the Bankruptcy Act, 1914, s. 38 (c), see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to:

- (1) *Ramdas Vithaldas Durbar v. S. Amerchand & Co.* (1916), L.R. 43 Ind. App. 164; 85 L.J.P.C. 214; 39 Digest 634, q.
- (2) *North Western Bank v. Poynter, Son and Macdonalds*, [1895] A.C. 56; 64 L.J.P.C. 27; 72 L.T. 93; 11 R. 125, H.L.; 11 Digest (Repl.) 386, 464.
- (3) *Re David Allester, Ltd.*, [1922] 2 Ch. 211; 91 L.J.Ch. 797; 127 L.T. 434; 38 T.L.R. 611; 66 Sol. Jo. 486; [1922] B. & C.R. 190; 10 Digest (Repl.) 814, 5281.
- (4) *Re Slee, Ex parte North Western Bank* (1872), L.R. 15 Eq. 69; 42 L.J.Bcy. 6; 27 L.T. 461; 21 W.R. 69; 7 Digest 27, 135.
- (5) *Re Hamilton, Young & Co., Ex parte Carter*, [1905] 2 K.B. 772; 74 L.J.K.B. 905;

- 93 L.T. 591; 54 W.R. 260; 21 T.L.R. 757; 12 Mans. 365, C.A.; 7 Digest 27, 138.
- (6) *Brandt & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, 230.
- (7) *Fakeerappa v. Thippanna* (1913), I.L.R. 38 Mad. 664.
- (8) *Re Couston & Co., Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 21 W.R. 530, L.C. & L.J.; 5 Digest 803, 6863.
- (9) *Spear v. Travers* (1815), 4 Camp. 251; 171 E.R. 80, N.P.; 39 Digest 523, 1378.
- (10) *McEwan v. Smith* (1849), 2 H.L. Cas. 309; 13 Jur. 265; 9 E.R. 1109, H.L.; 39 Digest 522, 1367.
- (11) *Inglis v. Robertson and Baxter*, [1898] A.C. 616; 67 L.J.P.C. 108; 79 L.T. 224; 14 T.L.R. 517, H.L.; 11 Digest (Repl.) 387, 471.
- (12) *Dublin City Distillery, Ltd. v. Doherty*, [1914] A.C. 823; 83 L.J.P.C. 265; 111 L.T. 81; 58 Sol. Jo. 413, H.L.; 10 Digest (Repl.) 814, 5285.
- (13) *Re Ambrose Summers* (1896), I.L.R. 23 Calc. 592.

Appeal by leave from the judgment of the High Court of Judicature of Madras, Appellate Jurisdiction (SIR OWEN BEASLEY, C.J., and STONE, J.), dated April 18, 1932.

The substantial question in this appeal was as to the consequences which in law flow from the endorsement and delivery by way of security to a financing bank of railway receipts belonging to the owner of goods and particularly whether such a transaction effects constructive delivery of the goods represented by these receipts. The appeal also raised questions as to the application and limits of the doctrine of reputed ownership.

The issue which fell to be determined in the proceedings was whether the appellant who was the official assignee in the insolvency of C. K. Narayana Ayyar & Sons (hereinafter referred to as the insolvents) or the respondent bank (hereinafter referred to as the bank) was entitled to the proceeds of sale of the various consignments of ground nuts hereinafter referred to.

Van den Berg, K.C., *Walter H. Moresby*, and *Henry Hope* for the appellant, the official assignee of Madras.

Stuart Bevan, K.C., and *Sir Thomas Strangman* for the respondents, the lenders.

Cur. adv. vult.

Oct. 15.—The judgment of their Lordships was read by

LORD WRIGHT.—The appellant is the Official Assignee of Madras in whom the property vested on insolvency of C. K. Narayana Ayyar & Sons (who will be referred to hereafter as the borrowers); the question in the appeal is whether the appellant or the respondent lenders are entitled to the proceeds of certain consignments of ground nuts; the primary issue is whether the lenders who had advanced moneys on the security of the railway receipts in respect of these ground nuts obtained a valid pledge of the goods. Certain further or alternative questions will be dealt with subsequently.

The official assignee succeeded before WALLER, J.; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate Jurisdiction; the official assignee now appeals to His Majesty in Council.

There is little dispute about the facts. The borrowers did a large business in ground nuts, which they purchased from the up-country growers; the nuts were then despatched by rail and arrived in Madras by one or other of two railways, the Madras and Southern Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the borrowers, but there was on it a signboard bearing the name of the lenders.

DAVY v. ATTORNEY-GENERAL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), July 13, 1934]

[Reported [1935] P. 1; 103 L.J.P. 115; 151 L.T. 562; 50 T.L.R. 588; 78 Sol. Jo. 618]

Legitimation—Evidence—Declarations of relatives made ante litem motam—"Relatives"—Date of lis mota—Declaration of deceased man—Admission in his interest.

On a petition for a declaration of legitimacy under the Legitimacy Act, 1926, declarations of deceased relatives or members of the family made ante litem motam are admissible in evidence as in pedigree cases. Although a petitioner who is born illegitimate is filius nullius until a declaration of legitimacy is made in his favour, such declarations may be admitted on the footing that he was lawfully related to the declarants. The date of lis mota is not necessarily at the commencement of the actual litigation or the moment when a lawful cause of action arises, but it is when a controversy originates between persons sufficient to create a bias in the minds of the declarants at the moment of their declarations.

On this petition the court admitted a declaration by the reputed father denying paternity when he was challenged, as an exception upon the exception to the rule against the admissibility of declarations post litem motam, on the ground that it was a matter of natural justice to allow a dead man whose reputation had been seriously impugned to be heard in his own defence.

Notes. Followed: *Battle v. Attorney-General*, [1949] P. 358. Extended: *Scappaticci v. Attorney-General*, [1955] 1 All E.R. 193, n. Referred to: *Re Jenion, Jenion v. Wynne*, [1952] 1 All E.R. 1228.

As to legitimation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 98-103, and for cases, see DIGEST SUPPS., tit. Bastardy, cases 111 et seq.

Cases referred to:

- (1) *Sturla v. Freccia* (1880), 5 App. Cas. 623; 50 L.J.Ch. 86; 43 L.T. 209; 44 J.P. 812; 29 W.R. 217, H.L.; 22 Digest (Repl.) 47, 299.
- (2) *Doe d. Bamford v. Barton* (1837), 2 Mood. & R. 28; 3 Digest 368, 95.
- (3) *Doe d. Jenkins v. Davies* (1847), 10 Q.B. 314; 16 L.J.Q.B. 211; 11 Jur. 607; 116 E.R. 122; 22 Digest (Repl.) 29, 92.
- (4) *Murray v. Milner* (1879), 12 Ch.D. 845; 48 L.J.Ch. 775; 41 L.T. 213; 27 W.R. 881; 3 Digest 367, 84.
- (5) *Re Perton, Pearson v. Attorney-General* (1885), 53 L.T. 707; 1 T.L.R. 655; 3 Digest 368, 97.
- (6) *Butler v. Mountgarret* (1859), 7 H.L.Cas. 633; 11 E.R. 252, H.L.; 22 Digest (Repl.) 115, 984.
- (7) *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; 30 L.J.P.M. & A. 217; 3 L.T. 592; 6 Jur. N.S. 1163; 9 W.R. 285; affirmed (1869), L.R. 1 Sc. & Div. 470, H.L.; 3 Digest 370, 114.
- (8) *Whitelock v. Baker* (1807), 13 Ves. 510; 33 E.R. 385, L.C.; 22 Digest (Repl.) 113, 960.
- (9) *Berkeley Peerage Case* (1811), 4 Camp. 401, H.L.; 3 Digest 368, 91.

Petition for a declaration of legitimacy.

In his petition the petitioner Arthur Henry (or Robert Henry) Davy, commonly known as Harry Davy, a commercial traveller, of Frodsham, Cheshire, sought a declaration under the Legitimacy Act, 1926, and the Judicature (Consolidation) Act, 1925, s. 188, that he was the son, born in 1879, of the late Edward Chatham, a solicitor, of Bredbury, Lancashire, then a bachelor, and Mary Chatham, formerly Davy; that his parents were lawfully married at St. Thomas' Church, Pendleton, Eccles, on Dec. 29, 1884; and that by such marriage he became legitimated from Jan. 1, 1927, when the Legitimacy Act came into operation. The petitioner also averred that Edward Chatham died domiciled in England on Jan. 7, 1929, intestate, leaving estate worth about £15,000,

and that he left two children, the petitioner and Edward Alfred Chatham, who was born on July 13, 1895, and died on March 16, 1930. Letters of administration of Edward Chatham's estate had been granted to Edward Alfred Chatham out of the Manchester District Registry in May, 1929, as the only child of the deceased. Edward Alfred Chatham left a will, the executors and trustees under which were respondents to the present petition.

By their answer the respondents denied that the petitioner was the natural son of Edward Chatham and Mary Davy, averred that he was the son of Mary Davy by a man unknown, and prayed that his petition be dismissed. The Attorney-General, as respondent pursuant to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188 (4), put the petitioner to strict proof.

The estate of Edward Chatham, having vested in his son Edward Alfred on the former's intestacy, formed part of Edward Alfred's estate which he bequeathed to his widow and others by his will, and on the issue raised by the present petition rested the question whether the petitioner was entitled to share the estate of Edward Chatham with Edward Alfred Chatham.

Apart from certain documentary evidence as to births, marriages, and deaths, and the facts of the petitioner's upbringing, the principal evidence for and against the petitioner's case consisted of declarations made by the putative father, Edward Chatham, and of other people, since deceased, who were members of the family. The most important declarations, which were received *de bene esse* in the course of a prolonged hearing, were to the following effect:—For the petitioner: (i) Thomas Hugh Davy (since deceased), a brother of Mary Davy, told his wife (now Mrs. Dinah Maria Mobley) over thirty years ago, that the petitioner was the son of Edward Chatham. Later, he told the petitioner the same thing. These declarations were deposed to by the petitioner and Mrs. Mobley. (ii) Mrs. Mobley said that she was present at the christening of the petitioner in May, 1884, and on that occasion Edward Chatham said that he was standing godfather to his own child. (iii) The same witness said that her father-in-law, Robert Davy, told her that the petitioner was the child of Edward Chatham and Mary Davy. These declarations were alleged to have been made many years before any actual dispute arose in the family as to the fact of the petitioner's paternity. (iv) Another woman witness who was brought into contact with Edward Chatham during the war of 1914–1918 said that he referred to his son Edward and the petitioner as “my lads,” and on one occasion told her he had made provision for the petitioner and his wife. For the respondents: A solicitor who was in 1918 an articled clerk with Edward Chatham said that when in that year the petitioner's wife was seeking from Edward Chatham an acknowledgment that he was the father of the petitioner, Chatham clearly stated that the petitioner was the child of his wife, formerly Mary Davy, before he met her.

Whether or not any of these declarations (which are dealt with more particularly in the judgment together with other relevant facts) were admissible became the subject of argument, and in the result the court received them all in evidence.

Preston, K.C., and G. Tyndale for the petitioner.

Wilfrid Lewis and George Bankes for the Attorney-General.

R. H. Bayford for the respondents other than the Attorney-General.

Cur. adv. vult.

July 13. **LANGTON, J.**, read the following judgment. In this case the petitioner, Arthur Henry Davy, seeks a decree of legitimation under the Legitimacy Act, 1926. The marriage in respect of which he claims legitimation took place on Dec. 29, 1884. Since this date is prior to the date upon which the Act came into force, the decree for which he asks is that he became legitimated as from Jan. 1, 1927. The petition has been opposed and strenuously contested by the executors and trustees of the will of Edward Alfred Chatham, dated Feb. 26, 1930, and the Attorney-General has also appeared in opposition to the claim. The attitude adopted by the Attorney-General, both in his answer to the petition and the conduct of the case by counsel, has been to insist firmly but not contentiously upon strict proof of each step in the chain of evidence upon which the petitioner has based his suit. I have no doubt that this attitude is both

them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in *Spear v. Travers* (9). The common law rule was stated by the House of Lords in *McEwan v. Smith* (10). The position of the English law has been fully explained also more recently in *Inglis v. Robertson and Baxter* (11) and in *Dublin City Distillery, Ltd. v. Doherty* (12).

However, there also grew up that legislation which is compendiously described as the Factors Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus entrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties bona fide and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Section 3 of the Factors Act, 1889, provides that "a pledge of document of title to goods shall be deemed to be a pledge of the goods." It has been held that this section only applies to transactions within the Factors Act (*Inglis v. Robertson, and Baxter* (11)).

Thus the curious and anomalous position was established that a mercantile agent acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodian and obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the official assignee that s. 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on s. 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in s. 3 of the English Act of 1889.

However, s. 178 of the Contract Act, 1872, has omitted the word "agent," and has without express qualification made the section apply to "a person who is in possession of any goods or of any bill of lading, &c." The Appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out by this Board in *Ramdas's Case* (1) that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended to pledge the goods and not merely the railway receipts and the lenders have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England in the like case is no argument against their Lordships' conclusion, nor is it an argument that s. 178, as subsequently amended in 1930 and now in force, has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that "any person, &c.," includes owner; the decisions appear to have turned on the meaning of the word "possession," and on such distinctions as that between mere custody and juridical possession. An examination of ss. 103 and 108 of the Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

The other question arising under s. 178, namely, whether under its terms a pledge of the documents amounts to a pledge of the goods should also, in their Lordships' judgment, be answered as it was by the Appellate Court, in favour of the lenders. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained; the actual words of s. 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of s. 178 is abbreviated; but "a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by "bill of lading," the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the pledging of a bill of lading. This was the view adopted in regard to railway receipts in *Ramdas's Case* (1). In that case it was held that the pledging of a railway receipt had the same effect on the right of stoppage in transitu under s. 103 as a pledging of the goods; the railway receipt quoad this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under s. 178 to a pledge of the documents, especially as the board held in *Ramdas's Case* (1) that documents and instruments of title had the same meaning in both sections. A "pledge" is defined as stated above to be a bailment of goods as security (s. 172), hence it seems that s. 178, the marginal note to which is "pledge by the possessor of goods or of documentary title to goods," can only be dealing with pledges of goods, though the section uses the words "pledge of such goods or documents." In other words, it is describing a pledge of goods, either by pledging the goods eo nomine or by pledging the relative documents.

On this construction of s. 178 the lenders were, on the facts of the case, entitled to their security in the ground nuts represented by the forty-six railway receipts as being validly pledged to them.

It was contended that even on this view the goods represented by the fourteen railway receipts presented on Feb. 7, 1929, were in a different position, because, it was said, the lenders had parted with their pledge on these goods by giving back possession of the railway receipts to the borrowers. In their Lordships' judgment this contention is based on a misuse of the word "possession." The borrowers did not part with the

Being filius nullius, he has no family, and, therefore, can have no relations. If this be in truth a valid objection, which must be upheld by the court, it is apparent that in a very large number of cases of this class the court will be obliged to take away with one hand, by a rule of evidence, much of what the legislature, by a statute, has attempted to confer with the other hand upon persons of illegitimate birth. A

I have been at pains, therefore, to examine the authorities upon which this objection is rested, and I do not disguise my satisfaction in finding that they do not constitute a very formidable array. The case first cited by the majority of text-books in support of this objection is that of *Doe v. Barton* (2). The action was for ejectment, in respect of land belonging to a testator who had devised his property to his illegitimate sons for life, with remainder entailed to their children, the remainder to his own right heirs. It was sought to prove that one of the illegitimate sons of the testator was dead without issue; and the somewhat roundabout means employed was to call an individual who stated that he was a son-in-law of another of the illegitimate sons, and that he had heard his father-in-law say that his natural brother (the party whose death it was sought to prove) was dead without issue. PATTESON, J., rejected this evidence without troubling to formulate any very precise rule of objection. In the circumstances, this is not, perhaps, surprising, since the evidence at its best could hardly have been of a very forcible character. Having stated that the courts had not latterly been disposed to enlarge the exception in favour of declarations of this kind, the learned judge goes on to observe: B C D

“The person whose declarations are now tendered in evidence was not, in point of law, a member of the family of his reputed father, and it would be opening a new and wide door to such evidence if it were to be received merely because the party was living in habits of intimacy amongst those who were members of the family.” E

This judgment was given as long ago as 1837, in times when a statute framed in the spirit which has animated the passing of the Legitimacy Act, 1926, would have been almost unthinkable. Furthermore, the danger against which PATTESON, J., is there taking precautions, namely, that of admitting in evidence declarations of loose-living people, whose evidence would be likely to be untrustworthy, is a danger against which it would not be difficult for the courts to protect themselves in modern times. We are very familiar nowadays with the distinction between admissible evidence and testimony of any real evidentiary value. Jury trials are becoming less common in civil matters, and no one, I think, would feel real concern nowadays in leaving a judge to assess at its proper value evidence which had sprung from an obviously disreputable source. F

The next case which is commonly cited in support of the principle contended for by the Attorney-General is that of *Doe v. Davies* (3). This case was heard in the year 1847, and the judgment of the court, which comprised ERLE, J., COLERIDGE, J., and DENHAM, C.J., was delivered by the Chief Justice. In so far as the decision is relevant to the matter at present under discussion, it would seem to be almost a stronger authority against the contention of the Attorney-General than it is in his favour. It is true that the judgment of PATTESON, J., in *Doe v. Barton* (2) is in general terms approved, but, on the other hand, the judgment of the court is directed more immediately towards approving and upholding a ruling of COLTMAN, J., which appears helpful rather than harmful to the petitioner in the present instance. A question had been litigated before a jury at Cardigan Assizes as to the legitimacy of a lady named Elizabeth Stevens, and the question of her legitimacy turned upon the single point whether her mother was lawfully married to a Mr. John Davies. On behalf of the defendants in the action, who were asserting that Mrs. Stevens was legitimate, COLTMAN, J., admitted hearsay evidence of a declaration by her concerning her mother's marriage. G H I

Objection was apparently taken to the admission of this declaration upon various grounds, but first and foremost, upon the ground that at the time when the declaration was admitted in evidence she had not been conclusively proved to be a member of her father's family. Since this was actually the sole point for the jury to decide, it is not difficult to understand that the objection was taken with considerable force and point. The full court, however, approved the action of COLTMAN, J., in admitting the declara-

tion upon the ground that it was for the judge, and the judge alone, to say whether the condition precedent necessary to make such a declaration admissible in evidence had or had not been fulfilled. The court added that it made no difference to the judge's ruling, and did not constitute any flaw in the ruling, that he was obliged to predetermine for the purposes of this ruling the very question which the jury had subsequently to decide. I must confess to a certain difficulty in following this involved line of argument, but I may, perhaps, be pardoned for thinking that doctrines which give rise to such tortuous sinuosities of dialectic do not rest on any very broad or solid basis.

The same point, in a slightly different form, arose in *Murray v. Milner* (4). A will of a deceased father was offered in evidence to prove the illegitimacy of his children. FRY, L.J., sitting then as a judge of first instance in Chancery, dealt with the contention in the following terms:

"It has been argued that the will is not capable of being looked at as a declaration by the deceased father of the claimant, because it is said you must either admit the marriage before you can show that there is any relationship between the declarant and the claimant, or you must deny the existence of the relationship, and then it would be the declaration of a mere stranger. In my judgment, the argument cannot prevail. It would lead to great difficulty."

This case was strongly relied upon by the petitioner's counsel as an authority against the contention of the Attorney-General, and, in my view, this summary dismissal of the objection is not below its deserts.

In a slightly later case, *Re Perton, Pearson v. Attorney-General* (5), CHITTY, J., brings together and exposes some of the difficulties and absurdities to which this class of contention may lead. The precise point in that case was whether a deceased man's declarations as to his own legitimacy or illegitimacy were admissible, and in the final view at which the judge arrived he deals, of course, with other grounds more pertinent to the special point in hand as supporting his conclusion. On the broader question, however, he makes these observations:

"The technical reasoning for the claimant on this point was that the deceased is not a member of any family. That is a highly technical mode of putting the case. No doubt, it is true that the law does not admit the declarations of deceased persons unless they are members of the family, or connected as husband or wife with the family, and by members of the family, of course, is meant legitimate members of the family. But, if it were necessary to reply to this technical reasoning, it seems to me it would not be too great a refinement to say of the deceased himself that he concentrates and sums up in his own person the whole of the family, he being, according to the argument of the Crown, nullius filius."

I find myself heartily in accord with the view here expressed that reasoning of this kind is highly technical, and I cannot believe that a technical line of reasoning, resting upon a somewhat slender basis of authority, ought to be allowed to limit, and possibly defeat, the efforts of claimants who are endeavouring to obtain the advantages of the Legitimacy Act.

A further point of wide ambit upon the subject of evidence arose in this case upon the construction of the phrase *ante litem motam*. No one is concerned to dispute that the declarations specially received in pedigree cases must satisfy the qualification that they have been made before the *lis* in the case arises. In the present case the matter assumes urgent importance because by far the most important part of the case for the respondents rested upon a declaration of Edward Chatham, and it was contended strongly for the petitioner that this declaration was *post litem motam*. Counsel for the Attorney-General took, in the first place, the broad point that, where the Legitimacy Act is concerned, there is and can be no *lis* before the date of the Act. He did not seek to limit the meaning of the expression *lis* to the narrow translation of "litigation," but he claimed that no *lis* could exist at any time at which the point subsequently in issue was not capable of being litigated. *Lis*, he said, may not be confined to litigation in *esse*, but it cannot be extended to mean something beyond litigation in *posse*; since, therefore, the question now before the court was not capable of being litigated before

The pledge was not affected by the handing over of the railway receipts for the limited purpose; it was only for that purpose that the borrowers had the temporary possession, or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession order and disposition of the borrowers, still less that they were so with the consent of the true owners, that is the lenders, as pledgees. Nor could it be said, either as to the consignments as a whole or as to the fourteen consignments, that the circumstances were such as to make the borrowers the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know

"those facts which are capable of being generally known to those who make inquiry on the subject,"

in the sense explained by LORD SELBORNE in *Re Couston & Co., Ex parte Watkins* (8) (L.R. 8 Ch. at p. 528): the general course of business and the relationship of the interested parties to the consignments and, in particular, the purpose for which the borrowers had custody of the fourteen receipts were inconsistent with any reputation of ownership in that sense. Reference may be made in this connection to the English cases of *Re Slee, Ex parte North Western Bank* (4), and *Re Hamilton, Young, & Co.* (5). The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also.

In the result the appeal should, in their Lordships' opinion, be dismissed with costs. They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *Burton, Yeates & Hart; E. F. Turner & Sons.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

SIMMONS v. RUSSELL FINANCIERS, LTD.

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.JJ.), June 26, 1934]

[Reported [1934] 2 K.B. 487; 103 L.J.K.B. 724; 151 L.T. 472]

Moneylender—Memorandum—Sufficiency—Terms of contract set out—No explanation of effect of terms on number of instalments to be paid—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6 (2).

The note or memorandum of a contract for the loan of money, after stating the date on which the loan was made, the amount of the principal of the loan, the interest charged on the loan expressed in terms of a rate per cent. per annum, and the fact that the loan was made on the terms of a bill of sale, set forth a copy of the bill of sale, which was in statutory form. The memorandum contained the further clause: "The mortgagor doth further agree and declare that he will duly pay to the [moneylenders] the principal sum aforesaid together with the interest then due by equal monthly payments of £3, the first of such payments to be paid on June 22, 1930, and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount, including principal and interest, be repaid." On objection that the note or memorandum did not contain all the terms of the contract and so comply with the provisions of sub-s. (2) of s. 6 of the Moneylenders Act, 1927, in that it did not set out what proportion of each instalment was referable to the repayment of principal and what proportion to the payment of interest and so did not specify the number of the instalments and the time within which they would take to be paid,

Held: to comply with the provisions of s. 6 (2) of the Act of 1927, a memorandum

must contain all the terms of the contract and the other matters mentioned in the subsection, but it need not contain an explanation to the borrower of what the effect of the terms of the contract will be with regard to the length of time he will have to keep up his payment of instalments; in the present case the memorandum complied with the provisions of s. 6 (2); and, therefore, the objection taken by the borrower must fail.

Notes. Applied: *Bullock v. Lloyds Bank, Ltd.*, [1954] 3 All E.R. 726.

As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190-192, and for cases, see DIGEST SUPPS., tit. MONEY AND MONEYLENDING, cases 353a et seq. For Moneylenders Act, 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 377.

Case referred to:

- (1) *Rosefield v. Provincial Union Bank*, [1910] 2 K.B. 781; 79 L.J.K.B. 1150; 103 L.T. 378; 17 Mans. 319, C.A.; 7 Digest 61, 343.

Appeal from an order of MACNAGHTEN, J.

The plaintiff, Elias Simmons, by his action claimed a declaration that a contract of loan for the sum of £45 advanced to him by Russell Financiers, Ltd., the defendants, who were registered moneylenders, was unenforceable. It was admitted before MACNAGHTEN, J., that the sum of £45 was lent by the defendants to the plaintiff on May 22, 1930, and that the plaintiff, before the money was advanced, signed the following note or memorandum of the contract of loan, purporting to be made in compliance with the provisions of s. 6 of the Moneylenders Act, 1927.

"Note or memorandum of contract made the twenty-second day of May One thousand nine hundred and thirty between Russell Financiers, Ltd. of 96, Mile End-road, E. 1, registered offices, and Elias Simmons, of 27, St. Peters-road, Mile End, E. 1, master tailor.

"(1) The said loan was made on May 22, 1930.

"(2) The amount of principal of loan is £45 (forty-five pounds).

"(3) The rate of interest charged is 48 per cent. per annum.

"(4) The loan is made on the terms of a bill of sale, copy whereof is as follows:

"This bill of sale made the twenty-second day of May One thousand nine hundred and thirty between Elias Simmons (master tailor) of 27 St. Peter's-road Mile End E. 1, in the county of London (hereinafter called the "mortgagor"), of the one part, and Russell Financiers, Ltd., of 96 Mile End-road, E. 1, registered office in the county of London, registered moneylenders (hereinafter called "the mortgagees"), of the other part, witnesseth that in consideration of the sum of forty-five pounds now paid to the mortgagor by the mortgagees the receipt of which the mortgagor hereby acknowledges he the mortgagor doth hereby assign to the mortgagees their executors administrators and assigns all and singular the several chattels and things specifically described in the schedule hereunder written by way of security for the payment of the sum of forty-five pounds and interest thereon at the rate of 48 per cent. per annum. And the mortgagor doth further agree and declare that he will duly pay to the mortgagees the principal sum aforesaid together with the interest then due by equal monthly payments of £3 the first of such payments to be paid on the twenty-second day of June one thousand nine hundred and thirty and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount including principal and interest be repaid. And the mortgagor doth also agree with the mortgagees that he will forthwith insure the said chattels and things during the continuance of this security against loss or damage by fire in the Licensees and General or other insurance company to be approved by the mortgagees and will punctually pay the premiums on such insurance and will when required produce to the mortgagees the receipt for the current premium and will expend any moneys paid in consequence of loss or damage by fire under such policy in discharge of the money secured by these presents. And also will punctually pay all rent

the roof of Edward Chatham. After two years of estrangement the quarrel between Harry Davy and Edward Chatham was composed, and the petitioner gave evidence as to good relations between himself and his parents, and to calling them respectively "Mother" and "Pa." The significance which might be attached to this latter method of address was very much diminished by subsequent evidence that Edward Chatham, in his later years, was familiarly addressed as "Pa." by a number of people, including a clerk in his office named Tom Dixon, who was no relation whatever to Chatham. The petitioner's answer to the very natural question put to him in cross-examination why he never claimed from Chatham that he should acknowledge him as his son was that at different times, and especially at the time of the petitioner's marriage, he had believed that Chatham was on the point of making this recognition, and that when he failed to come up to expectation the petitioner was too much hurt and angry to ask him to do so.

This evidence, not, in my view, particularly strong, standing by itself, received strong corroboration from Mrs. Mobley. This elderly lady, who had married Thomas Hugh Davy in 1886, was, in my judgment, very much the best witness who gave evidence in these proceedings. She was very alert, very clear, and quite unshaken as to the events of which she gave testimony. She gave an even clearer and better account than the petitioner of the interview between her husband and Edward Chatham, which took place in her presence and in her house, after the petitioner had run away from the house of Mr. Chatham. She described most convincingly, and without unnecessary detail, how her husband had threatened to publish the fact that Edward Chatham was the boy's natural father if Chatham would not leave the boy alone, and narrated much better than the petitioner had done how her husband and herself had explained to the boy later that Chatham was his father. Furthermore, she strongly corroborated the evidence of Harry Davy as to an offer by Edward Chatham to give him £100 if he would return home. This offer, though far from being conclusive, is not, in my judgment, without significance. In other circumstances it might well be said that no special significance should attach to the holding out of such an inducement to a wayward lad who had been harshly treated. It could be attributed to a not unnatural remorse on the part of a just man who felt that he had acted precipitately in anger. But in the present circumstances it is exceedingly hard to reconcile with the respondents' case. If it were true that this boy Harry Davy was, to the full knowledge of Edward Chatham, an illegitimate child of his wife's by another man before marriage, he would need to be something more than human not to seize somewhat eagerly any opportunity of getting rid of him, and it would seem almost wildly improbable that any man so situated would actually be prepared to pay a substantial price to coax him back.

Mrs. Mobley gave very clear evidence of an even more important incident concerning the christening of Harry Davy. This took place, it will be remembered, in 1884, and Mrs. Mobley was present at the ceremony, and stood godmother to the three children who were christened together on that occasion. She would thus have every reason to recall the occasion accurately. She gave evidence to the effect that Edward Chatham stood godfather to Harry Davy, and made the observation to her, "I am standing godfather to my own child," to which she, Mrs. Mobley, answered: "There are plenty that do that." She gave further evidence that her father-in-law, Robert Davy, told her that Harry was the child of Edward and Mary Chatham, and explained Chatham's remark to her by saying in evidence, "He knew that I knew he was the father." Counsel for the petitioner laid great stress upon this incident, and, indeed, claimed that it was the crux of the case. He argued, and, I think, argued soundly, that it is difficult, if not impossible, to reconstruct this incident. Nothing is commoner in accounts of conversations of long ago than the alteration, possibly unintentional, by the narrator, of one or two important words whereby the whole meaning of the conversation is completely metamorphosed. No one who heard this portion of Mrs. Mobley's evidence could, I think, take such a view of her account of the christening incident. It either took place as she recounted it or it never took place at all. In my judgment, Mrs. Mobley was a truthful and accurate witness, and I accept her evidence entirely as to this conversation at the christening of Harry Davy. Moreover, apart from Mrs. Mobley's evidence, the admitted facts that Edward Chatham stood godfather to the boy and took him to live

in his house seem to me to point much more in the direction of the tacit admission by Chatham that the responsibility for the boy lay at his door rather than towards the alternative theory that Mary Chatham's father, having first concealed from Chatham that his daughter had an illegitimate son, had succeeded in persuading Chatham to stand godfather, and subsequently in making him maintain this unwanted child.

This evidence for the petitioner was reinforced, to a lesser degree, by a witness independent of the Davy and Chatham families, named Miss Nellie Kenyon, who was brought into contact with the petitioner and with Chatham's legitimate son, Edward Alfred Chatham, during the war. Miss Kenyon occupied a responsible position under the National Savings Committee during the war, and made the impression upon me of a wholly reliable witness. Her evidence did not go very far, but she spoke with great conviction to interviews with Edward Chatham in which he referred to Harry Davy and his son Eddie as "my lads," and also to an occasion upon which Chatham said that he had made provision for Harry Davy and his wife. Harry Davy, as I have already noted, never made a direct request to Edward Chatham to acknowledge his paternity. It is agreed, however, that at some time after Harry Davy's marriage his wife made a determined attempt to secure for her husband what she believed to be his rights, and I have little doubt that it was her move in this direction which caused an estrangement between Harry Davy and Edward Chatham in the latter's closing years. Where Mrs. Harry Davy's evidence is in conflict with that of Mr. Tom Dixon, the principal witness for the respondents, on a matter of dates, I prefer Mr. Dixon's trained recollection to the untrained and biased recollection of Mrs. Harry Davy.

The case for the respondents opened with some evidence from inhabitants of Ludlow at or about the time when Chatham, and later the Davy family, were resident in that town. The evidence of these witnesses, Mr. Wainwright and Mr. Evans, was, I think, sincere so far as it went, but it was not particularly destructive of the petitioner's case. The evidence of Mr. John Nelson, who was called to produce some records of the 10th Shropshire Volunteers, was chiefly instructive in showing how unreliable records may prove, since, in this case, they were demonstrably wrong. As to the part of the case to which this evidence was addressed—namely, the whereabouts of Edward Chatham and Mary Davy at the time of the conception of the child Harry—I think the evidence is too uncertain for any exact finding to be made. It is probably right, as respondents' counsel contended, that the distance between Ludlow and Pontefract was in those days prohibitive against any frequent visits by Edward Chatham to Pontefract. Against that, however, is the undeniable fact that Mary Davy was at one period of her life in service in an hotel in Ludlow, and the records of the Davy family, contained for the most part in a somewhat untidy pocket-book, are much too uncertain to exclude the possibility that she was so employed before her parents came to reside in Ludlow.

The serious evidence on behalf of the respondents was given by a solicitor, Mr. Tom Dixon, who had been articled to Edward Chatham, and subsequently employed by him as a trusted and confidential clerk. His main evidence was that in 1918 Mrs. Harry Davy had threatened to take steps to compel Edward Chatham to acknowledge that he was the father of her husband, Harry Davy. This design she had imparted to himself, Mr. Dixon. Mr. Dixon had thereupon immediately acquainted his employer with Mrs. Davy's intention, and Edward Chatham, upon learning this, had told Mr. Dixon the whole story of Harry Davy from his birth to that day. Mr. Dixon was a fair but somewhat disappointing witness. In view of the fact that he is the solicitor to the respondents in the present case, and, therefore, a most responsible agent in this litigation, I saw no reason to distrust him because he had made himself fluently familiar with the evidence which he had determined to give. I was, however, disappointed with him in cross-examination, in which he gave the unfortunate impression of being strictly on the defensive, and very much concerned to defend unimportant and indefensible positions. He was not shaken, and, indeed, it is a little difficult to see how he could be shaken, in respect of what I call the main portion of his evidence, and I have weighed very carefully Edward Chatham's reasoned denial and ready acceptance of the challenge upon the crucial issue.

In addition to the evidence for the petitioner and the general considerations which,

in my judgment, overbear this denial, it should be remembered that by the time this challenge reached him Edward Chatham was in a secure and respected position. He was well equipped with funds to meet any form of attack, and had behind him a long professional experience to enable him to deal successfully with any ill-instructed and ill-directed attack. Nor had Mrs. Harry Davy at her command any cogent or compelling evidence which could cause alarm to Chatham. He could not but be well aware that there were no records outstanding against him. He was thus well fortified to meet and to repel any action which Mrs. Davy should inadvisably take against him. These latter considerations could not, of course, be allowed to weigh a feather in the balance against Edward Chatham if one were not satisfied upon direct evidence that the charge against him is fairly and sufficiently proved. I add them only to explain how, in my view, his attitude upon attack, in itself consistent with complete innocence, may also be explained in conformity with the view that I have formed.

In my judgment, Harry Davy has discharged the onus which lay upon him of proving that Edward Chatham was his father, that Mary Davy was his mother, that they were free to marry at the time when he was born, and that they subsequently married. Accordingly, I make the declaration prayed in his favour.

No order was made as to costs as between the petitioner and the respondents.

Wilfrid Lewis asked for an order for the Attorney-General's costs. He pointed out that since the passage of the Administration of Justice Act, 1933, which made it possible for the Crown to be condemned in costs like an ordinary citizen, it was the policy of the Attorney-General, who was necessarily a respondent in legitimacy suits, to press for his costs in appropriate cases. Here there was a considerable sum of money involved, and the petitioner, who was asking for indulgence, should pay the costs of the Attorney-General, who appeared in the public interest.

LANGTON, J., ordered the petitioner to pay the costs of the Attorney-General.

Solicitors: *Stow, Preston, & Lyttelton*, for Mr. *William Hough*, Runcorn; *Mauby & Barrie*, for *Tom Dixon*, Manchester; the *Treasury Solicitor*.

NOTE

CUNLIFFE v. ATTORNEY-GENERAL

In *Cunliffe v. Attorney-General*, heard before SIR BOYD MERRIMAN, P., on June 27, 1934, the petitioner was granted a declaration of legitimacy under the Legitimacy Act, 1926.

Wilfrid Lewis, for the Attorney-General.—I ask for an order for costs. Though it has not been the practice in past years for the Attorney-General to make such an application, the position has changed since the Administration of Justice Act, 1933, came into operation. Section 7 provided that in any civil proceedings in which the Crown was a party the court should in its discretion be able to make orders for costs for or against the Crown as in cases between subjects. It is now considered fair and just that where petitioners in legitimacy proceedings are in a position to pay the Attorney-General's costs they should be ordered to do so. By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188 (4), the Attorney-General has to be a respondent on the hearing of the petition, and he is there, indeed, in the public interest. On the other hand, the petition is a luxury application, and the public should not be called upon to bear the costs involved by the representation of the Attorney-General. The Attorney-General's instructions are to use discretion in what particular cases of the kind he asks for costs.

Clifford Mortimer, for the petitioner.—The Attorney-General's application is a departure from the practice of many years. The right of legitimation per subsequens matrimonium was conferred by the statute of 1926, but the effect of several decisions, notably *Green v. Green* and *Jones v. Jones* is to make it necessary for the person who seeks to be legitimated to obtain a judicial declaration so as to establish his status for all time. A petition thus becomes a necessity and not a luxury, and in any event the

means of the petitioner in the present case does not warrant an order against him for the Attorney-General's costs.

The PRESIDENT said he was not going to decide the question of costs in this case by an inquiry into means, but was deciding it on a question of principle—whether any of the costs in a matter of this kind should fall on the taxpayer. If there was any responsibility for the necessity of applying for a declaration of legitimacy, it certainly was not the fault of the taxpayer. Counsel had received instructions from the Attorney-General to exercise discretion as to the cases in which he should apply for costs. In this case he ordered the petitioner to pay the Attorney-General's costs.

Solicitors: *Pritchard, Englefield, & Co.*, for *Butcher & Barlow*, Bury; the *Treasury Solicitor*.

[Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.]

GOVERNORS OF RUGBY SCHOOL v. TANNAHILL

[COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), October 24, 1934]

[Reported [1935] 1 K.B. 87; 104 L.J.K.B. 159; 152 L.T. 198; 51 T.L.R. 84; 78 Sol. Jo. 801]

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Notice of breach—No requirement that breach should be remedied—No requirement of compensation—Breach permitting premises to be used as brothel—Validity of notice—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 146 (1).

A lease contained a covenant by the tenant not to use the demised premises for an immoral purpose and conferred on the landlord a right of re-entry for breach of covenant by the tenant. The tenant was convicted of knowingly permitting the premises to be used for the purpose of habitual prostitution. The landlord served a notice, pursuant to s. 146 (1) (a) of the Law of Property Act, 1925, complaining of this offence as a breach of covenant and giving notice to quit in exercise of the right of re-entry; the notice neither required the tenant to remedy the breach nor required her to make compensation in money therefor. Since the date of her conviction the tenant had not used the premises for any immoral or illegal purpose, had evicted all the sub-tenants who had done so, had replaced them by sub-tenants of unimpeachable character, and had offered an undertaking to the court to take every care in the future choice of her sub-tenants.

On the landlords' claim for possession of the premises the tenant contended that the landlords' notice failed to satisfy the requirement of s. 146 (1) that it must be a notice "(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach," and that the landlord was not entitled to possession.

Held: the notice was good and the landlord entitled to possession because (i) merely ceasing to use the premises for illegal or immoral purposes was not remedying this particular breach, namely, permitting the house to be conducted as a brothel;

(ii) this particular breach was incapable of remedy, and there was, therefore, no obligation upon the landlord to require the tenant to remedy it;

(iii) as the landlord did not require compensation for the breach he was under no obligation to require such compensation by the notice: *Lock v. Pearce* (1) [1893] 2 Ch. 271, followed.

Per CURLIAM: there may be cases of breach of a negative covenant in which the immediate ceasing of that which is complained of for a reasonable time, together

with an undertaking that there will be no future breaches, might be a sufficient remedy, so that a proper notice under s. 146 (i) ought to require the lessee to remedy the breach in such cases. A

Notes. Considered: *Druce & Co. v. Beaumont Property Trust, Ltd.*, [1935] 2 K.B. 257.

As to forfeiture notices, see 20 HALSBURY'S LAWS (2nd Edn.) 258, 259, para. 291, and for cases on the subject, see 31 DIGEST (Repl.) 538-541, 6620-6638.

For the Law of Property Act, 1925, s. 146 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 739. B

Cases referred to:

- (1) *Lock and another v. Pearce*, [1893] 2 Ch. 271; 62 L.J.Ch. 582; 68 L.T. 569; 41 W.R. 369; 9 T.L.R. 363; 37 Sol. Jo. 372; 2 R. 403, C.A.; 31 Digest (Repl.) 539, 6626. C
- (2) *Civil Service Co-operative Society, Ltd. v. Trustee of Sir J. R. D. McGrigor*, [1923] 2 Ch. 347; 92 L.J.Ch. 616; 129 L.T. 788; 31 Digest (Repl.) 564, 6849.
- (3) *Fletcher v. Nokes*, [1897] 1 Ch. 271; 66 L.J.Ch. 177; 76 L.T. 107; 61 J.P. 232; 45 W.R. 471; 13 T.L.R. 171; 41 Sol. Jo. 242; 31 Digest (Repl.) 539, 6629.
- (4) *Fox v. Jolly*, [1916] 1 A.C. 1; 84 L.J.K.B. 1927; 113 L.T. 1025; 31 T.L.R. 579; 59 Sol. Jo. 665, H.L.; 31 Digest (Repl.) 540, 6633. D

Appeal from the decision of MACKINNON, J., in an action tried under Order XIV, r. 8 (b). E

The plaintiff landlords, the Governing Body of Rugby School, were the owners of certain premises, 14, Great Ormond-street, in the County of London. By a lease dated Nov. 11, 1931, they let the said premises to one Arthur Reason from June 24, 1932, to June 20, 1939, at a rent of £110 per annum.

Under a licence from the landlords dated Nov. 28, 1932, Reason assigned the said lease to the defendant tenant, Marian Hannah Cecilia Tannahill. The lease contained a covenant by the lessee and his assigns not to permit the premises to be used for any illegal or immoral purpose. It further provided that s. 196 of the Law of Property Act, 1925, should be applicable to all notices.

On Jan. 13, 1934, the tenant was convicted of permitting the premises to be used for habitual prostitution contrary to s. 13 of the Criminal Law Amendment Act, 1885, and was fined £10 and ordered to pay £15 15s. costs. F

By a notice dated Jan. 25, 1934, the landlords gave notice to the tenant as follows:

"We hereby give you notice, pursuant to s. 146 of the Law of Property Act, 1925, that you have broken the covenant contained in the said lease not to permit the said premises or part thereof to be used for the purposes of habitual prostitution. And in the exercise of the right of re-entry conferred by the lease for breach of covenant we hereby give you notice to quit and deliver up the said premises." G

Since the date of the said conviction the tenant had not used the premises for any immoral or illegal purpose, and had evicted all her sub-tenants complained of, and her present sub-tenants were of unimpeachable character. She stated in her affidavit in opposition to summary judgment that she was prepared to undertake to the court that she would in the future take every care in the choice of her tenants. She stated that she had paid £850 on the assignment to her of the said lease, of which £500 was agreed as the value of the lease. H

The Law of Property Act, 1925, s. 146 (1), provides: I

"A right of re-entry on forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

The landlords contended, firstly, that the covenant was a negative one, the breach of which was not capable of remedy, and therefore that it was unnecessary to call on the tenant to remedy such breach. Secondly, that it was not necessary to call on the tenant to make compensation in money if no compensation was desired.

The tenant contended that the notice to quit was bad, since the section required that she should be called on to remedy the breach and to make compensation in money, and this had not been done.

MACKINNON, J., held that, notwithstanding the provisions of s. 146 (1) of the Law of Property Act, 1925, the landlord could obtain judgment for possession, since the covenant in question was a negative one, not capable of remedy by a mere abstention from continuing the breach complained of.

The tenant appealed.

Fearnley-Whittingstall for the tenant.

H. I. P. Hallett, for the landlords, was not called upon.

GREER, L.J.—In this case MACKINNON, J., gave judgment for possession in favour of the Governors of Rugby School, the landlords of certain premises in London, against the defendant, the tenant by assignment. From that decision the tenant appeals.

The question depends on whether or not the notice which was served upon her by the landlords' solicitors is a sufficient notice within the provisions of s. 146 of the Law of Property Act, 1925, which has now taken the place of s. 14 of the Conveyancing Act, 1881.

The material facts are that for some time before the notice was served the tenant had been knowingly and actively permitting the house to be used as a brothel, because she herself admitted the prostitutes and their companions into the house, and I have very little doubt in saying that she had been receiving profits from somebody or other in respect of the immoral and illegal business that was being carried on on the premises. The covenant, the breach of which is said to have given rise to the right to recover possession, forbids the tenant to permit the premises to be used for any illegal or immoral purpose. Undoubtedly for some time, according to the finding of fact of the learned judge, the tenant had permitted the premises to be used for an illegal and immoral purpose.

In the court below certain affidavits were made. One was by a police officer stating certain facts. The tenant in her affidavit said: "I admit the facts set out in paras. 1 to 6 of the affidavit of Gerald Herbert Leslie Sweet" (the landlord's solicitor), and among the facts stated are these, in para. 5:

"I am further informed by the said officer that the evidence upon which the tenant was convicted was to the effect that in consequence of complaints made to the police special observation had been kept on the said premises on Dec. 8, 9, 11, 12, 13 and 14, 1933; that during that period seven women known to the police as prostitutes were seen to accompany sixty-four different men to the house; that the tenant was seen to admit some of the couples; that she was also seen about the door of the premises when couples entered and left and also in the company of prostitutes in a nearby public house; and that four of the known women who took men to the premises resided on the premises. I am further informed by the said officer that the magistrate on convicting the tenant remarked that the premises were very extensively used, and the tenant must have known perfectly well what was going on, and in fact it would have been impossible for her not to know."

I regard the admission which the tenant made not as a mere admission that the officer had said those things, but that the facts to which the officer had deposed were the true facts. It is obvious, if that was the case during the week from Dec. 8 to 14, that it must have been going on for some considerable time. The charge on which the woman was convicted was for permitting the premises in question to be used for habitual prostitution.

In those circumstances there can be no question whatever that there had been a very serious breach of the covenant of the lease, entitling the landlords to obtain possession

unless they failed to comply with the terms of s. 146 of the Law of Property Act, 1925. A
 [The Lord Justice read s. 146 (1) of the Law of Property Act, 1925, and continued:]
 It is conceded that the contents of the notice complied with requirement (a) in that it
 specified the breach which had taken place. It is common ground that there was no
 requirement in the notice that the lessee should remedy the breach, and no requirement
 that she should make compensation in money in respect thereof. Counsel for the B
 tenant says, and quite rightly, that if the conditions provided for with regard to the
 notice have not been complied with, then the proceedings for possession failed *ab initio*
 —that is to say, the learned judge ought not to have made an order for possession.
 — The first question is whether the particular breach complained of is capable of remedy.
 It is not whether any breach of the clause in the covenant or any other negative breach
 would be capable of remedy, but whether the particular breach complained of was
 capable of remedy. In my judgment, the learned judge was quite right in coming to C
 the conclusion that the particular breach in question was incapable of remedy, but I
 think, perhaps, that he went further than was necessary for the decision in holding that
 a breach of any negative covenant can never be capable of remedy. It is unnecessary
 to decide that question in this case. There is a great deal to be said for the view that
 there may be cases in which it would be right to say that the immediate ceasing of that D
 which is complained of for a reasonable time, together with an undertaking that there
 will be no future breaches, might be a sufficient remedy, and therefore that of such
 cases it might be said that the breach is capable of remedy. This particular breach,
 however, namely, permitting the house to be conducted as a house of ill-fame, or, in
 other words, as a brothel—is a breach which, in my judgment, was not remedied merely
 by ceasing so to conduct the house. The complaint about the breach was of something E
 which had taken place in the past, and the mere fact that for the future, after receiving
 the notice, the tenant did not commit any further breaches of the same kind is not a
 remedy within the meaning of sub-s. (1) (b). I cannot conceive how a breach of this
 sort could be remedied, because the result of it is that for a considerable period a house
 which was the property of a very respectable body, the Governors of Rugby School,
 had been used by the tenant as a brothel, and the unpleasantness and the effect on the
 property, and, possibly, on property that the landlords might have in the neighbour- F
 hood, was such that even a money payment, together with the ceasing of the improper
 conduct of the house, could not be a remedy for the breach of which complaint was made.
 I think that the breach in this particular case was incapable of remedy, and therefore
 that it was unnecessary to comply with sub-s. (1) (b) of s. 146 by requiring in the notice
 the lessee to remedy the breach.

As to the next question, namely, whether the absence of any statement in the notice C
 requiring the lessee to make compensation in money for the breach is not fatal to the
 validity of the notice, the decision of the Court of Appeal in *Lock and another v. Pearce*
 (1) binds us to hold that/as the landlords did not require compensation for the breach
 they were under no obligation to state in the notice that they required the lessee to make
 compensation in money for the breach. I can well understand that the landlords would
 not like to touch money coming from such a source as it would come from if it came
 from the tenant in this case. In any event, whatever may have been our view if the
 case were free from authority, it is clear from the decision of the Court of Appeal in *Lock*
and another v. Pearce (1) that the point is not now open to this court. LINDLEY, L.J.,
 used these words ([1893] 2 Ch. at p. 279):

“Then, as regards the notices required by s. 14 (1) [of the Conveyancing Act, 1881],
 the statute requires notice to be given specifying the breach complained of, as the
 first thing, and, if the breach is capable of remedy, requiring the lessee to remedy
 it, and ‘in any case requiring the lessee to make compensation in money for the
 breach.’ Supposing the lessor does not want compensation, is the notice to be
 held bad because he does not ask for it? There is no sense in that. The meaning
 is to be found by looking a little further on. The subsection begins by saying that
 the right of re-entry or forfeiture shall not be enforceable unless proper notice is
 given and the lessee fails within a reasonable time afterwards to remedy the breach

and to make reasonable compensation in money to the satisfaction of the lessor. The sense of that is that the lessor must tell the lessee what he wants done. The lessee is entitled to know what his landlord complains of, and, if his landlord is entitled to compensation, whether he wants compensation."

LINDLEY, L.J., went on to give some illustrations which I need not quote, and he winds up with a paragraph consisting of two sentences specially applicable to this case. He says:

"On these grounds I am of opinion that this appeal fails. Upon the merits, as well as upon the technicalities, all the points are against the appellants."

KAY, L.J., merely said that he was of the same opinion. I should add that in *Civil Service Co-operative Society, Ltd. v. Trustee of Sir J. R. D. McGrigor* (2), RUSSELL, J., followed the decision in *Lock and another v. Pearce* (1) as applicable to a case like this, where the breach was incapable of remedy.

For these reasons I think that the appeal should be dismissed.

MAUGHAM, L.J.—I am of the same opinion. The learned judge in the court below drew a distinction between negative and positive covenants, and I am not myself satisfied that there are not some negative covenants with regard to which the breach is capable of remedy, so that a proper notice under s. 146 (1) of the Law of Property Act, 1925, ought to require the lessee to remedy the breach. My ground for affirming the decision in this case, like that given by GREER, L.J., proceeds on a somewhat narrower basis. I ask myself, first: What is the object of s. 146, which reproduces s. 14 of the Conveyancing Act, 1881? I have any number of authorities to help me, beginning with *Fletcher v. Nokes* (3), a decision by NORTH, J., which had the approval of the House of Lords in *Fox v. Jolly* (4). After having detailed the things which he said that the notice must do, NORTH, J., observed ([1897] 1 Ch. at p. 274):

"I think that s. 14 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 13 had not been passed."

There are other passages in *Fox v. Jolly* (4) and in *Lock v. Pearce* (1) which GREER, L.J., has already mentioned, and also in other cases to the same effect.

The section has always been construed, having regard to the common sense of the matter, so that the tenant is to be given reasonable information about what he has to do, and under sub-s. (2) of s. 146, which is the old sub-s. (2) of s. 14 of the Conveyancing Act, 1881, he is entitled to apply to the court for relief whether or not the notice is perfect. On the other hand, the lessor has no right of action unless he has complied with the provisions of the section. It was because of this common-sense interpretation which had to be given to s. 14 of the Conveyancing Act, 1881, that the Court of Appeal—although the language pointed in the opposite direction—in *Lock and another v. Pearce* (1) came to the conclusion that the section really was not intended to insist on the lessor requiring the lessee to make compensation in money for the breach when he did not want any compensation at all.

It being the case that a reasonable construction has to be put on the section, and that the object of it is to let the lessee remedy the breach or make compensation before an action is brought against him by the lessor, two things follow. First, the remedy which is spoken of in the section must be a complete remedy; a partial remedy is not within the section, since the final words of the sub-section read thus:

"and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Accordingly, in the first place, the remedy must be a complete remedy. The other thing which follows is this, that it must be a breach which, if capable of remedy, is capable of remedy within a reasonable time, because the words that I have quoted assume that such breach can be so remedied. That is in order that the landlord should

not be kept out of his right of action for an unreasonable time. If, then, the breach is of such a character that many months or possibly years must elapse before there can fairly be said to be a remedy of the breach to the satisfaction of the lessor, I think that that is not within the section at all. It is not a breach which is capable of remedy within the meaning of the words in the section. A

The importance of that in this case is that merely ceasing to use the premises for an illegal or immoral purpose is not in any true sense remedying the breach. The phrase in the covenant is negative. It is "not to permit the premises to be used for any illegal or immoral purpose." One ceases in a sense to permit the premises to be used for an illegal or immoral purpose if during a week the conditions are complied with and for that period prostitutes are not allowed to frequent the house and to carry on their trade. However, that is not sufficient to establish the fact that the breach in the particular case we are here dealing with is capable of remedy. The use of the premises during a prolonged period for an immoral purpose, as GREER, L.J., has pointed out, is a thing which tends to damage the value of the house, to give it a bad name, as, indeed, the common adjective applied to these houses proves, because it is called a house of ill-fame. I see no reason to suppose on the evidence in this case that merely ceasing for a reasonable time, which I presume would mean a few weeks or a month, to use the house for any illegal or immoral purpose would be a remedy for the breach of the covenant which the tenant has been committing for so long a period. B C D

The result is that, in my opinion, the breach was not capable of remedy within the terms of s. 146, and there was, therefore, no obligation upon the landlords to say anything about remedy in their notice.

I would only add that I am confirmed in my view by the circumstances that I think a lessor is in some difficulty if, in a case where he considers the breach is quite incapable of remedy, he has to put in his notice a requisition that the lessee is required to remedy the breach, because I think that, in that case, he is to some extent injuring his position under sub-s. (2) if he were asking the court to refuse to grant relief under that subsection. In this case I am satisfied that the breach was not capable of remedy within a reasonable time, and, for those reasons, I think that the judgment of the learned judge was correct and that the appeal should be dismissed. E F

ROCHE, L.J.—I am also of the opinion that this appeal should be dismissed, for the reasons assigned by the other members of the court.

Appeal dismissed.

Solicitors: *Solomon, Staddon, & Barnes; Iliffe, Sweet & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.] G

HIGGS v. HIGGS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Langton, J.), October 4, 1934]

[Reported [1935] P. 28; 104 L.J.P. 1; 152 L.T. 24; 98 J.P. 443; 51 T.L.R. 22; 78 Sol. Jo. 768; 32 L.G.R. 471; 30 Cox, C.C. 183]

Justices—Husband and wife—Maintenance—Conflict of jurisdiction—Summons by wife for alleged wilful neglect to maintain—Petition by husband for divorce pending—Jurisdiction of magistrate to make maintenance order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 32, 190 (3)—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925 (58 & 59 Vict., c. 39, s. 4; 15 & 16 Geo. 5, c. 51, s. 1)—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25) s. 19 (1)—Matrimonial Causes Rules, 1957, r. 42.

Justices ought not to deal with any question of maintenance at the instance of the wife when a petition in the Divorce Division is pending, as the High Court then has jurisdiction to order her alimony pendente lite.

R. v. Middlesex Justices, Ex parte Bond (1), [1933] 1 K.B. 72, applied.

Notes. The power to order alimony pendente lite is now contained in s. 19 (1) of the Matrimonial Causes Act, 1950, which replaces s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, and r. 42 of the Matrimonial Causes Rules, 1957. Despite this decision a wife petitioner may, while her petition is pending, apply to the Magistrates' Court for the discharge of a maintenance order so as to enable her to apply to the High Court for alimony pendente lite: *Pooley v. Pooley*, [1952] 1 All E.R. 395.

Considered: *Re Blake, Clutterbuck v. Bradford*, [1945] 1 All E.R. 1; *Klessner v. Klessner*, [1945] 2 All E.R. 708.

As to the grant of relief by a magistrates' court when a suit is pending in the Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 486, para. 1086, and for cases on the subject, see 27 DIGEST (Repl.) 694–695, 6641–6644. For the Matrimonial Causes Act, 1950, s. 19 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407; and for the Summary Jurisdiction (Married Women) Act, 1895, s. 4 (as amended), see 11 HALSBURY'S STATUTES (2nd Edn.) 849, and cumulative supplement.

Cases referred to:

- (1) *R. v. Middlesex Justices, Ex parte Bond*, [1933] 1 K.B. 72; 102 L.J.K.B. 40; 148 L.T. 134; 96 J.P. 487; 49 T.L.R. 18; 30 L.G.R. 498; 29 Cox, C.C. 563, D.C.; on appeal [1933] 2 K.B. 1; 102 L.J.K.B. 432; 148 L.T. 544; 97 J.P. 130; 49 T.L.R. 247; 31 L.G.R. 169; 29 Cox, C.C. 620, C.A.; Digest Supp.
- (2) *Craxton v. Craxton* (1907), 71 J.P. 399; 23 T.L.R. 527; 51 Sol. Jo. 484, D.C.; 27 Digest (Repl.) 361, 2982.

Appeal by husband from a maintenance order for 17s. 6d. a week made by the magistrate at Marylebone Police Court on May 21, 1934.

The order was made on the ground of wilful neglect to maintain, notwithstanding a pending petition for divorce filed by the husband. The case in the magistrate's court was adjourned four times: at the last hearing at which the husband was represented (on March 12, 1934) it was submitted on his behalf that the magistrate had no jurisdiction in view of the pending petition and on the authority of *Craxton v. Craxton* (2), in which BARGRAVE DEANE, J., said:

"Once the Divorce Court is seised with a matrimonial dispute justices have no right to interfere in the matter. Here the President had actually made an order; how, then, can the justices claim to overrule it? I assume that in the future justices will hold their hand in such a case."

The husband appealed on the ground of lack of jurisdiction.

A. L. Ungood-Thomas for the appellant husband.
The wife respondent was not represented.

SIR BOYD MERRIMAN, P.—This appeal raises a curious point not free from difficulty. The material facts are as follows. On Sept. 22, 1933, the wife is alleged to have committed an act of adultery on which there is still pending in this court a petition by the husband for dissolution of marriage. On Sept. 25 the wife took out a summons returnable before one of the metropolitan magistrates on the ground of wilful neglect to maintain her, the alleged neglect consisting of his leaving her on his discovery of the supposed act of adultery. On Oct. 6, 1933, the husband filed his petition. There appears to have been a curious delay in the prosecution of that petition, which has not yet been heard. The wife's summons for maintenance came before the magistrate on Oct. 9. He was informed that the petition had been filed and, therefore, with perfect propriety he adjourned the summons sine die. On Feb. 26, 1934, the summons came on again, and on a further representation that proceedings were still pending and that the husband was in Ireland, it was again adjourned. On March 12 a solicitor appeared for the husband. He said that his client was returning from Ireland next month and that the petition would be heard in the ensuing term, and he cited *Craxton v. Craxton* (2) as an authority that the magistrate had no jurisdiction to deal with the matter. The magistrate again adjourned the summons. In my opinion, everything so far had proceeded as it ought to have.

When the case came on again on April 23, 1934, the husband did not appear and was not represented. No blame can be attributed to the husband's solicitors, who had tried but failed to obtain instructions from him. No one appearing for this defendant, the summons was adjourned for a further month. On May 21 there was no appearance or representation by the husband, and the magistrate then dealt with the matter and made an order against the husband.

I am of opinion that the magistrate ought not, as a matter of law, to have made the order, on the short ground that a petition was pending in this court. I wish to say at once that the magistrate, by the failure of the defendant to appear before him, was placed in an impossible position. He had been told that a petition, presented as long ago as October, 1933, had been filed in this court. He would have known by the following May that no decision, on the petition had been or was in course of being reached, indicating, having regard to the ordinary time which it takes to hear a petition in this court, that there had been some failure to prosecute the petition. The magistrate may very well have supposed that the petition had ceased to be effective, and I attribute the blame wholly to the husband himself for the magistrate's having dealt with the matter.

Notwithstanding the conduct of the husband, the point of law still remains—whether having regard to the pending petition the magistrate ought to have dealt with the matter. The point has given me a little difficulty, but I am satisfied that in the circumstances the magistrate ought not to have made the order. The moment a petition is presented to this court for any sort of matrimonial relief the court, by the combined effect of the Judicature (Consolidation) Act, 1925, s. 190 (3), the old practice of the Ecclesiastical courts as preserved by s. 32 of that Act, and the group of Matrimonial Causes Rules, beginning with r. 57, has power to order alimony to be paid pendente lite. It is quite true that neither the statute nor the rules say that that power is exclusive, but once the right of a respondent wife is established to have the provision for her ascertained it appears to me that the concluding passage of the judgment of AVORY, J., in *R. v. Middlesex Justices, Ex parte Bond* (1) applies with very great force. He said ([1933] 1 K.B. at p. 80):

“The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for if the justices may make an order as in this case, there is nothing to prevent the husband from going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might see-saw between the two courts, producing an absolute scandal.”

That that is not a fanciful over-statement of the possibilities is shown by the case of *Craxton v. Craxton* (2). In my opinion, that case is not conclusive of this particular point. Stated quite shortly, the position in that case was that, in spite of the fact that a petition was pending in this court and that a particular sum had been ordered by way of alimony by this court, the magistrate dealt with a summons for desertion on behalf of the wife and awarded a larger sum for maintenance. The decisive answer to the summons in *Craxton v. Craxton* (2) was that it was impossible to hold that there was desertion at the same time as the petition was pending, but it is quite plain that the judges thought, apart from the question of desertion, that it was improper for the magistrates to award one sum for maintenance when the court here had ordered another sum for alimony. In substance, that court was of the same opinion as AVORY, J., in *Ex parte Bond* (1).

I prefer to base my decision on the broad grounds laid down by AVORY, J. So long as there is a petition pending a wife has the rights to which I have referred. If there is undue delay in the presentation of the petition she has such remedies as the rules provide for expediting the hearing of the petition or its dismissal for want of prosecution. In the latter event the magistrate's power would revive. On the broad ground given by AVORY, J., with which I entirely agree, justices ought not to deal with any question of maintenance at the instance of the wife when a petition is pending. The magistrate was induced to act against what I am sure would have been his inclinations if he had known that this petition was still subsisting, and that position was brought about by the husband's default. The appeal will be allowed.

LANGTON, J.—I agree. The matter is admirably summarised by AVORY, J., in the passage quoted by my Lord, and there I am content to leave it. The difficulty in this case has arisen from the way in which the husband handled the matter. I have every sympathy for the magistrate, who probably came to the conclusion that the petition was not a bona fide one at all. He might have thought that it was no longer subsisting. With his customary good sense he dealt with the facts as they were known to him. Nevertheless, this court must consider the facts as they are and whether the law as laid down by AVORY, J., applies. The petition, however, seems to be perfectly bona fide and is still on the file, and I entirely agree with what the President has said.

Appeal allowed; order discharged.

Solicitors: *Raymond Oliver & Co.*

[Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.]

WILLIAMS v. SMITH

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 11, 1934]

[Reported [1934] 2 K.B. 158; 103 L.J.K.B. 421; 151 L.T. 112; 98 J.P. 231; 50 T.L.R. 336; 78 Sol. Jo. 318; 32 L.G.R. 171; 30 Cox, C.C. 110]

Agriculture—Wages—Benefits or advantages reckoned as wages—Board and lodging provided by employer—Separate contracts—Charge for board and lodging in excess of value as fixed by order—Liability of employer—Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37), s. 7 (1), (10), & 11, s. 8 (1) (replaced by Agricultural Wages Act, 1948 (11 & 12 Geo. 6, c. 47), s. 4 (1), s. 11 (1) (a), s. 7 (1) (c), (2)).

The Agricultural Wages Board by order under the Agricultural Wages (Regulation) Act, 1924, fixed the minimum rate of wages for wagoners between nineteen and twenty years of age in the Kesteven and Lindsey division of Lincolnshire at £1 11s. per week. The Kesteven and Lindsey Agricultural Wages Committee by order, pursuant to regulations made under s. 8 (1) (a) of the Act, defined the benefits or advantages which might be reckoned as payment of wages in lieu of payment of cash, including board and lodging the value of which, in the case of workers of eighteen years or over, the committee fixed at the value of 15s. per week of seven days. An employer agreed to employ a young worker between nineteen and twenty years of age as a wagoner at a weekly wage of £1 11s., and told him that if he lived at the employer's farm the charge for board and lodging would be £1 per week, but at the same time gave him the opportunity of finding lodging accommodation elsewhere, which was in fact available. The worker, however, elected to live at his employer's farm. At the end of each week the employer handed the worker his full wage less the amount properly deductible in respect of National Health Insurance contribution, and the worker handed £1 to the employer's wife or daughter in respect of his week's board and lodging.

On the question whether the worker's agreement to pay £1 per week was avoided by s. 8 of the Act as an "agreement for the payment of wages in contravention of . . . or for abstaining to exercise any right of enforcing the payment of wages in accordance with" the Act, and whether the employer was guilty of the offence under s. 7 (1) of the Act of failing to pay wages to the worker at not less than the minimum rate,

Held: the agreement was void and the employer was guilty of the offence because the Act and the regulations made thereunder prohibited the worker from paying the employer more than the 15s. a week fixed by the order for his board and lodging.

Notes. The Act of 1924 has now been replaced by the Agricultural Wages Act, 1948. Sections 7 (1), (10), (11), and 8 (1) (a) of the 1924 Act are reproduced by ss. 4 (1), 11 (1) (a), 7 (2), and 7 (1) (c) of the 1948 Act; but s. 7 (2) of the 1948 Act is at the moment in suspense because the Agricultural Wages Board have made orders under s. 7 (1) (c) fixing the values of all the benefits and advantages which may be reckoned as payments of wages in lieu of cash.

Considered: *Long Eaton Co-operative Society, Ltd. v. Smith*, [1949] 1 All E.R. 633. Referred to: *Bomford v. South Worcestershire Assessment Committee*, [1947] 1 All E.R. 229.

As to benefits or advantages which may be reckoned as payments of agricultural wages, see 1 HALSBURY'S LAWS (3rd Edn.) 477, para. 933; as to agreements in contravention of the Agricultural Wages Act, 1948, see 1 HALSBURY'S LAWS (3rd Edn.) 478, para. 934.

For the Agricultural Wages Act, 1948, ss. 4 (1), 7 (1) (c), (2), 11 (1) (a), see 28 HALSBURY'S STATUTES (2nd Edn.) 6, 11, 13.

Case Stated by justices for the Parts of Lindsey Division of the county of Lincoln.

An information was preferred before a court of summary jurisdiction by the prosecutor, the appellant, Williams, against the respondent, Smith, for that he, being a person who employed Percy Birch, a worker in agriculture, did not pay him wages at a rate not less than the minimum rate as fixed under the Agricultural Wages (Regulation) Act, 1924, Order No. 546 of the Agricultural Wages Board, and the Order of the Agricultural Wages Committee for Kesteven and Lindsey, dated Feb. 4, 1926.

On the hearing of the information the following facts were proved or admitted.

The prosecutor was a person duly authorised to take proceedings in respect of offences against the Agricultural Wages (Regulation) Act, 1924.

By an order dated Feb. 20, 1933, the Agricultural Wages Board duly fixed, *inter alia*, minimum rates of wages for male workers employed in agriculture in the Kesteven and Lindsey area of Lincolnshire. The order provided, *inter alia*, that the wages payable for the employment of a male worker of nineteen and under twenty years of age as a wagoner should be not less than £1 11s. per week.

By an order dated Feb. 4, 1926, the Kesteven and Lindsey Agricultural Wages Committee duly defined the benefits or advantages which might be reckoned as payment of wages in lieu of payment of cash, and the values at which these were to be reckoned. The order provided, *inter alia*, (a) that board and lodging was a benefit which might be reckoned at the value in the case of workers of eighteen years and over, of 15s. per week of seven days; and (b) that, except as provided by the order, no benefit should be so reckoned.

In May, 1932, the employer agreed to employ the worker, Percy Birch, as a wagoner at a weekly wage of £1 11s. per week. At the time when the contract was made, the employer said to the worker: "If you want to live with me it will be £1 per week." The worker was given opportunity by the employer of finding lodging accommodation elsewhere, but preferred to live in the farmhouse. There was suitable lodging to be had at the cottages on the employer's farm and in the village. The worker was at all material times of nineteen and under twenty years of age, and was in the employment of the employer from May 23, 1932, to May 13, 1933. Throughout the period of his employment he was provided by the employer with board and lodging at the employer's house. The amount properly deductible weekly from the worker's wages in respect of his National Health Insurance contribution was 9d. per week. Subject to the retention of certain small sums at the worker's request, at the end of each week during the period of employment, the employer handed the worker his full wage less his insurance, and the worker handed £1 to the employer's wife or daughter in respect of his week's board and lodging.

The justices held that no offence had been committed, and dismissed the information. The prosecutor appealed by Case Stated to the Divisional Court.

By the Agricultural Wages (Regulation) Act, 1924, an Agricultural Wages Board for England and Wales, and an Agricultural Wages Committee for each county were constituted.

By Order No. 546, made on Feb. 20, 1933, the Board fixed the wages of wagoners between nineteen and twenty at not less than £1 11s. per week.

The Agricultural Wages (Regulation) Act, 1924, provides:

Section 7: "(1) Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction [to penalties] . . . (10) Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void. (11) Subject to any definition under this Act of the benefits or advantages which may be reckoned as payment of wages in lieu of cash and the value at which they are to be reckoned, and to any limitation or prohibition under this Act of the reckoning of benefits or advantages as payment of wages in lieu of cash, the court may, in any proceedings under this Act, reckon as a payment of wages such amount as in the opinion of the court represents the value of any benefits or advantages

(not being benefits or advantages prohibited by law) received by a worker under the terms of his employment.”

Section 8: “(1) The Minister shall, in addition to any special power to make regulations given to him under this Act, have power to make regulations for the following purposes: (a) for requiring the wages committees by order to define the benefits or advantages (not being benefits or advantages prohibited by law) which may be reckoned as payment of wages in lieu of payment in cash and the value at which they are to be reckoned. . . .”

Pursuant to powers conferred under the above section, the Agricultural Wages Committee for Kesteven and Lindsey, by order dated Feb. 4, 1926, fixed the benefits or advantages which in that county division might be reckoned as payment of wages in lieu of payment of cash, and included therein board and lodging. In the case of persons between the ages of nineteen and twenty, they fixed the value of such board and lodging at 15s. per week.

The Attorney-General (Sir Thomas Inskip, K.C.) and Hubert Hull for the prosecutor. W. T. Monckton, K.C., and L. C. Graham-Dixon for the employer.

LORD HEWART, C.J.—In my opinion this appeal ought to be allowed.

I agree entirely with the argument of the learned counsel for the prosecutor, attractive as counsel for the employer's argument is upon a first view. No doubt it does seem hard that a man shall not be allowed to spend his wages as he pleases, but, when one looks at this Act and the purpose of this Act, I cannot help thinking that within certain limits the very purpose of the Act is to prevent what has been called an independent bargain. Section 7 (10) provides as follows:

“Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void,”

and s. 8, which is to be read in close connection with sub-s. (11) of the preceding section, provides that the Minister shall have power

“to make regulations for the following purposes—(a) for requiring—[the word requiring is important]—the wages committees by order to define [not only] the benefits or advantages . . . which may be reckoned as payment of wages in lieu of payment in cash, [but also] the value at which they are to be reckoned.”

That being so, it seems to be quite immaterial that in a particular case the worker is willing to pay more. The Act says that the wages committee may be required by order to define the value at which certain things are to be reckoned, and when one looks at the order which has been made, these certain things are what one would naturally expect, milk, potatoes, oil and fuel, board and lodging, and, in the case of a man or a youth of the age of the wagoner here, the board and lodging are defined to be of the value of 15s. per week of seven days. However hard it may seem in the particular case, this part of the Act would be reduced to a nullity if, notwithstanding the clear words of this section, what is called an independent or a collateral bargain could be made between the employer and the worker whereby the value defined by the wages committee was exceeded.

At first blush the suggestion that what was done here was done voluntarily is attractive, but if that argument is to prevail it seems to me to follow, as indeed counsel for the employer appeared to admit in one passage of his ingenious argument, that the utility of the definition provided for in s. 8 (1) (a) would be limited to a case where a deduction was made against an unwilling person. When I look at the form of this transaction and compare it with what seems to be the reality, I think the truth of the matter, on the facts found in this case, is clearly this, that this man had no alternative but to pay 20s. a week for that which was defined in value as being worth 15s. a week and one only gets into confusion by travelling beyond the matters of which the value is defined by the committee into matters over which the committee has no control whatever. It is nothing to the purpose to say that a man may pay what he likes for his boots or his clothes. Where there is a definition of the value made by the committee it appears to me that

the statute says that amount is not to be exceeded. Speaking for myself, I think it is mere matter of form that the one bargain: "I will employ you at 31s. a week" is said to be separate from and independent of the other bargain: "if you come to lodge in my house you shall pay me £1 a week." The effect of this enactment is that the farmer is bound to say: I cannot prevent you from paying £1 a week to somebody else, but as between you and me, or as between employer and employed since the passing of this Act, I am limited to 15s. as are you. I think, therefore, that, if effect is to be given to this statute, that which was done here, although no doubt done in perfect good faith, was a contravention of the provisions of the statute and that this appeal ought to be allowed and that the case ought to go back to the justices with a direction that the offence which was charged was proved.

AVORY, J.—I agree. However attractive at first sight the argument of counsel for the employer that an agricultural worker who has once been paid the wages fixed under this regulation ought to be allowed to spend his money as he pleases may be, I have come to the conclusion that sub-ss. (10) and (11) of s. 7 and the provisions of s. 8 of the Act of 1924 in effect do prohibit the agricultural worker from spending more than a certain amount upon certain matters which are described as benefits or advantages under the Act, one of those or two of those benefits or advantages being board and lodging, and that the effect of the legislation and of the regulations and definitions of the wages committee is that in this case the worker was not permitted to make an agreement for payment of more than 15s. a week for his board and lodging as between him and his employer. I entirely agree with what my Lord has said that there is nothing in the Act to prevent him, when he has once been paid his full wages and in the absence of an agreement with his employer, from going into a village and paying what he pleases for anything which is not provided for by these regulations as between the employer and the worker.

I agree, therefore, that this case should be remitted to the magistrates to find that the employer is liable.

HUMPHREYS, J.—I agree. I have felt great difficulty in the course of the argument in this case, but on the whole I have arrived at the same conclusion as the other members of the court. I think that counsel for the prosecutor was right in saying that if the court once allowed the theory of an independent contract to be established, the court would have to put itself in the position which the legislature by s. 8 (1) of this Act has reserved for the wages committee, namely, that of deciding not only what benefits or advantages may be reckoned as payment of wages in lieu of payment in cash, but also the value at which they are to be reckoned. In other words, the court would be doing, in the case of benefits or advantages which are defined under the Act, that which the court is required to do in the case of benefits or advantages which are not defined under the Act. I am referring to sub-s. (11) of s. 7 of the Act, under which the court itself decides what is the value of the benefit or advantage which accrued to the employee in the particular case. I agree with the judgments which have been pronounced.

Appeal allowed.

Solicitors: Solicitor to the Ministry of Agriculture; Ellis & Fairbairn.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

FLINT v. LOVELL

[COURT OF APPEAL (Greer, Slessor and Roche, L.JJ.), November 6, 23, 1934]

[Reported [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; 51 T.L.R. 127; 78 Sol. Jo. 860]

Negligence—Damages—Shortened expectation of life—Damages assessed by judge sitting without jury—Test for review by Court of Appeal.

In an action for damages for personal injuries caused by the negligence of the defendant, the tribunal in assessing damages may take into account as a separate item or head of damage the fact that the plaintiff's expectation of life has been substantially shortened by the injury he has received. So held by GREER and SLESSOR, L.JJ. (ROCHE, L.J., dubitante).

Admiralty Commissioners v. Steamship Amerika (Owners) (1), [1917] A.C. 38, distinguished.

Per GREER, L.J.: To justify reversing the assessment of damages by a judge who has tried the case without a jury, the Court of Appeal must be convinced either that the judge has acted on a wrong principle of law or that the amount awarded was so extremely high or so very small as to make the assessment an entirely erroneous estimate of the damages to which the plaintiff is entitled.

Notes. Considered: *Slater v. Spreag*, [1935] All E.R. Rep. 900. Applied: *Roach v. Yates*, [1937] 3 All E.R. 442. Approved: *Rose v. Ford*, [1937] 3 All E.R. 359. Considered: *Shepherd v. Hunter & Co.*, [1938] 2 All E.R. 587; *Chant v. Read*, [1939] 2 All E.R. 286; *Gambling v. Benham*, [1940] 1 All E.R. 275; *Mills v. Stanway Coaches, Ltd.*, [1940] 2 All E.R. 586. Referred to: *Feay v. Barnwell*, [1938] 1 All E.R. 31; *The Aizkarai Mendi*, [1938] 3 All E.R. 483; *Rook v. Fairrie*, [1941] 1 All E.R. 297; *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278; [1942] 1 All E.R. 657; *Dick v. Piller*, [1943] 1 All E.R. 627; *Greenham v. Tecalemit, Ltd.* (1948), 93 Sol. Jo. 26; *Nance v. British Columbia Electric Rail. Co.*, [1951] 2 All E.R. 448.

As to the review by the Court of Appeal of an award of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 310 et seq., and for cases, see 17 DIGEST (Repl.) 193, 194. As to damages for negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 722 et seq., and for cases, see 36 DIGEST (Repl.) 195 et seq.

Cases referred to:

- (1) *Admiralty Commissioners v. Steamship Amerika (Owners)*, [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 33 T.L.R. 135; 61 Sol. Jo. 158; 13 Asp. M.L.C. 558, H.L.; 36 Digest (Repl.) 207, 1084.
- (2) *Higgins v. Butcher* (1606), Yelv. 89; Noy. 18; 80 E.R. 61; 1 Digest 60, 491.
- (3) *Baker v. Bolton* (1808), 1 Camp. 493, N.P.; 36 Digest (Repl.) 206, 1081.
- (4) *Hadley v. Baxendale* (1845), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.
- (5) *Phillips v. London and South Western Rail. Co.* (1879), 4 Q.B.D. 406; 40 L.T. 813; affirmed 5 Q.B.D. 78; 41 L.T. 121; 43 J.P. 749; 28 W.R. 10, C.A. Subsequent proceedings, 5 C.P.D. 280; 42 L.T. 6, C.A.; 17 Digest (Repl.) 190, 860.
- (6) *R. v. Tessymond* (1828), 1 Lew. C.C. 169; 15 Digest (Repl.) 966, 9367.
- (7) *Markham v. Cobb* (1625), Lat. 144; W. Jo. 147; Noy. 82; 82 E.R. 316; 1 Digest 60, 496.
- (8) *Dawkes v. Covenigh* (1652), Sty. 346; 82 E.R. 765; 1 Digest 61, 497.
- (9) *Crosby v. Leng* (1810), 12 East, 409; 104 E.R. 160; 1 Digest 63, 523.
- (10) *Re Shepherd, Ex parte Ball* (1879), 10 Ch.D. 667; 48 L.J.Bey. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest 65, 533.
- (11) *Armstrong v. Lisle* (1697), Kel. 93.

Appeal from an order of ACTON, J., sitting without a jury.

The plaintiff, Henry Warne Flint, sued the defendant, Mrs. Doris Lovell, for damages for personal injuries sustained in a motor-car accident which occurred on Sept. 18, 1933,

on the highway at Coulsdon. The defendant admitted liability and the sole issue tried was that of damages.

The plaintiff was a man aged sixty-nine at the time he met with his injuries and seventy at the time of the action. Before Sept. 18, 1933, he was in ordinary health for a man of his years and might have been expected to live for eight or nine years in the usual course of things subject to the average risks of human life. As a result of injury from the collision, by the unanimous testimony of the medical men called, the plaintiff's life had been shortened so that he could not be expected to live for long, "probably some time under a year."

ACTON, J., in giving judgment, said that the plaintiff had suffered terribly as the result of the accident. There was no doubt that he had lost the prospect of an enjoyable, vigorous and happy old age, which he (his Lordship) was satisfied on the medical testimony might have gone on for a number of years if the accident had not occurred. The special damages were agreed at a sum of £400, and he awarded the plaintiff the sum of £4,400, and for that he gave judgment, with costs.

The defendant appealed on the issue of damages, alleging that the learned judge at the hearing of the action, in assessing the damages, had taken into account the probability of the plaintiff's early death—the expectation of a shortened life—and that he was not entitled to take this element into consideration, and that in any case the damages were excessive. The plaintiff contended that the learned judge's finding was no more than a finding that the mental pain and suffering of the plaintiff had been increased by the prospect of his early death, and, alternatively, that if the learned judge had taken into consideration the plaintiff's expectation of shortened life, he was entitled so to do.

Maurice Healy, K.C., and N. R. Fox-Andrews for the defendant.

Richard O'Sullivan, K.C., and Gerald Gardiner for the plaintiff.

Nov. 23. The following judgments were read.

GREER, L.J.—This is an appeal from an order of ACTON, J., whereby he awarded to the plaintiff the sum of £4,400 as damages for personal injuries caused by the negligence of the female defendant in driving her motor car so as to bring it into collision with the plaintiff's car, with the result that he suffered grave personal injuries. There was no dispute with regard to the liability of the defendant to pay damages. The sum of £400 was agreed as the amount of the special damages which the plaintiff was entitled to recover.

The learned judge came to the conclusion, on the facts given in evidence, that before the accident the plaintiff was a man in good health and in good condition for a man of his years. There was some evidence that before the accident he had had heart trouble, but that was contradicted by the evidence of the plaintiff's witnesses, which the learned judge accepted, and I think that we must deal with this case as the case of a man who, for his age, which at the time of the accident was sixty-nine, and at the time of the trial seventy, was a man of ordinary health who might, in the ordinary course, be expected to live for at least eight or nine years, subject, of course, to the average risks of human life. In giving judgment the learned judge said that he found that the plaintiff's life was very materially shortened, and that at the date of the trial he was, unhappily, according to the unanimous testimony of the doctors, not to be expected to live for long, probably something under a year, and, in the conclusion of his short judgment, he said:

"There is no doubt that he has lost the prospect of an enjoyable, vigorous, and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred."

The learned judge then awarded the plaintiff £4,000 in addition to the agreed amount for special damage.

It is unnecessary to state in any detail the evidence as to the results of the accident upon the plaintiff. I think that we ought to accept the judge's finding that by reason of the accident the plaintiff's future was reduced to pain and suffering for a year with the certainty of additional medical and nursing expenses, and the high probability that by reason of the injuries caused by the defendant's negligence he would be dead within

a year. If it was open to the judge to take into account the probability of early death, I do not think it can be said that the damages which he awarded, though somewhat on the generous side, and though this is a border-line case, are such that the Court of Appeal ought to interfere with his decision by reducing them. A

The question which arose for consideration during the argument, on a suggestion that came from the court, was whether, having regard to the decision in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1), it was permissible in law for the plaintiff to claim damages in respect of a reasonable certainty that his life had been substantially shortened by the wrongful act of the defendant. It is clear from that decision that any person who suffers damage by reason of the death of another, occasioned by the wrongful act of a third party in respect of which the law would otherwise give him a cause of action, cannot, either for the purpose of proving a cause of action, or for the purpose of recovering damages for a cause of action which he proves independently of the death, rely on the death either as giving him a right to, or increasing the amount of, damages which he is entitled to recover. It is plain that the decision of the court in that case, which is based on two old cases—*Higgins v. Butcher* (2) and *Baker v. Bolton* (3)—extends not merely to prevent the death of another being treated as a cause of action in the English courts, but also to prevent the recovery of any damages in respect of the death of another person even where the cause of action is complete without any proof of the death. B C D

In referring to claims for damages for the loss of the services of a servant or daughter occasioned by the wrongful act of another person LORD PARKER said in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) ([1917] A.C. at p. 46):

"If the writ alleged only an injury per quod servitium or consortium amisit, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only." E

LORD SUMNER's judgment is to the same effect. Each of these judgments contains an interesting account of how the rule arose out of the old law in which the killing of any subject of the Crown could only be put in suit by a prosecution for felony by the Crown, the only remedy for the relatives of the deceased being an appeal under which the killer, if he did not arrange the matter with the relatives, could be subjected to certain cruel tests. F

Having regard to the peculiar origin of the rule, I have come to the conclusion that it has no application to a case in which a plaintiff still living at the date of the trial is asking for damages on the ground that he has not only suffered severe pains of body and mental disquietude through the prospect of an early death, but also claims that what might have been an eight or nine years' pleasant life, in which he could have carried on his normal activities, has been converted into a precarious tenure not likely to exceed twelve months, during which he will continue to suffer severely as the result of the wrong of which he complains. It is my considered judgment that under the rules as to measure of damages laid down in *Hadley v. Baxendale* (4) the plaintiff's claim is one on which he is entitled to succeed. G H

I should like to add a few words about the jurisdiction of this court in appeals where the only contention, or one of the contentions, is that the damages awarded by a judge hearing a case without a jury are excessive. It is not possible to say that the tests which have been laid down in cases like *Phillips v. London and South Western Rail. Co.* (5) apply to an appeal from a judge trying a case without a jury, because an appeal is a re-hearing by the court with regard to all the questions involved in the action, including the question what damages ought to be awarded. But though the established rules with regard to appeals in cases tried with juries do not apply to appeals from the decisions of judges trying cases without the assistance of a jury, I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. I

To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some

wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

The result is that the appeal will be dismissed, with costs.

SLESSER, L.J.—This is an appeal from a judgment of ACTON, J., awarding to a gentleman who was very seriously injured in a collision between motor cars the sum of £4,400, £400 of which were for special damage. The sole question for our decision on this appeal is whether the damages were excessive. Were it not for certain grounds on which the learned judge bases his determination of damages, I should feel less difficulty about this appeal.

The plaintiff is a more or less wealthy man of seventy years of age. He had, before the accident, enjoyed a vigorous life, devoting himself to sport and recreation, which he carried on notwithstanding his age, and the damages, though considerable, are not in themselves so excessive as to merit disturbance.

The difficult question of law arises thus. The learned judge finds, among other matters, that as a consequence of the accident the plaintiff

“has lost the prospect of an enjoyable, vigorous, and happy old age, and that he has suffered terribly as a result of the accident, and that there is no doubt that he will go on suffering from the effects.”

On this finding I think that the learned judge would have been justified in awarding to the plaintiff very substantial damages as compensation for the wreck of his physical life, though not a sum so large as £4,000. But ACTON, J., has gone on to assign the reason why he has assessed damages at the figure which is impeached, and this most difficult question of law arises: Whether one of the grounds which he has so selected is a ground which supports a claim for damages at all. If it does not, I think that it is impossible to say that the sum awarded is not too great. If, on the other hand, the reason to which I shall shortly refer is a valid reason for giving or increasing damages, I do not think that the total sum is such that this court is called on to interfere with it.

I, therefore, approach the problem which the learned judge has raised by his judgment, which is as follows. I have no doubt that he has included as one of the elements of damage the fact that the plaintiff's life has been very materially shortened, and that he is not expected to live very long, probably something under a year, whereas, had the accident not occurred, the learned judge says that he is satisfied on the medical testimony that the plaintiff might have gone on living for a number of years. It was attempted in argument to say that this finding was no more than a finding that the mental pain and suffering of the plaintiff had been increased by the prospect of his early death. In my view, this interpretation is not possible. The learned judge clearly severs the question of the plaintiff's suffering from the consideration of the loss of his prospect of life, for the learned judge states, in addition to the physical disabilities and the suffering, the further ground for giving damages that the plaintiff's life has been shortened.

Now, were there no principle to the contrary, it is clear to my mind that the general rule that a plaintiff may claim such damages as arise naturally and directly from the tort would entitle him to say that the shortening of his life might properly be taken into consideration, for it is certainly, on the judge's finding, the natural and direct result of the accident. But it is said that so to hold would be in effect to award the plaintiff damages in respect of death and that the authorities show that such damages cannot be allowed.

As a general proposition of law, if the claim be indeed in respect of death, this argument cannot be disputed. In *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) the House of Lords in terms so decided, upholding the principle laid down in *Baker v. Bolton* (3), that in a civil court the death of a human being cannot be complained of as an injury. Thus LORD LOREBUEN, L.C., said in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) ([1917] A.C. at p. 41):

“It is far too late for this House to disturb the rule expressed by LORD ELLENBOROUGH in *Baker v. Bolton* (3).”

And LORD PARKER said ([1917] A.C. at p. 42):

"I may point out that the correctness of the ruling in *Baker v. Bolton* (3) has since been accepted, not only by all courts in this country but by the Supreme Court of the United States, nor can anything be found in the earlier authorities inconsistent with it."

And again, LORD SUMNER added (*ibid.*, at p. 50) that the rule that in a civil court the death of a human being cannot be complained of as an injury, was a rule which has long been treated as universally applicable law, and went on to say that the rule had received statutory recognition in LORD CAMPBELL's Act.

Faced with this indisputable doctrine, counsel for the plaintiff seeks to distinguish it in the present case on the following grounds. He says, as I understand him, that so much of the damage here as was attributable to the shortening of the plaintiff's life was given, not in respect of his death, but in respect of the destruction of the prospect of future amenities of life which he might otherwise have enjoyed. To determine this point I have found it necessary, once again, notwithstanding the exhaustive historical researches of LORD PARKER and LORD SUMNER in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) to consider, so far as is necessary for the present case, certain aspects of the rule in *Baker v. Bolton* (3). In particular, I would emphasise this passage from the speech of LORD PARKER in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) ([1917] A.C. at p. 44):

"It is almost a commonplace that apparent anomalies in our law can generally be explained if we consider the conditions of its historical growth."

A person upon whom the law imposes a duty and who grossly neglects to perform it, or performs it with gross negligence, may be guilty of manslaughter, a felony (*R. v. Tessymond* (6) per BAYLEY, L.J.). According to PROFESSOR HOLDSWORTH (*HISTORY OF ENGLISH LAW*, vol. III, at p. 331):

"The rule that if a tort amounts to a felony the injured party's right of action is barred does not seem to be expressly stated in the YEAR BOOKS."

According to the same learned author, the general application of the rule is due to the fact that in the great majority of cases where death ensues as a result of a tort felony has been committed.

Higgins v. Butcher (2) appears to be the earliest express statement of the rule that if a tort amounts to a felony the injured party's right of action is barred. TANFIELD, J., there said (*Yelv.* at p. 90):

"If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service . . . it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence, and private wrong offered to the master before, and his action is thereby lost,"

FENNERY and YELVERTON, JJ., concurred.

This is now too wide, and to give effect to the later authorities the rule must be construed in a more strict and limited sense. Thus, LORD PARKER pointed out in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1) ([1917] A.C. at pp. 47-8) that the generality of this rule was modified some years later, in 1625, in *Markham v. Cobb* (7) and in *Dawkes v. Coveleigh* (8), which, said LORD PARKER, were authorities that in such felonies as burglary or larceny

"the trespass is not drowned in the felony, so as to preclude an action for the trespass, provided the requirements of public policy are first satisfied."

He said that these cases were quoted with approval by SIR MATHEW HALE (1 HALE, *PLEAS OF THE CROWN*, p. 546) and also by LORD ELLENBOROUGH in *Crosby v. Leng* (9) and, said LORD PARKER, "it cannot be disputed that they are good law."

It is true that in *Re Shepherd, Ex parte Ball* (10) (Ch. Div. at p. 674) BAGGALLAY, L.J., said,

"notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice."

But, as LORD PARKER pointed out, the lord justice said "that a felonious act may" (not that it must) "give rise to a civil action." LORD PARKER proceeded—*Admiralty Commissioners v. Steamship Amerika (Owners)* (1) ([1917] A.C. at p. 49):

"Most felonies involve a wrong less than a felony and for such a wrong civil proceedings will lie when once the demands of public policy have been satisfied. But there may be felonies where the only wrong is the felony itself, and it may well be that the felony cannot be made the subject of complaint in civil proceedings."

The problem raised by mayhem, an injury amounting to the deprivation of a limb useful for the purpose of fighting, which might on a strict construction of the doctrine of no complaint of felony in civil proceedings debar all actions in tort of the nature here under consideration, is possibly soluble on the ground that mayhem never became an indictable felony although prosecuted by appeal of felony, and BRITTON actually recommends complainants in such cases to bring the action of trespass rather than the appeal as being under the degree of felony: BRITTON 49 (Translation by F. M. NICHOLS (1865), vol. I, at p. 123); and see *Armstrong v. Lisle* (11).

In any event, whatever the modern extent of the rule that where the act complained of is a felony the civil action is lost, the whole principle depends on the fact that the act itself is not only tortious but also felonious. As SIR FREDERICK POLLOCK writes (LAW OF TORTS (13th Edn.), p. 65):

"Homicide is presumably felonious. Hence no civil action could be allowed for causing the death of a human being. The affinity of the rule, if any, is with the principle, long recognised but never properly defined till our own time, of trespass being 'merged in felony.'"

With these historical considerations in mind I approach the present case. It is obvious that, in so far as the plaintiff is still living, the doctrine *actio personalis moritur cum persona* can have no application, and I have not paused to consider it. But equally, on the principle of *Baker v. Bolton* (3) it is impossible to say that the tort, in so far as it shortened the plaintiff's life, could in any circumstances merge in the felony, for the defendant, fortunately, did not kill the plaintiff, and, if mayhem or wrongs analogous be excluded from consideration, has committed no felony at all. At most, criminally, the defendant's wrongdoing might have amounted to a misdemeanour on which, alternatively, trespass could always properly be brought.

The final result is to point to a highly artificial rule limited to certain defined subject-matter. There is, in my judgment, no scope in the present case for the application of the principle which I have discussed which may apply where a felony has been committed or where the doctrine of no claim in respect of death has been attached, and no reason why, among other matters, the shortening of the plaintiff's life should not be taken into account in the assessment of damages. I would quote in conclusion in this connection a passage from BLACKSTONE'S COMMENTARIES (8th Edn., vol. 3, at p. 122), where, dealing with injuries, the learned author writes:

"Injuries, affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution."

The view which I here take does not appear to be inconsistent with the general principles laid down in *Phillips v. London and South Western Rail. Co.* (5) and particularly with the doctrine of COCKBURN, C.J., in that case (4 Q.B. Div. at p. 407), where he mentions, as matters for consideration for a jury, not only the bodily injuries sustained and the pain undergone, but also

"the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent."

He also said:

"As a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained."

In my opinion, for the reasons here stated, I think that the learned judge was entitled to take into consideration all the matters which he has mentioned in his judgment, and I see no reason to disturb the damages which he has found as a result of those considerations.

ROCHE, L.J.—I regret that I am unable to concur in the judgment of the lords justice. I am of opinion that the amount awarded to the plaintiff by the judgment under appeal was excessive and ought to be reduced. I agree with the view expressed by **GREER, L.J.**, that, notwithstanding the powers this court undoubtedly possesses to review any decision of a judge, it ought not lightly to interfere with the conclusion reached by a trial judge on the quantum of compensation to be awarded to a plaintiff, and I should certainly not favour such interference merely because I should myself have awarded somewhat more or less than the trial judge.

But in the present case I am satisfied that the figure awarded by the learned judge was very much in excess of the proper figure, and, to adopt the test laid down by **GREER, L.J.**, was an entirely erroneous estimate of the amount of the damage. My reasons for this opinion are as follows. The evidence showed that the plaintiff was, for a man of seventy, fairly healthy and likely to live some years if the accident had not happened, and that by reason of the accident this anticipation of life was reduced to not more than a year from the date of the hearing. I do not doubt that this evidence was relevant, and had a very material bearing on the amount of damages to be awarded. I so think for two reasons: first, because the fact of such a reduction was a very strong piece of evidence on the seriousness of the injuries unrepaired by medical treatment—the loss of vigour which is mentioned in the case cited by **SLESSER, L.J.**—and such lasting injuries are properly an element and, not seldom, the principal element, to be considered in assessing damages in a case of this kind. Secondly, because impending death and the weakness preceding it, and the knowledge of these conditions, naturally produce or increase the pain and suffering which constitute another element to be considered in the assessment of damages in a case of personal injuries. The reasons given by the learned judge for his decision are not very full. I make no criticism of that, but I infer from his language that he did consider and take into account the shortening of the plaintiff's life in both the above connections.

But I also infer that the learned judge went further and included in the damages a sum, and I doubt not, a substantial sum, for the actual or prospective shortening of the plaintiff's life regarded as a further and independent head of damage. This is, I think, open to the objection that it has, in my opinion, tended to and resulted in compensation being given for the same matter more than once.

As to the interesting point with regard to the applicability to the present circumstances of the rule of law recognised and re-approved by the House of Lords in *Admiralty Commissioners v. Steamship Amerika (Owners)* (1), I entertain considerable doubts, but I am not prepared to dissent from the conclusions of the lords justices who have given judgment. My doubts arise from these considerations. First, on the theoretical side, though it is, no doubt, true that the law of England is not in all respects logical, it would seem to go to an extreme in lack of logic if, while the death of a human being does not, apart from statute, give a right of action, and does not, where a cause of action exists, found or constitute an independent right or head of damage, yet the shortening of life can give such right of action, and can found or constitute an independent right or head of damage. There would thus, as it seems to me, be allowed to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant.

Secondly, from the practical point of view I think that the admission of this head of damage as a separate and independent head is novel and difficult of application. In the hearing of very many cases of personal injuries I do not remember this head of damage being so treated. The difficulty of application arises out of the question of differences of age. If the case of this plaintiff merits the sum awarded, I do not see how

or by what sum a similar shortening of the life of a young man or middle-aged man could be adequately met. A further difficulty of application is this, that it seems to me extremely hard to avoid the danger of giving a plaintiff compensation for the same thing more than once under various heads of damage. With great respect to the learned judge I cannot help thinking that this is what has happened in the present case.

Finally, this head of damage seems to me to involve inquiries and speculations inappropriate to and difficult for a court of law—as, for example, the disposition and outlook on life as well as the material circumstances of a plaintiff.

But, in spite of the doubts thus expressed, I adopt for the purpose of my judgment the principle that this factor ought to be allowed for as an independent head of damage, and that full compensation ought to be made for the shortening of the plaintiff's life, so far as it can be made in money. Nevertheless, I am of opinion that the amount awarded by the trial judge is so excessive that this court should interfere. It is, perhaps, right that I should express in figures my view of what the circumstances of the case warrant, and I do so by saying that the utmost figure which, in my judgment, is warranted is the sum of £3,000, to include the agreed item of £400 for special damage.

Holding the view that so substantial a reduction in the amount of the judgment would be proper on any view of the law, I should allow the appeal, but having regard to the contrary opinions of GREER, L.J., and SLESSER, L.J., it will be dismissed.

Appeal dismissed.

Solicitors: *Joynson-Hicks & Co.; Wiley & Powles.*

[*Reported by C. G. MORAN, ESQ., Barrister-at-Law.*]

R. v. DONOVAN

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Swift and du Parc, J.J.), June 18, 25, July 27, 1934]

[Reported [1934] 2 K.B. 498; 103 L.J.K.B. 683; 152 L.T. 46; 98 J.P. 409; 50 T.L.R. 566; 78 Sol. Jo. 601; 32 L.G.R. 439; 25 Cr. App. Rep. 1; 30 Cox, C.C. 187]

Criminal Law—Assault—Defence—Consent—Act malum in se.

If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful—an act *malum in se*—it can never be necessary for the prosecution to prove absence of consent on the part of the party wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected, and in such a case the onus of negating consent is on the prosecution. Consent, being a state of mind, is to be proved or negated only after a full and careful review of the behaviour of the person who is alleged to have consented. Unless the jury is satisfied beyond reasonable doubt that the conduct of that person has been such that, viewed as a whole, it shows that he or she did not consent, the prisoner is entitled to be acquitted.

Notes. Referred to: *R. v. Turner*, [1944] 1 All E.R. 599; *Bravery v. Bravery*, [1954] 3 All E.R. 59.

As to the defence of consent, see 10 HALSBURY'S LAWS (3rd Edn.) 285, and as to assault, see *ibid.*, 740 et seq., 755; and for cases, see 14 DIGEST (Repl.) 57, 981 et seq., 1026–1028.

Cases referred to:

- (1) *R. v. May*, [1912] 3 K.B. 572; 82 L.J.K.B. 1; 108 L.T. 351; 77 J.P. 31; 29 T.L.R. 24; 23 Cox, C.C. 327; 8 Cr. App. Rep. 63, C.C.A.; 14 Digest (Repl.) 335, 3246.
- (2) *R. v. Coney* (1882), 8 Q.B.D. 534; 51 L.J.M.C. 66; 46 L.T. 307; 46 J.P. 404; 30 W.R. 678; 15 Cox, C.C. 46, C.C.R.; 14 Digest (Repl.) 91, 540.
- (3) *R. v. Bruce* (1847), 2 Cox, C.C. 262; 15 Digest (Repl.) 954, 9208.

Appeal against conviction.

The appellant was convicted at Surrey Quarter Sessions of indecent assault and common assault on a girl aged seventeen years and was sentenced to concurrent terms of eighteen months' and six months' imprisonment, in each case with hard labour.

The facts of the case, which are summarised in the above headnote, appear fully in the judgment.

G. B. McClure for the appellant.

C. G. L. Du Cann for the Crown.

Cur. adv. vult.

July 27.—The judgment of the court was read by

SWIFT, J.—The appellant was convicted at the Surrey Quarter Sessions upon an indictment charging him with indecent assault and common assault on Norah Eileen Harrison. He was sentenced to eighteen months' imprisonment with hard labour upon the count for indecent assault, and to six months' imprisonment with hard labour upon the count for common assault, the sentences to run concurrently. He was given leave to appeal against conviction. There was no appeal against sentence. The appellant complained that the chairman misdirected the jury in the summing-up and in the reply which he gave to a question put to him by the jury, and that the verdict was unreasonable and could not be supported upon the evidence.

It was established by the evidence, and was not in dispute, that on March 8, 1934, in the evening, the appellant induced Norah Eileen Harrison, a girl seventeen years of age, to go with him to a garage at Morden, and that there he beat her with a cane in circumstances of indecency. The defence was that it lay upon the prosecution to prove absence of consent, and that in fact the girl had consented to everything which was done by the appellant.

It is not necessary to narrate the facts in detail. It appeared that the appellant was addicted to a form of sexual perversion, and there was no doubt that during a series of telephone conversations he had made suggestions to the prosecutrix which, if they were taken seriously, meant that he intended or desired to beat her. According to the evidence of the appellant, and of a young woman who said that she had overheard some of the telephone conversations, there was talk between the appellant and the prosecutrix which left no doubt that she had expressed her willingness to submit herself to the kind of conduct to which he was addicted. On the evening of March 8 she met him for the first time, and met him, according to her evidence, in the belief that she was to be taken to a place of entertainment—"the pictures." They met by appointment at the Marble Arch. It was common ground that his first remark was, "Where would you like to have your spanking, in Hyde Park, or in my garage?" but the prosecutrix said that she did not treat the question seriously. She went with him, however, on the tube railway to Morden, and then to a garage, either, as she said, because she was compelled or induced by fear to do so, or, as he maintained, willingly and in pursuance of a common design. The garage is described as being in a passage-way between two houses. There the alleged offences were committed.

In addition to the girl herself, three witnesses were called on behalf of the prosecution. A doctor, who had examined her at 9.40 p.m. on March 10, said that there were seven or eight red marks upon her body, and expressed the opinion that these marks indicated that she had suffered a "fairly severe beating." He found no sign of any other injury. A married sister of the prosecutrix deposed that she had returned home just after ten o'clock on the night of the alleged assault looking pale and ill, and had made a complaint which was consistent with her evidence. A detective inspector who arrested the appellant on March 13 proved that he found in the possession of the appellant a sealed envelope.

lope, the terms of which left no doubt as to the nature of the practices to which he was addicted.

The appellant gave evidence on his own behalf, asserting that the prosecutrix had so acted throughout as to make it plain that she consented to all that he did. The young woman who has already been mentioned was called, and gave evidence about the telephone conversations to which she had listened. It is enough to say that her evidence, if believed, showed that the prosecutrix went to the garage with full knowledge of the appellant's intentions, and without reluctance.

At the close of the case for the defence, and before counsel addressed the jury, the learned counsel for the Crown submitted (in the absence of the jury) that, in the circumstances of the case, it was unnecessary for the prosecution to prove absence of consent. After hearing the argument, the justices ruled against this submission. The jury returned into court, and the chairman summed up to them upon the footing that the question "consent or no consent" was the vital issue.

If it be assumed that a verdict of Guilty could be justified in this case only by proof that there was absence of consent, certain observations may properly be made. First, it was of importance that the jury should be left in no doubt as to the incidence of the burden of proof in relation to consent. In *R. v. May* (1) ([1912] 3 K.B. at p. 575) the principle applicable to cases of this kind was laid down by this court in these words:

"The court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negating consent being on the prosecution and as to the evidence in the particular case bearing on the question."

We have no doubt that the facts proved in the present case were such that the jury might reasonably have found consent. It is, indeed, difficult to reconcile some of the admitted facts with absence of consent. It was, therefore, of importance (if consent was in issue) that there should be no possibility of doubt in the minds of the jury upon the question whether it was for the Crown to negative consent, or for the defence to prove it. A second observation which may fairly be made is that consent, being a state of mind, is to be proved or negated only after a full and careful review of the behaviour of the person who is alleged to have consented. Unless a jury is satisfied beyond reasonable doubt that the conduct of the person has been such that, viewed as a whole, it shows that she did not consent, the prisoner is entitled to be acquitted.

It is evident to the court that the chairman was at pains to sum up an unusually difficult case with impartiality and precision. We think, nevertheless, that if the summing-up be looked at in the light of the observations which we have made it will be seen to be defective in two respects. First, we cannot find that the chairman ever gave a clear direction to the jury that the onus of negating consent was on the prosecution. In that part of the summing-up where this aspect of the case is specifically dealt with, the chairman, after using the words

"if there is consent, that is a complete answer," [went on to say:] "Next you get to this vital question in the case, and that is whether the complainant in this case . . . was, as she alleges, compelled by fear to submit to the defendant's wishes, or whether, as he alleges, there was no compulsion; that is the point. Because if there was no compulsion, if she was not, as she alleges, compelled by him to comply with his wishes, then she was a consenting party, and that is a good defence to each of the charges."

This material passage from the summing-up is, we think, so phrased as to leave the jury in doubt where the burden of proof lay on this part of the case, if, indeed, it did not lead them to believe that it was for the appellant to establish the defence of consent. Other words were used in the summing-up and in the observations made by the chairman in answer to questions put to him by the jury after he had concluded his summing-up which have some bearing upon this point, but we think it unnecessary to comment upon them in detail, inasmuch as it was conceded by the learned counsel for the Crown that he could not point to any direction which fulfilled the requirement laid down in the passage from *R. v. May* (1) already mentioned.

The second matter of complaint is a direction given to the jury in answer to a question. After a retirement which lasted for one hour, the jury returned into court and handed a note to the chairman. The shorthand note of what then took place is as follows:

"(The chairman): Members of the jury, the question put to me is: If a man has reason to think that consent has been given, does that constitute consent? The answer is definitely 'No.' It is a question of fact. Do you want to retire again?"
(The foreman of the jury): "I do not think we need retire again."

The jury then "shortly conferred without leaving the jury box," and returned their verdict of "Guilty."

In our view, this direction is open to grave objection. It is no doubt true that consent is a question of fact. The state of a person's mind is a question of fact, but, as we have said, it can be ascertained only by considering and weighing the ascertained facts about that person's conduct.

The proper answer to the jury's question would have been that if they, as reasonable persons, thought that the conduct of the prosecutrix, viewed as a whole, was consistent with consent, they ought not to find that the prosecution had negatived consent. It is, in our view, at least possible that such a direction, coupled with a correct and unambiguous direction as to the burden of proof, would have resulted in the acquittal of the appellant, and we are, therefore, compelled to come to the conclusion, notwithstanding the evident desire of the chairman to do justice to the appellant's case, that the trial was not satisfactory.

This conclusion would have been enough to dispose of the case were it not for the fact that the learned counsel for the Crown relied in this court upon the submission which he had unsuccessfully made at the trial, and argued that, this being a case in which it was unnecessary for the Crown to prove absence of consent, this court ought not to quash the conviction.

We have given careful consideration to the question of law which this submission raises. The learned counsel on both sides referred us to passages in the judgments in *R. v. Coney* (2). The subject-matter of that case was very different from that of the present case, but the judgments undoubtedly contain statements of the law which are of great value for the present purpose. Much reliance was placed, on behalf of the Crown, upon the following passage from the judgment of CAVE, J. (8 Q.B. Div., at p. 539):

"The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial."

We have considered the authorities upon which this view of the learned judge was founded, and we think it of importance that we should state our opinion as to the law applicable in this case. If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection may, in another, be an assault, for no other reason than that in the one case there is consent and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and, when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognised. In his *DIGEST OF THE CRIMINAL LAW* (7th Edn., art. 290), SIR JAMES FITZJAMES STEPHEN enunciates the proposition that

A "everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim."

This may have been true in early times when the law of this country showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification. It is to be observed, indeed, that in art. 293 of his Digest, the learned author says:

B "It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another."

In early works of authority, such as FOSTER'S CROWN CASES and EAST'S PLEAS OF THE CROWN, much learning upon the distinction between lawful and unlawful acts is to be found in the chapter dealing with homicide. At p. 259 of the former work (3rd Edn.), SIR MICHAEL FOSTER gives his reason for the proposition that a man who beats another "in anger or from preconceived malice" is responsible if fatal consequences ensue, in the following words:

C "What he did was malum in se, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other; he is therefore answerable for all the harm he did."

D If an act is malum in se in the sense in which SIR MICHAEL FOSTER used the words, that is to say, is, in itself, unlawful, we take it to be plain that consent cannot convert it into an innocent act.

E There are, as we have said, well-established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by SIR MICHAEL FOSTER in the chapter just cited, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests, such as "cudgels, foils, or wrestling," which are capable of causing bodily harm. The learned author, at p. 260, emphasises two points about such contests: (i) that bodily harm is not the motive on either side, and (ii) that they are "manly diversions, they tend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need." For these reasons, he says that he cannot call these exercises unlawful.

F Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in *R. v. Bruce* (3). In such cases the act is not in itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party.

G It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or by a person in loco parentis.

H In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse, and it may truly be said of him in SIR MICHAEL FOSTER'S words that

"he certainly beat . . . with an intention of doing . . . some bodily harm, he had no other intent,"

I and that what he did was malum in se. Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those "manly diversions" of which SIR MICHAEL FOSTER wrote. Nor is his act to be compared with the rough but innocent horseplay in the case of *R. v. Bruce* (3). Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to

convict him, and that it was only if they were not so satisfied that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling. A

This being our view of the law, we considered the question whether, in all the circumstances, it would be right to quash the conviction. The whole case was conducted, in so far as it was conducted in the presence of the jury, upon the footing that the issue of consent was the "vital question in the case." It is not too much to say that, in all probability, the only question which the jury felt called upon to decide, as the case was left to them, was the question whether in fact the prosecutrix was shown to have consented. We may summarise the position by saying that, of the two questions which should have been left to the jury, the first was not left at all, while the second was left to them with an inadequate and misleading direction. It may well be that, if the first question had been left to the jury, they would have answered it by saying that the appellant intended to cause and inflicted blows likely to cause bodily harm to the prosecutrix, so that the second question would not have arisen. But, although we think it probable that this would have been the jury's view, it is, in our opinion, impossible to say that they must inevitably have so found. There are many gradations between a slight tap and a severe blow, and the question whether particular blows were likely or intended to cause bodily harm is one eminently fitted for the decision of a jury upon evidence which they have heard. We may have little doubt what that decision would have been in this case, but we cannot, consistently with the practice of this court, substitute ourselves for the jury and decide a question of fact which was never left to them. It is, therefore, impossible to say that facts have been proved which show the appellant's act to have been unlawful in itself. Without proof of such facts, he could be convicted only if the prosecution negatived consent, and upon the issue of consent there was a misdirection which may have led to a wrong verdict. For these reasons we came to the conclusion that the conviction must be quashed and the appellant discharged. B C D E F

Conviction quashed.

Solicitors: *Wilkinson, Howlett, & Moorhouse; Wontner & Sons.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

SANDLER v. SANDLER, DAVIES AND JOHNSTONE

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.J.J.), May 7, 8, 1934]

[Reported [1934] P. 149; 103 L.J.P. 88; 151 L.T. 313; 50 T.L.R. 397; 78 Sol. Jo. 383]

Divorce—Collusion—Prayer of petition dismissed as petition tainted with collusion—Supplemental petition not collusive—Jurisdiction to order decree nisi and damages on prayer in supplemental petition—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178 (2)—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25, s. 4 (2) (c)).

A husband petitioned for divorce alleging adultery and claiming damages against a named co-respondent, with whom the respondent had been to a hotel by arrangement with the petitioner. This co-respondent had never committed adultery with the respondent and the petition was a sham, the respondent being anxious and the petitioner, at the time, willing to keep the real adulterer's name out of the proceedings. Subsequently the petitioner obtained evidence of the respondent's association with J., of which he had previously been unaware, and amended the petition by adding charges of adultery and a claim for damages against J., who was named as a second co-respondent. The petitioner later filed a supplemental petition making fresh charges against the second co-respondent. The only defence was by the second co-respondent and on the issue of damages only. At the trial the claim for damages against the first co-respondent was abandoned. The jury were asked to separate their findings of adultery against the second co-respondent into two periods, that covering the charges made in the main petition and that covering the charges made in the supplemental petition, and to award damages, if any, in respect of the charges in the supplemental petition only. The jury found adultery proved in both periods, and awarded £2,500 damages. The President held (i) that the main petition was tainted with collusion in respect of the charges against the first co-respondent and dismissed the prayer in that petition; (ii) that the supplemental petition was untainted with collusion and the prayer therein could be granted. He, accordingly, pronounced a decree nisi and gave judgment for damages against the second co-respondent.

On appeal by the second co-respondent, and cross-appeal by the husband petitioner against the decision of collusion,

Held: (i) there was evidence on which the President could hold that there had been collusion between the husband and wife in the presentation of the petition;

(ii) the effect of the dismissal of the prayer of the petition on the ground of collusion was that the whole petition was dismissed;

(iii) the supplemental petition could not stand *proprio vigore*, but was part of and an addition to the original petition, and, therefore, stood dismissed with it.

Borham v. Borham and Brown (1) (1870), L.R. 2 P. & D. 193, and *Lapington v. Lapington* (2) (1888), 14 P.D. 21, applied.

Notes. The provision as to collusion in s. 170 of the Supreme Court of Judicature Act, 1925, has now been replaced by the requirement in s. 4 (2) (c) of the Matrimonial Causes Act, 1950, that the court shall pronounce a decree if "satisfied on the evidence that . . . the petition is not presented or prosecuted in collusion with the respondent or either of the respondents . . . but if the court is not satisfied . . . , it shall dismiss the petition." Supplemental petitions are now dealt with in r. 15 (2)–(6) of the Matrimonial Causes Rules, 1957; and in the President's direction dated Oct. 31, 1935.

Followed: *Volkers v. Volkers* (Wingate cited), [1935] P. 33; *Chapman v. Chapman and Thomas*, [1938] 1 All E.R. 635; *Spawforth v. Spawforth*, [1946] 1 All E.R. 379. Referred to: *Wyatt v. Wyatt*, [1937] 3 All E.R. 885.

As to supplemental petitions, see 12 HALSBURY'S LAWS (3rd Edn.) 320, para. 645, and for cases on the subject, see 27 DIGEST (Repl.) 450-451, 3219-3826. As to the meaning and effect of collusion, see 12 HALSBURY'S LAWS (3rd Edn.) 300, 301, paras. 594, 595, and for cases on the subject, see 27 DIGEST (Repl.) 389-390, 3220-3226. For the Matrimonial Causes Act, 1950, s. 4 (2) (c), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.

Cases referred to:

- (1) *Borham v. Borham and Brown* (1870), L.R. 2 P. & D. 193; 40 L.J.P. & M. 6; 19 W.R. 215; 23 L.T. 600; 27 Digest (Repl.) 450, 3819.
- (2) *Lapington v. Lapington* (1888), 14 P.D. 21; 58 L.J.P. 26; 59 L.T. 608; 52 J.P. 727; 37 W.R. 384; 27 Digest (Repl.) 361, 2986.
- (3) *Churchward v. Churchward and Holliday*, [1895] P. 7; 64 L.J.P. 18; 71 L.T. 782; 43 W.R. 380; 11 T.L.R. 69; 11 R. 626; 27 Digest (Repl.) 392, 3234.
- (4) *Crewe v. Crewe* (1800), 3 Hagg. Ecc. 123; 162 E.R. 1102; 27 Digest (Repl.) 389, 3220.
- (5) *Laidler v. Laidler* (1920), 90 L.J.P. 28; 123 L.T. 208; 36 T.L.R. 510; 27 Digest (Repl.) 394, 3247.
- (6) *Rutherford v. Rutherford*, [1922] P. 144; 91 L.J.P. 129; 126 L.T. 740, C.A.; affirmed sub. nom. *Rutherford v. Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 39 T.L.R. 42; 67 Sol. Jo. 78, H.L.; 27 Digest (Repl.) 592, 5536.
- (7) *Smith v. Smith* (1863), 3 Sw. & Tr. 216; 32 L.J.P.M. & A. 145; 9 L.T. 118; 7 Jur. N.S. 539; 11 W.R. 989; 164 E.R. 1257; 27 Digest (Repl.) 456, 3910.
- (8) *Schira v. Schira and Sampajo* (1868), L.R. 1 P. & D. 466; 27 Digest (Repl.) 485, 4234.
- (9) *Webb v. Webb* (1828), 1 Hagg. Ecc. 349; 162 E.R. 609; 27 Digest (Repl.) 454, 3863.

Appeal by the petitioner against the dismissal of his petition by SIR BOYD MERRIMAN, P., on March 7, 1934; cross-appeal by the second named co-respondent against the President's judgment against him on the supplemental petition in the same suit for damages and costs pursuant to the verdict of a jury.

Mr. Albert Sandler petitioned for the dissolution of his marriage with Mrs. Raymonde Gilberte Defly Sandler, née de Mèry, on the ground of her alleged adultery with Mr. Michael Davies and Mr. Clarence Nathaniel Johnstone (who was added as the second co-respondent in the amendment to the petition). Damages were claimed against both co-respondents. It was alleged that the respondent had committed adultery in February, 1933, with Mr. Davies at a London hotel, and with Mr. Johnstone at various places between December, 1930, and July, 1932. The respondent did not defend, her answer having been struck out. Mr. Davies did not appear, and the claim for damages against him was not pursued. By a supplemental petition the respondent was charged with committing adultery in April, 1933, at a Southampton hotel with Mr. Johnstone, who defended only on the issue of damages. The marriage took place on Sept. 25, 1924, at Brentford register office, and there is one child, a daughter, born in April, 1931. The petitioner and the respondent entered into a deed of separation on Dec. 30, 1932.

Beffus, K.C., and *Victor Russell* for the husband, the petitioner.

Wallington, K.C., and *G. Tyndale* for the co-respondent Johnstone.

The respondent, giving evidence on behalf of the co-respondent Mr. Johnstone, said that the original petition (in which Mr. Davies was alone cited) was collusive as she went to the hotel with Mr. Davies by arrangement with the petitioner, but no adultery took place.

Before the final addresses to the jury, the President told them that the petitioner was now asking for damages only in respect of the adultery alleged in the supplemental petition against Mr. Johnstone.

SIR BOYD MERRIMAN, P., in summing-up, said that though the charges of adultery were not defended they must be proved to the satisfaction of the jury. They could not find

A adultery merely on the pleadings like a debt for £100 or negligence in a claim for damages in a running-down case. In matrimonial causes there was a third party who was even more vitally concerned, perhaps, than the two parties themselves, the State. It was regarded as a matter of public importance that the marriage tie should be maintained and that it be ensured that dissolution of marriage should only be decreed on grounds allowed by the law. That had been the law for a very long time, and was specifically B ordained by the 105th Canon as follows:

C “Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony having been in the church duly solemnised, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled; we do straightly charge and enjoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the deposition of witnesses, and other lawful proofs and evictions, and that the credit be not given to the sole confession of the parties themselves, however taken upon oath either within or without court.”

D The President reviewed the evidence of adultery, after asking the jury to divide their findings with regard to the charges against Mr. Johnstone into two periods, the first before the deed of separation in December 1932, and the second in regard to April, 1933. There was sufficient evidence of adultery in both periods if the jury chose to accept it.

The jury found that adultery had been committed between the respondent and Mr. Johnstone in both periods, and assessed the damages at £2,500.

E An argument followed on the question of the original petition being collusive in regard to the charges against Mr. Davies.

By s. 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925,

“If on the evidence the court . . . find . . . that the petition is presented or prosecuted in collusion with either of the respondents, the court shall dismiss the petition.”

F SIR BOYD MERRIMAN, P.—By s. 178 (2) of the Judicature (Consolidation) Act, 1925, a statutory duty is imposed on me, even if adultery is proved, of being satisfied with regard to such questions as connivance, condonation, and collusion. If a petition is tainted with collusion or connivance I am bound to dismiss it. I am satisfied beyond reasonable doubt that there was no connivance at all on the part of the petitioner. The deed of separation was based on the promise of the respondent that there had been

G no adultery and that there would be none in the future with Mr. Johnstone. Whatever the petitioner suspected as to his wife's relations with Mr. Johnstone there was no condonation of any adultery with real knowledge of the facts. There was no sort of collusion between the parties as to Mr. Johnstone. The whole aspect of the case changed soon after the presentation of the petition, when the petitioner obtained evidence from the chauffeur of details as to association with Mr. Johnstone of which the petitioner

H had been unaware. He then brought forward a real charge of adultery untainted with collusion. But the original petition related to adultery with a man named Davies. I find, in fact, that the respondent never committed adultery with Mr. Davies. The whole thing was a sham. From that it followed that there was no connivance, which can only apply to real and not fictitious adultery. The petition as originally framed, before the discovery of the real material against Mr. Johnstone, was collusive. [His I Lordship referred to *Churchward v. Churchward and Holliday* (3) and SIR F. JEUNE's citation therein of a pronouncement on collusion by LORD STOWELL in *Crewe v. Crewe* (4) and continued:]

The substance of the matter is that both husband and wife were quite willing, from the point of view of one or the other, to keep Mr. Johnstone's name out of the business. Neither was anxious for the world to know with whom the wife was associating. The claim in the petition for £2,000 damages against Mr. Davies was so much camouflage. It was a case of collusion of the most aggravated character. The petition must go so far as it relates to Mr. Davies. It follows from that that the original petition must go

as a whole, as it is not possible to separate that which is collusive and that which is genuine, though it was amended in order to set out real charges relating to real adultery. I dismiss that petition; the petitioner, the respondent, and the co-respondent must each bear their own costs of that petition.

As to the supplemental petition, I am assured there is a complete absence of authority on the question of severing it from the original petition. I have some doubt whether it should not suffer the same fate as the original petition, but have come to the conclusion, rightly or wrongly, that this result does not necessarily follow. A supplemental petition might introduce a new co-respondent, or new material against an existing co-respondent as in this case, but it relates to matters arising since the filing of the petition. [The President referred to *Churchward v. Churchward* (3) and to the review of the law of collusion by McCARDIE, J., in *Laidler v. Laidler* (5), and concluded:] A new petition, though based on exactly the same material as a petition which is void for collusion can nevertheless be entertained, and although in this sense there cannot be an entirely different set of circumstances between the same spouses in a matrimonial cause, a new petition can be regarded as sufficiently self-subsisting to be treated as free from any taint of collusion affecting the original petition. It would be making a technicality to import into a supplemental petition the taint of collusion which would be absent from a new petition founded on old facts and new facts. The supplemental petition is untainted with any of the statutory bars. The result is that I dismiss the prayer of the original petition, but allow the prayer of the supplemental petition with costs against Mr. Johnstone. There will be a decree nisi with an order for custody of the child. I allow the figure of the damages claimed to be amended from £2,000 to £2,500, and direct that the damages be paid into court within fourteen days.

The second co-respondent appealed and the husband petitioner cross-appealed against the finding of collusion.

H. J. Wallington, K.C., and *Geoffrey Tyndale* for the second co-respondent, Mr. Johnstone.

G. H. Beyfus, K.C., and *Victor Russell* for the husband petitioner.

LORD HANWORTH, M.R.—This is an appeal from a decision of the President of the Divorce Court. The question is one of some complexity and difficulty. It is necessary to recount the facts which gave rise to the presentation of the petition and the supplemental petition.

On March 20, 1933, the husband presented a petition alleging adultery by his wife with Davies; and on March 22 that petition was amended by adding more particulars such as Davies' address. On June 2 the petition was again amended: there had been a claim for £2,000 damages against Davies, but now Johnstone was added and £2,000 was also claimed against him. On June 9 a supplemental petition was filed against Johnstone, charging him with acts of adultery subsequent to the original petition. On July 1 the respondent, the wife, delivered an answer denying adultery, and on July 28 Johnstone put in an answer denying adultery. On Aug. 10 the wife amended her answer, denying adultery and alleging that there had been collusion between her and her husband. Davies put in no answer. On Nov. 1 the supplemental petition was amplified by adding allegations of acts of adultery at Southampton. There was, therefore, a petition and a supplemental petition, and a charge against Davies and Johnstone, Davies putting in no answer and Johnstone denying adultery. On Dec. 12 an order was made that the respondent's answer be struck out on the ground that she had not made any allegation which supported the charge of collusion. The result was that when the matter came before the court the only party in a position to raise an issue was Johnstone.

The trial took place on March 6 and 7 of this year, and the issues were whether the co-respondent Johnstone had committed adultery with the respondent; and, secondly, as to the amount of damages. The President divided these questions, and he put the question of adultery by two questions: First, whether Johnstone had committed adultery with the wife, as alleged in the original petition up to July, 1932, and the answer of the

A jury to that question was "Yes"; secondly, has adultery been committed by Johnstone from April 10 to 13, 1933, the answer to which was also "Yes." The damages given by the jury were £2,500, an amount in excess of the claim. That left for the determination of the President whether there had been any adultery by the wife with Davies, and whether there had been collusion as alleged in the amended answer of the wife in the presentation of the original petition between the husband and the wife, that question being raised by the court.

I will deal first with the question of collusion raised by the cross-appeal of the husband, because, logically, that comes first. Collusion is a serious offence, and particularly so in matters coming before the Divorce Court. The original sections dealing with it are contained in the Matrimonial Causes Act, 1857, which, by s. 30, provided:

C "In case the court, on the evidence in relation to such petition . . . shall find the petitioner has, during the marriage . . . condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of such cases the court shall dismiss the said petition."

D That section is reproduced in s. 178 of the Supreme Court of Judicature Act, 1925. Therefore, the court under that section had a definite duty, in the cases specified, to refuse to give relief. In *Rutherford v. Rutherford* (6) ([1922] P. at p. 154) LORD STERN-DALE said that ss. 29 and 30 of the Matrimonial Causes Act, 1857, meant that the court could look at the whole of the evidence with regard to the petition and on that must determine the answer it would give to the petition, in any case where the whole matter is tried before the same judge at the same time, and that whether all the parties were before the court or not. That was re-affirmed by LORD BIRKENHEAD in that case on appeal sub nom. *Rutherford v. Richardson* (6) ([1923] A.C. at p. 8).

E It was argued on the cross-appeal that the evidence was insufficient to justify the conclusion that there had been collusion and, in particular, it was said that it depended on the evidence of the wife, whose answers to certain questions were clearly not acceptable and were not accepted by the court, in other words, that the wife was not a credible witness. But it is impossible for this court to interfere with the conclusions come to by the President on the evidence, and the court are therefore unable to interfere with the decision of the President on that question. It is to be remembered that the President has had the opportunity of seeing the witnesses in the box and observing their demeanour.

F It is plain from the documents that there has been an association between Mrs. Sandler and Mr. Johnstone, which, when it became known to Mr. Sandler, he (Mr. Sandler) disapproved of. It is plain, too, that there has been concealment on the part of the wife and Mr. Johnstone. Later, Mr. Johnstone wrote to the husband a letter in which he gave his word of honour that he would not see the wife again. It is known, however, that they did see one another, and that acts of adultery were committed. On Dec. 30, 1932, there was a deed of separation between the husband and wife by which the husband made provision for his wife, but on Feb. 11, 1933, there was an interview between the husband and the wife, which was followed on Feb. 24, 1933, by a letter from the wife to the husband, in these terms:

I "It is now some months since we parted, and I feel that I cannot go on like this any longer. I have taken a step which I cannot now go back upon, and have decided to throw in my lot with Nicky Davies, with whom I stayed at a certain hotel last Monday night, the 20th of the month. If you care you can get confirmation at the hotel."

I No one up to then had heard of Mr. Davies, but following up that letter a petition was lodged on March 20, charging the wife with adultery with Mr. Davies alone. Was that a surprising letter? Did it bear the impress of truth? The petitioner when asked if he was surprised at receiving that letter, said: "Not exactly." There is no doubt that the voice and the way in which that was said are of the greatest importance, and I can understand the judge attaching much importance to that statement. Even if, on the

petitioner's evidence alone, it is not possible to hold collusion, the wife has given evidence, and the judge has said that while disbelieving some of it, he has accepted other parts of it, and that might well have meant that he accepted that part which received corroboration from the written evidence. The wife's evidence is quite plain that she had made an agreement with the husband that she would supply the hotel evidence sufficient to enable him to get a divorce without bringing in Mr. Johnstone, and that evidence received confirmation from the fact that, when she found that the petition had been amended so as to make Mr. Johnstone a co-respondent, she took the step of going to see her husband at Huddersfield. There was, therefore, evidence to justify the judge in holding that there was collusion, and the cross-appeal must be dismissed.

The question then arose what was the effect of the collusion upon the petition and supplemental petition. It is clear that the President endeavoured to avoid circuitry of proceedings and expense, and, in order to do so, merely dismissed the prayer of the petition and gave the petitioner relief on the supplemental petition. If, however, the prayer of a petition is dismissed the whole petition must be dismissed. Part of the petition cannot be dealt with separately in that way. It was, however, then said that the supplemental petition still stood of its own power, *proprio vigore*, and gave the right to the relief asked for by the petitioner. There is no ground for such a contention. The supplemental petition could not be severed from the petition. It is stated in the textbooks that supplemental petitions are not referred to in the rules, but are governed by case law and practice. The practice is laid down in certain directions of the registrar, and direction No. 69 which states:

"Supplemental and amended petitions must bear the proper notice to any person not previously named. Orders giving leave to amend the petition or to file a supplemental petition must, where there has been an appeal, state the time allowed for filing or amending an answer (Jan. 14, 1924)"

treats a supplemental petition in the same way as an amended petition, and direction No. 7 provides:

"An application to file a supplemental petition made prior to service of the original petition should be refused and a new petition containing all the charges should be filed (Sept. 11, 1911)"

—that means that you cannot make the supplemental petition stand alone. And direction No. 74 has the same effect, making it clear that the petition and the supplemental petition were treated as one petition. Direction 74 provides that where a petition for restitution of conjugal rights has been filed, an application to file a supplementary petition praying for dissolution of marriage should be refused. The restitution petition should be dismissed, and fresh proceedings instituted (July 28, 1931).

There is also no distinction made between the petition and supplementary petition in the cases. *Smith v. Smith* (7) shows that proceedings are based on one citation and one only. In *Schira v. Schira and Sampajo* (8) it was held that, where a husband petitioned for dissolution of marriage on the ground of his wife's adultery, and she in answer prayed for a judicial separation on the ground of desertion, the Court would not, at the husband's instance (the wife opposing), terminate the suit by dismissing the petition. That was once more going back to the root namely, the original petition. *Borham v. Borham and Brown* (1) and *Lapington v. Lapington* (2) are also authorities for that view. Therefore it is impossible to hold that the supplementary petition was anything but part of and an addition to the original petition, and stood by virtue of the citation on which the original petition was founded. The supplemental and original petitions accordingly cannot be separated for the purposes of granting relief. The petition in this case comes on a petition as amended and supplemented, and as the petition has been found to be by collusion the result is that the whole of the original petition, as amended, and the supplemental petition come to ruins.

The appeal must be allowed, and therefore the verdict of the jury fails. The damages awarded are of large amount, but no doubt the jury were influenced by the fact that in spite of Mr. Johnstone's letter promising never to see the wife again nevertheless he again lived in adultery with her against the honour of his own written word. This

A court, therefore, throws no doubt nor raises any question as to the amount of the damages awarded. The appeal will be allowed with costs, and the petition, and with it the supplemental petition, be dismissed. The verdict against Mr. Johnstone for damages cannot therefore stand. No variation will be made in the order as to the costs of the proceedings before the President except that that part of it which ordered the co-respondent to pay the costs of the supplemental petition must be discharged.

B SLESSER, L.J.—In this case the learned President has found that the petition of March of 1933 was prosecuted in collusion with the respondent, and so far as that petition is concerned he has exercised the duty imposed upon him under s. 178 of the Judicature (Consolidation) Act, 1925, and has dismissed the petition. In April, 1933, however, a supplemental petition was entered by the petitioner alleging further acts of adultery on the part of the respondent which extended from April 10 to April 15, 1933. C In respect of that supplemental petition there is no finding of collusion, and the learned judge has found himself able to give damages against the co-respondent in respect of the matters alleged, the adulteries, in that supplemental petition. He has gone further and increased the damages sought in the supplemental petition by amendment, by incorporating in them some of the damages claimed in respect of the matters which strictly were within the ambit of the original petition.

D The primary question of law in this case is whether the learned judge was right, having found that there was collusion in the presentation and prosecution of the petition, in holding that that wrong did not in fact make void the supplemental petition, so that he ought to have dismissed the supplemental petition too. There appears to be no doubt that if an altogether new petition is presented, a finding of collusion in an earlier petition will not necessarily disqualify the later and independent petition, and this court has to consider now what is the legal position of what has been called in the directions and in the authorities a supplemental petition. The words "supplemental petition" find no place either in the Judicature Act, s. 178, or in its ancestor, ss. 29 and 30 of the Matrimonial Causes Act, 1857. Therefore, when we read the words "the petition" in the statute, which requires a petition to be dismissed where collusion is proved, we are not told by the statute itself whether those words, "the petition," do or do not include E a supplemental petition. That is the question which we have here to decide.

F The purpose of a supplemental petition is clear when the history of the matter is once considered. It is a general rule at the common law that matters which arise subsequently to the issuing of a writ cannot be pleaded in that particular action, but in the ecclesiastical courts, before the passing of the Act of 1857, it was otherwise. The question arose in the case of *Webb v. Webb* (9). There, after the citation, the mover for G the citation discovered misconduct which was subsequent in date to the date of the citation, and the question arose whether such additional evidence was or was not properly includable in the subject-matter of the libel following upon the citation; and DR. LUSHINGTON said this:

H "It has been correctly stated that the practice of the ecclesiastical court is to allow facts of adultery that may have come to the knowledge of a party even after publication—[that is publication of the libel]—to be pleaded,"

and he did permit the additional plea; but I cite that case as showing that at that time it was quite clear that the additional plea was a part of and incorporated in the original libel and was by no means a separate suit. That was the position under the old ecclesiastical law.

I The matter next came up in 1870 in the case of *Borham v. Borham and Brown* (1). The question which was raised in that case was: notwithstanding the ecclesiastical practice, whether the language of s. 30 of the Act of 1857, which says that

"in case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed"

—that is, alleged before the time of the petition, because of course under the Act of 1857 the old system of citation and libel was done away with and the petition was substituted—whether the new words in s. 30, dealing with petition and not with citation and libel,

did not have the effect of precluding the court from going into matters which had arisen subsequently to the publication of the petition. What the learned Judge Ordinary said in that case was this:

"I think, therefore, that acts of adultery subsequent to the date of the petition cannot properly be taken into consideration at the hearing of the petition itself; and that if a judgment for a dissolution be founded on such subsequent acts, the whole proceeding would be held by a court of appeal to be erroneous. I am willing, however, if the petitioner desires it, to allow the amendment to be made, or he may file a fresh petition. If he determines to commence a new proceeding the question of costs will be reserved."

and so forth; then on the application of counsel leave was given to the petitioner to file a supplemental petition, setting out the acts of adultery alleged to be committed subsequently to the filing of the original petition. It is clear to my mind that no real change in the substance of dealing with these matters had taken place by reason of the Act of 1857. By the words there used, as the Judge Ordinary points out, it became necessary to put in a further petition, but the practice of the court to receive evidence of acts of adultery subsequent to the original petition or the original citation remain unaltered.

Finally, in the case to which my Lord drew attention, the case of *Lapington v. Lapington* (2), BUTT, J., gave expression to that view, where he said he could not see the difference—and I think the learned judge meant a difference in principle—between amending a petition by adding new parties and filing a supplemental petition; and he contrasts those two methods on the one hand with proceedings by a fresh suit on the other. Therefore, it is clear to my mind that a supplemental petition is merely an expedient for dealing with evidence which has arisen since the presentation of the petition, and is in no sense to be said to be a new suit. Applying that conclusion to s. 178 of the Judicature Act dealing with collusion, I think it is clear, when the section speaks of a petition to be dismissed by reason of collusion, it must include any supplemental matters by way of evidence added to that petition. Therefore, I think the learned judge was wrong when he came to the conclusion that he could treat a supplemental petition as a separate and independent suit. That conclusion concludes this case in favour of the appellant, because collusion having been found, the collusion covers not only the petition but the supplemental petition, so that the whole matter fails and is of no effect.

Finally, I would say a word as to the cross-appeal. It is argued by counsel for the husband that the learned judge ought not to have found collusion on the original petition. The evidence in the case is conflicting. The husband denies any such collusion, and I am not quite satisfied that, if his evidence stood alone within the kind of definition which appears in *Churchward's Case* (3) there was quite enough evidence to satisfy the court of collusion, because, as my Lord has pointed out, collusion is a very serious offence; it is not only serious in itself as deceiving the court, but it must involve, I think necessarily, perjury, because an affidavit has to be made in support of a petition that there has been no collusion; so there is both avoidance and deceit of justice, and perjury. Therefore, I think I agree with counsel for the husband that an allegation of collusion is one which must be regarded very very seriously indeed. On the other hand, we have in the present case the clear evidence of the wife of a definite arrangement made between her and the husband for a collusive suit. I do not propose to read all the evidence which has been read on that point, but she said in answer to the President that her husband said to her: "Remember, there is no reason for you actually to commit adultery." In cross-examination she remained quite unshaken in her evidence which, though it is true that she did not support it originally by means of an affidavit, at any rate was in earlier times sufficiently in her mind to have been part of her answer to the original petition when she alleged collusion. Of course, the learned judge paid no attention to that matter. He paid attention, however, to the evidence which she gave at the trial, and he found various corroborative matters, which have been mentioned by my Lord and which I do not repeat, such as the visit to Huddersfield and other

matters consistent with her story, and the husband's story on the face of it is a very difficult one to believe. I think the learned judge was perfectly entitled to come to the conclusion here that the wife was, in matters of substance—because he said he accepted part of what she said and part of what the husband said—speaking the truth when she said that she and her husband colluded in order to produce this result.

The result of the whole matter is this: all the parties in this case stand completely devoid of merits. The husband has been found guilty of collusion. The wife has participated in that collusion, and the co-respondent also is not a person of whom any strong approval can be expressed; in fact, rather strong disapproval can be expressed of him. However, we have to administer the law as we find it, and the result of it all is that there is collusion, which voids the petition and the supplemental petition. It follows that the petitioner was not entitled by reason of this collusion to recover any damages in the suit from the co-respondent, and that the appeal succeeds, the cross-appeal fails, and the order for costs must be as stated by my Lord.

ROMER, L.J.—I agree. Dealing first of all with the cross-appeal, as to collusion I should not myself have been prepared to hold on the husband's evidence alone that collusion had been shown. I cannot regard the letter of Feb. 24, 1933, from the wife to the husband, nor the admission he made as to not feeling any surprise when he received that letter, nor the visit of the wife to Huddersfield, as being in any way inconsistent with the evidence the husband gave in the box of the fact that there was no collusion. But the learned judge did not have to rely solely on the evidence of the petitioner. The wife went into the witness-box and gave evidence about this matter, and it is perfectly plain to my mind that the learned judge definitely arrived at the conclusion, after hearing her evidence, that an agreement had been arrived at between the petitioner and the respondent for the respondent to commit, or appear to commit, an act of adultery, in order that the petitioner might obtain a remedy at law as for a real injury. The learned judge saw the wife in the witness-box, and, although I have no doubt on the whole he regarded her as a very unsatisfactory witness, he was certainly entitled to select parts from her evidence which he thought, having regard to her demeanour, he might safely act upon. He accepted those parts and must be deemed to have found the existence of the agreement to which I have referred. Having found that there was collusion about the presentation of the original petition, he was bound to dismiss that petition, because I cannot agree with the argument of counsel for the husband that the word "petition" in s. 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, means part of the petition. It means the whole petition. I confess I arrive at that conclusion with some regret, because it appears to be admitted by everybody that, if at the time the petitioner amended his original petition, by adding Mr. Johnstone as co-respondent and alleging adultery between his wife and Mr. Johnstone, he had, instead of pursuing that course, withdrawn the original petition altogether and had started new proceedings against his wife and Mr. Johnstone alone, he would have been entitled in the circumstances to have obtained a decree. Unfortunately, instead of pursuing that course, he chose to amend the petition, and having done so the petition necessarily fails.

The only remaining point is as to whether the learned President was right in treating the supplemental petition as a different proceeding unaffected by the taint which he found attached to the original petition. As regards supplemental petitions, there is not very much to be found out. I gather that supplemental petitions—I gather this from a note in a textbook—are not referred to in the Divorce Rules, and are governed by practice and case law. In order, therefore, to discover the true nature of a supplemental petition, we must have regard to the practice in the Divorce Court and to such authorities as happen to be reported upon that practice. I do not propose myself to go through the directions that have been given from time to time by the learned Presidents in relation to the practice, nor to refer again to the authorities to which one or other of my Lords have already referred; I content myself with saying that for the reasons they have given I cannot find that a supplemental petition is a separate proceeding from the original petition and can be dealt with in the way in which the President has dealt with

it in the present case. I agree that the order which the Master of the Rolls has indicated must be made.

Appeal allowed.

Cross-appeal dismissed.

Solicitors: *Bulcraig & Davis; Beyfus & Beyfus.*

[*Reported by WILLIAM LATEY, Esq., and GEOFFREY P. LANGWORTHY, Esq.,
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LIDDLE v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), April 10, 11, 12, 23, 1934]

[Reported [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P.

319; 50 T.L.R. 377; 78 Sol. Jo. 349; 32 L.G.R. 241]

Child—Negligence—Trespasser—Liability of landowner—No act likely to injure child—Obvious danger.

To make a landowner liable for injury to a child on his land it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with the knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

The defendant council were carrying out certain road improvement works in their district which involved taking some adjoining land into the highway and building a retaining wall between the new edge of the highway and the adjoining land. In the course of the work a large quantity of soil was excavated, and, until it could be cleared away, was banked up against the retaining wall on a grass verge which had been made between the wall and the actual carriageway. The heap of soil thus created gave easy access to the top of the wall. Children living in the neighbourhood played round the works when the workmen were not there, but they were always warned off when the workmen saw them. On a Saturday afternoon, after the workmen had left, the plaintiff, a boy of seven years, who had previously been warned off, when passing along the road, saw two of his companions sitting on the wall, and climbed up the heap of soil and joined them. In showing them how bees flew about he gesticulated, waving his arms, with the result that he lost his balance, fell backwards on to the land beneath the wall, and received serious injuries. In an action in which the plaintiff claimed damages from the defendant council in respect of his injuries on the grounds of negligence, or, alternatively, nuisance,

Held: (i) the plaintiff had no right to go on that part of the verge where the earth had been heaped as it was still being used for the defendants' works and had not been dedicated to the public, and so he was a trespasser; the danger of falling off the wall to anyone who climbed on it was an obvious danger, and the heap of earth against the wall could not be called a trap; the plaintiff had been warned not to go near the works; and, therefore, the defendant council were not liable in negligence for his injuries;

(ii) even if the plaintiff were a licensee, the danger was an open and not a concealed danger, and the defendants would not be liable to him;

(iii) nor were the defendants liable to the plaintiff as for a nuisance on the highway since (a) the verge on which the heap of earth was had not been dedicated and so was not part of the highway, and the heap did not constitute a nuisance to the plaintiff or anyone else using the highway, and (b) if the heap were treated as a danger adjoining the highway, it did not cause the accident.

Notes. Considered: *Morley v. Staffordshire County Council*, [1939] 4 All E.R. 92; *Williams v. Cardiff Corpn.*, [1950] 1 All E.R. 250. Referred to: *Coates v. Rawtenstall Borough Council*, [1937] 1 All E.R. 333; *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Gould v. McAuliffe*, [1941] 1 All E.R. 515; *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; *Adams v. Naylor*, [1944] 2 All E.R. 21; *Buckland v. Guildford Gas Light and Coke Co.*, [1948] 2 All E.R. 1086.

As to the duty towards children, see 23 HALSBURY'S LAWS (2nd Edn.) 584-586, 613, 614, and for cases, see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

- (1) *Excelsior Wire Rope Co., Ltd. v. Eileen Callan and others*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 35 Com. Cas. 300; 28 L.G.R. 543, H.L.; Digest Supp.
- (2) *Mourton and another v. Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; 35 Com. Cas. 308; 94 J.P. 190; 46 T.L.R. 256; 74 Sol. Jo. 170, Digest Supp.
- (3) *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214, H.L.; Digest Supp.
- (4) *Latham v. Richard Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, 262.
- (5) *Hayward v. Drury Lane Theatre, Ltd. and Moss Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 33 T.L.R. 557; 61 Sol. Jo. 665, C.A.; 36 Digest (Repl.) 48, 255.
- (6) *United Zinc and Chemical Co. v. Britt* (1922), 258 U.S. Rep. 268.
- (7) *Rail. Co. v. Stout* (1873), 17 Wallace (U.S.) 657.
- (8) *Cooke v. Midland and Great Western Rail. Co. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, 590.
- (9) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 38 T.L.R. 102; 20 L.G.R. 205, H.L.; 36 Digest (Repl.) 119, 597.
- (10) *Hardy v. Central London Rail. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 T.L.R. 843; 64 Sol. Jo. 683, C.A.; 36 Digest (Repl.) 120, 603.
- (11) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, 419.
- (12) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J. Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
- (13) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; 102 L.J.K.B. 270; 148 L.T. 333; 49 T.L.R. 125; 77 Sol. Jo. 30; 36 Digest (Repl.) 109, 547.
- (14) *Harrold v. Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, 577.
- (15) *Campbell v. Ord and Maddison* (1873), 1 R. (Ct. of Sess.) 149; 11 Sc.L.R. 54; 36 Digest (Repl.) 136, *1041.
- (16) *Gavin v. Arroll & Co.* (1889), 16 R. (Ct. of Sess.) 509; 26 Sc.L.R. 370; 36 Digest (Repl.) 19, *65.
- (17) *Cass v. Edinburgh and District Tramways Co., Ltd.* 1909 S.C. 1068; 46 Sc.L.R. 734; 1909 1 S.L.T. 513; 36 Digest (Repl.) 124, *920.
- (18) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, 100.
- (19) *Bird v. Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, 808.
- (20) *Harrison v. Duke of Rutland and others*, [1893] 1 Q.B. 142; 62 L.J.Q.B. 117;

68 L.T. 35; 57 J.P. 278; 41 W.R. 322; 9 T.L.R. 115; 4 R. 155, C.A.; 43 Digest 405, 274.

- (21) *R. v. Pratt* (1855), 4 E. & B. 860; Dears. C.C. 502; 3 C.L.R. 686; 24 L.J.M.C. 113; 25 L.T.O.S. 65; 19 J.P. 575; 1 Jur. N.S. 681; 3 W.R. 372; 119 E.R. 319, C.C.R.; 26 Digest 317, 494.
- (22) *Dovaston v. Payne* (1795), 2 Hy. Bl. 527; 126 E.R. 684; 26 Digest 316, 486.
- (23) *Hickman v. Maisey and another*, [1900] 1 Q.B. 752; 69 L.J.Q.B. 511; 82 L.T. 321; 48 W.R. 385; 44 Sol. Jo. 326; 16 T.L.R. 274, C.A.; 26 Digest 317, 492.
- (24) *Earl of Coventry and others v. Willes* (1863), 3 New Rep. 119; 9 L.T. 384; 28 J.P. 453; 12 W.R. 127; 26 Digest 317, 496.
- (25) *Turner v. Ringwood Highway Board* (1870), L.R. 9 Eq. 418; 21 L.T. 745; 18 W.R. 424; 26 Digest 315, 476.

Appeal from an order of SWIFT, J., in an action tried by him with a special jury at Leeds Assizes.

The plaintiff, a child aged seven years, brought by his father as next friend an action against the defendants as road authority for the North Riding of Yorkshire. His complaint was that while sitting upon a wall which the defendants had built to bound and hold up a road they were in course of widening, he tumbled over backwards down a steep place and injured his head. His pleaded cause of action was that the defendants negligently placed against the wall in the course of their operations a heap of excavated soil without guarding the plaintiff from the danger of going on the heap to sit on the wall, or, in the alternative, created a nuisance on the highway by placing the heap against the wall and thereby causing the plaintiff to tumble off the wall.

The defendants were engaged in a road improvement which consisted in making a sharp turn an easier one. This was done by removing an old wall, taking into the road the field beyond it, and erecting a retaining wall on the outside edge of the new corner. On the site of the old wall there was made a concrete widening of the old road bounded by a grass verge between the road and the new wall. The new wall was 4 ft. 6 in. high with a castellated top. The process of excavation and construction produced a quantity of unwanted soil which was stacked against the new wall. There was evidence that children played about the works, and, if workmen were there, were always warned off. On Saturday, Sept. 24, 1932, after the workmen had gone, two boys went up the heap on to the new wall and were joined by the plaintiff who proceeded to show his companions how bees flew about and waved his arms, when he fell over backwards. The defendants pleaded that on the proved facts the plaintiff was a trespasser at the time that he fell from the wall or that he was, if not a trespasser, at most a licensee. If he was a trespasser, they said, they were clearly not liable as they had not constructed the dangerous place with a view to causing an injury to him, and, even if he were a licensee, the danger was an obvious one.

At the trial the jury returned a verdict for the plaintiffs for £1,562, as to £1,500 for the plaintiff and £62 for the father, and judgment was entered accordingly. The defendants appealed.

J. E. Singleton, K.C., A. Morley, K.C., and D. H. Robson for the defendants.
Willoughby Jardine, K.C., and H. Brian Taylor for the plaintiffs.

Cur. adv. vult.

April 23. The following judgments were read.

SCRUTTON, L.J.—A boy, by his father as next friend, brings an action against the road authority for the North Riding of Yorkshire. His complaint is that while sitting on a wall which the authority had built to bound and hold up a road that they were in course of widening he tumbled over backwards down a steep place and injured his head. His pleaded cause of action is that the authority negligently placed against the wall in the course of their operations a heap of the excavated soil without guarding the plaintiff from the danger of going on the heap to sit on the wall, or in the alternative created a nuisance on the highway by placing the heap against the wall and thereby caused the plaintiff to tumble off the wall. After a summing up, the sufficiency of which is attacked, a special jury of the Riding answered in favour of the boy every question that they were

asked. At the end of the evidence the judge was asked and refused to enter judgment for the defendants. The defendants now appeal primarily on the ground that on the evidence there was no cause of action against them; secondarily, on the ground of insufficient direction.

It is important in the first place to get the facts clear. The road authority at the time of the accident, Saturday afternoon, Sept. 24, 1932, were engaged in a road improvement covering about half a mile of road. Where the accident happened the improvement consisted in making a sharp turn a much easier one—"A very dangerous corner made very efficient, an excellent job." That is the statement of one of the plaintiff's witnesses. This was done by removing an old wall and the field beyond it so as to make a rounder corner, and erecting a retaining wall on the outside edge of the corner. On the site of the old wall and the portion of the field up to the new wall there was made a concrete widening of the old road, bounded by a grass verge between the road and the new wall. That new wall was 4 ft. 6 in. high, with a castellated top. The process of excavation and construction produced a quantity of unwanted soil. This, during the week before the accident, was stacked on the new verge against the new wall and came, on the evidence for the plaintiff, nearly to the top of the stone course below the castellation. It was being removed by lorry, but on this Saturday afternoon there was enough at the place of the accident to make a slope extending on the verge to 6 ft. or 7 ft. from the wall, and thus giving an easy access to the top of the wall. The road work was not completed at the time of the accident. The red flags and "repair work in progress" boards were out on the Saturday morning, but according to the evidence for the plaintiff, were removed when the workmen stopped work at mid-day on Saturday. I think it must be taken that carriages could get along the roadway on Saturday afternoon, but that the new verge was not completed, as the waste soil had to be removed and was in fact going to be and was removed on the Monday morning. There is abundant evidence that the children of the neighbourhood used to play about the works when there was no one there, but if there were workmen there the children were always warned off. Such being the case, on the Saturday afternoon, after the workmen had gone, two boys, Ruddlestone, aged nine, and McNeill, aged ten, were sitting on the new wall, having presumably walked up the heap to get there. Each boy admitted that he had been told by the workmen not to play about there, "because they would tumble over," and that "his mother had told him not to go on the wall." To them there came the infant plaintiff Liddle, aged about six years, who also had been "warned off the job" by Linton, a workman. He was going on an errand for his mother from his home some distance off to Mrs. McNeill's house. When he saw the two boys, he started to run to them and got up and sat on the wall between them, facing the road. He began to talk to them "about the bees and showing the boys how the bees were flying about and waving his arms when he fell over backwards." No further information could be obtained as to why, when sitting on a substantial wall, with his feet resting on the heap, he should fall over backwards.

The first question, and the principal question, argued for the defendants, is whether these facts show any legal liability on the defendants to the boy. The only connection of the heap of waste soil with the matter was that it made it easier for the boy to get to the wall and to sit on it, and provided a safer seat for him, because he could and must use it as a foot-rest. The wall was a pretty substantial wall, and, if the boy sat between the castellations, he would be in a kind of armchair with arms to take hold of. The defendants took no action which injured the boy, such as starting a wire rope, as in *Excelsior Wire Rope Co., Ltd. v. Eileen Callan and others* (1), or felling a tree when the boy was near, as in *Mourton and another v. Poulter* (2). The defendants certainly had not invited the boy to sit on the wall; they had warned him off the job. The learned judge seemed to think, from his questions to the witnesses and a passage in his summing-up, that the best way to get a boy to do something was to tell him not to do it; but he could hardly have seriously meant that prohibition was an additional ground of legal liability on the person giving prohibition.

The cause of action, if any, must be that the defendants created an attractive and dangerous combination which led the boy to go into danger, and took no sufficient

steps to prevent the boy from being tempted and so led into danger. The question is whether the facts can possibly justify this conclusion. The position of an adult who suffers injury while on the land of another depends on which of one of three classes he falls into: (i) a trespasser, who has no right on the land; (ii) a licensee, whether bare or with an interest; (iii) an invitee, who may be in a better position if he pays for his entrance. The duties owed by the landowner to an adult are to be found discussed at length by LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3) ([1929] A.C. at pp. 364 and 365); by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4) ([1913] 1 K.B. at p. 410), and by myself in *Hayward v. Moss Empires, Ltd.* (5) ([1917] 2 K.B. at p. 913).

In the present case it was agreed that, if the plaintiff had been an adult, he would have no cause of action. The danger of falling off the wall was, in daylight, obvious; the heap would have nothing to do with the fall; whether the grown-up man was a trespasser or a licensee, the owner of the wall had, on the facts, no legal obligation to him. But the plaintiff was a child of six years. "English law has been very ready to find remedies for their injuries"—i.e., of children: per HAMILTON, L.J., in *Latham's Case* (4) ([1913] 1 K.B. at p. 413). HOLMES, J., whose views on English as well as on United States law are entitled to the most respectful consideration, has said, in *United Zinc and Chemical Co. v. Britt* (6) (258 U.S. Rep. at p. 275):

"Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon the landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle, if accepted, must be very cautiously applied."

Again, on the following page he says:

"There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

From that case, where the Supreme Court of the United States decided by six votes to three in favour of the landowner and against the child, it appeared that there was some conflict both in the United States and in England between a view which may be called the "humanitarian" view, that a child which has no knowledge or discretion to make it capable of contributory negligence must be guarded by the landowner on whose ground it is allowed or tempted to enter, and the "hard" or "Draconian" view, that a child must trespass at its own risk, and if it is so young as not to appreciate what it is doing it is for its parents, and not for the landowner on whose land it enters without invitation, to protect it.

I agree with the view of SALMOND, J., in his work on TORTS, where he says (7th Edn. at p. 472):

"The humanitarian impulse which prompts such decisions as that of *Rail. Co. v. Stout* (7) and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company."

I also agree with the passage in POLLOCK ON TORTS (13th Edn. at p. 544), where he says:

"Some decisions in America have gone to great lengths in favour of infant licensees and even trespassers, and have been much discussed. In England they have been followed only to this extent, that an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them."

Confusion was temporarily introduced into the law of England by the decision of the House of Lords in *Cooke v. Midland and Great Western Rail. Co.* (8), where a small child recovered against a railway company damages for injuries received by its playing on an accessible and movable turntable which the railway company knew was frequented by children, and as to which it did nothing to prevent them from coming to the danger. I think it is now established by the judgment in *Latham's Case* (4) and the explanation of *Cooke's Case* (8) by LORD ATKINSON in *Glasgow Corpn. v. Taylor* (9) ([1922] 1 A.C. at p. 53), that *Cooke's Case* (8) must be treated as the case of a child impliedly licensed to use a plaything which was for a child a trap.

In *Hardy v. Central London Rail. Co.* (10) this court dismissed the claim of a child of five who, being taken, not for the purpose of travelling, by an older boy into a station where there was an escalator, from which children were driven away whenever they were seen, caught his fingers in the band of the escalator. He was treated by the court as a trespasser. In that case I stated the position of a child trespasser thus ([1920] 3 K.B. at p. 473):

"If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

LORD HAILSHAM, L.C., in the House of Lords in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), citing my words, said ([1929] A.C. at p. 367):

"My Lords, I believe that that sentence accurately summarises the English law." In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with the knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

If that is the law, do the facts in this case fall within it? The defendants were doing road repairs and might lawfully exclude the public from the portion of the road being repaired. In the case of new construction, not repair, the public had no right to go on the land on which the road was constructed till it was dedicated, and while under construction it was not dedicated. In my view, the child, in going up the heap left there in course of construction of the road, and in sitting on the wall, was a trespasser. When the jury answered the question, "Was the infant plaintiff lawfully using the highway?" by saying "Yes," they had no direction on this point at all, and I cannot think that to walk up a heap left there during road construction and sit for a talk on a four-and-a-half-foot wall could be reasonably held to be lawful use of the highway. Again the jury were asked: "Were the defendants negligent in leaving the heap of soil next the wall?" Negligence involves a duty which is not complied with, and the jury got no direction as to what the duty of the defendants was; and I see no evidence that the judge ever considered what the duty was, except that he says:

"Would a reasonable man, knowing the neighbourhood and what children are, have left the heap there?"

That, if applied to the escalator, might be answered against the railway company. The accident was in broad daylight on work not yet completed, and the defendants warned the children off whenever they were seen. I do not think there is any evidence on which a reasonable jury could answer "Yes" to that question.

Another set of questions was: "(ii) Were the acts of the defendants an allurement or invitation to the plaintiff to go on the wall?; (iii) Was the heap of soil a trap to the infant plaintiff? (iv) Did the heap of soil and the wall constitute a thing dangerous in itself if meddled with?" I can only deal with this group of questions in the way in which HAMILTON, L.J., dealt in *Latham's Case* (4) with a heap of building rubbish which crushed the hand of an infant plaintiff. The jury had found that the defendants ought

to have known that there was a likelihood of children being injured by the stones, and the lord justice said ([1913] 1 K.B. at p. 416):

"But it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

The alternative way of putting the case was to say that the heap was a nuisance on the highway and caused the accident. It was said to be a nuisance because it was an easy way of access to the wall; but (i) the verge on which the heap was had not yet been cleared and dedicated to the public; and (ii) if the heap is treated as a danger adjoining the highway, I think under the decision in *Barker v. Herbert* (11), it did not cause the accident. In that case there was a break in the railings surrounding an area next a highway, and a child fell into the area. The plaintiff's case was that he had injured himself by falling through the gap; the defendant's case that he got through the gap and clambered along inside the railings and then fell through a slate breaking. The jury found that this was how the accident happened, and the Court of Appeal held that the gap was not the cause of the accident. I do not think the temporary heap in undedicated land could be a nuisance, and it certainly did not cause the plaintiff to fall off the wall on which he was safely sitting before he began to antic.

I am, therefore, of opinion that no facts were proved that would give a cause of action against the defendants. The judgment for the plaintiff must be set aside and judgment entered for the defendants, with costs here and below. I should add that, if I had not come to this conclusion, I should have ordered a new trial as, in my opinion, the conduct of the case by the judge below was unsatisfactory, and such directions as he gave to the jury were quite insufficient.

GREER, L.J.—This is an appeal by the defendants against a verdict and judgment in favour of the plaintiffs in an action tried by SWIFT, J., at Leeds whereby the sum of £1,500 was awarded to the infant plaintiff for personal injuries, and the sum of £62 to his father in respect of expenses incurred by him in consequence of the injuries to the infant plaintiff. The defendants ask this court to set aside the verdict and judgment, and enter judgment for the defendants on the ground that there was no evidence fit to be left to the jury of any liability on the part of the defendants to the plaintiff, and, alternatively, they ask for a new trial on the ground of misdirection. The infant plaintiff, a boy, received serious injuries by falling from a wall which the defendants had made in the course of improving and reconstructing one of the main roads in their district.

The material facts are as follows. The road in question led from Whitby to Grosmont, in the part of Yorkshire subject to the defendants' jurisdiction, and before alteration had a very awkward turn in the neighbourhood of some cottages about a quarter of a mile from Grosmont. Between the road on the right-hand side and the adjoining fields there was an old fence from which the land gradually sloped to a meadow. The defendants decided to make a broader sweep to the road at this point, and to do this they had to widen the road and fill up the slope in the ground so as to bring the added part of the road up to the same level as the old part. They made a concrete foundation for the new part of the road, and after providing for a grass verge beyond the metalled part of the road they erected a stone wall with a castellated top, and made a retaining wall under the new part of the road, with the result that instead of the comparatively easy slope that there had been from the edge of the old fence there was a precipitous fall from the new wall to the field below. The nature of the additions to the road and of the condition of things left after the road was made on the field side of the road are indicated by the plan and the three photographs put in at the trial. The evidence leaves no doubt that any infant sitting, standing, or playing on the wall and getting overbalanced would be likely to sustain very serious injuries.

On Saturday afternoon, Sept. 24, 1932, the state of progress of the work on which the defendants were engaged was that at the material place they had finished putting

A in the foundations, the metalling of the road, and the building of the wall, but in connection with their operations there was a month's work still to be done, and for the purposes of the work they had placed on the grass verge a mound of earth which had remained there for three or four days before the accident, but which they removed on the Monday following the accident. They must have purchased under their powers the necessary land to increase the width of the road, and in so far as the work was still
B incomplete they cannot be said to have dedicated the new land to the public as a highway, but on the Saturday they removed the notices that had been placed at some distance from the approaches to the place in question, and I have no doubt that all the metalled part of the road became dedicated to the use of the public as a highway, but, inasmuch as they were still using for the purposes of their work the grass verge, I do not think that the grass verge had at the date of the accident become part of the highway.
C It was land adjoining the highway which had become the property of the defendants, and which, no doubt, they intended when their work was completed should become part of the highway. The boys of the neighbourhood had been warned by the defendants' workmen not to go on the pile of earth or climb on the wall, but, notwithstanding the warning, they did so, though when seen they were chased away. The two boys who were called apparently did not know whether the infant plaintiff had been so
D warned, but Linton, one of the workmen called for the defendants, said he had warned the infant plaintiff off the part of the work where the danger was. By this I think it is clear that he meant the place where the mound was on the road side of the wall and the precipitous descent on the other. The little boy himself was not called to give evidence, and therefore the evidence of this workman must be taken as uncontradicted evidence.

E On the afternoon in question the infant plaintiff was going on a message with some milk cans from his home, a quarter of a mile away, to a house which was a short distance beyond the place where the accident happened. Passing the wall at the point where the mound was he saw two little boys of his acquaintance, Eric Ruddlestone and John McNeill, who were a little older than himself, sitting and talking on the wall near where the mound was. They had climbed there by means of the soil. One of them said that
F the wall was too high for them to get on to it if it had not been for the heap of soil. The plaintiff as he approached the place, seeing his two friends there, climbed up the same way as they had done and sat between them on the wall and began to talk to them. He appears to have been saying something about how bees fly, and stretching out his arms, overbalanced himself and fell backwards over the precipitous descent to the field, and thereby received the serious injuries in respect of which the jury have awarded him
G £1,500.

The plaintiff's claim was based (i) on negligence, and (ii) on nuisance. At the conclusion of the evidence for the plaintiff the defendants' counsel submitted that there was no case for him to answer, and the learned judge ruled against him. The learned judge, indeed, took the view that there was evidence that this combination of the mound of soil and the wall was something that the jury were entitled to hold was an
H allurement to young children, and that on the authority of such cases as *Lynch v. Nurdin* (12) and *Cooke v. Midland and Great Western Rail. Co.* (8) the defendants would be liable if the jury found that they had failed to exercise reasonable care to prevent any harm coming to the children whom they knew to be likely to get on the wall at a place where it was dangerous to young children. The trial took place on circuit, and the learned judge, having made up his mind that the case was one which ought to go to the jury, was not prepared to listen to any lengthy citation of cases which he thought
I probably turned on different facts from the facts proved in the case before him.

Certain questions were agreed to by the counsel on both sides, and as the judge left these questions to the jury it must be taken that the questions had his approval. The questions and answers were as follows: (i) Were the defendants negligent in leaving the heap of soil next to the wall?—(A) Yes. (ii) Were the acts of the defendants an invitation or allurement to the infant plaintiff to go upon the wall?—(A) Yes. (iii) Was the heap of soil so placed against the wall of the nature of a trap to the infant plaintiff?—(A) Yes. (iv) Did the heap of soil and the wall in the circumstances constitute a

thing dangerous in itself, or if meddled with?—(A) Yes. (v) Did the negligence of the defendants cause the plaintiff's injuries?—(A) Yes. (vi) Was the infant plaintiff lawfully using the highway?—(A) Yes. (vii) Was the heap of soil so placed against the wall a nuisance on the highway?—(A) Yes. (viii) Was such nuisance the cause of the infant plaintiff's injuries?—(A) Yes. (ix) Damages?—(A) £1,500.

It was contended on behalf of the defendants that on the proved facts the infant plaintiff was a trespasser at the time when he fell from the wall, or that he was, if not a trespasser, at most a licensee. If he was a trespasser they were clearly not liable, as they had not constructed the dangerous place with a view of causing an injury to him or, indeed, in contemplation of him at all. They contended also that, even if he were a licensee, the danger was an obvious and not a hidden danger, and the only obligation on the defendants was, so far as licensees were concerned, not to subject them to a hidden danger without warning them. This argument was supported by reference, *inter alia*, to the following authorities: *Latham v. Richard Johnson & Nephew, Ltd.* (4), *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), *Hardy v. Central London Rail. Co.* (10), and *Donovan v. Union Cartage Co., Ltd.* (13).

For the plaintiffs it was contended that the "arrangement or contraption," as it was called, consisting of a mound of soil alluring children to climb up to the wall and sit or play on it, was, within the authorities, such a state of circumstances as raised a duty on the defendants to take reasonable care to see that infant children doing what every reasonable person would expect them to do came to no harm. They contended that the plaintiff was not a trespasser, or, indeed, merely in the position of a licensee, but was lawfully using the highway when sitting on the wall. In support of their arguments they relied on *Lynch v. Nurdin* (12), *Cooke v. Midland and Great Western Rail. Co.* (8), *Harrold v. Watney* (14) and *Excelsior Wire Rope Co., Ltd. v. Callan* (1).

In my judgment, this appeal must succeed. I can quite understand the force of the argument that in a case such as this the law ought to cast a duty on the defendants to exercise reasonable care to prevent damage happening to infant children at a place adjoining a high road which they have left in a state which is likely to allure children into a position of danger, and at one time I was inclined to think that the law as laid down by LORD DENMAN, C.J., in *Lynch v. Nurdin* (12), and by LORD MACNAGHTEN in *Cooke v. Midland and Great Western Rail. Co.* (8), would support such a proposition, but I am satisfied, on going further into the authorities, that the modern cases make it necessary to hold that the law imposes no such duty on people in the situation of the defendants in this case.

The rules of law applicable to claims by adults or infants for damage occasioned through alleged negligence on the part of the owner or occupier of the land or property on which the injured person was at the time he received his injuries have been often considered by the courts. The decision of the House of Lords in *Cooke v. Midland and Great Western Rail. Co.* (8) seemed to have cast doubt on the well-established principles applicable to such cases, and to have extended the liability of owners or occupiers to infant licensees and to infant trespassers. The decision in that case must, of course, be treated as decisive of the propositions of law necessarily involved in it, but it is now certain that some of the observations in the speech of LORD MACNAGHTEN cannot be accepted as accurate statements of the law. In the course of his speech LORD MACNAGHTEN is reported to have said ([1909] A.C. at p. 234):

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?"

Later decisions of the Court of Appeal and the House of Lords make it necessary for us

A to treat the observations quoted above as dicta going beyond what was necessary for the decision of the case.

The law has now been stated in unmistakable language by LORD HAILSHAM, L.C., and LORD DUNEDIN in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3) and by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4).

B There are three categories, and only three categories, in which any person meeting with an accident causing personal injuries on the land or property of another can be placed for the purpose of determining a claim against the latter for damages for negligence. Such a person may be an invitee, a licensee, or a trespasser. Children have not by law been placed in a different category. Their rights and the liabilities of the landowner or occupier fall to be determined by deciding in which of the three categories the proved facts place them. The law applicable to claims by children in each of these categories is stated by LORD HAILSHAM, L.C., in *Addie's Case* (3) as follows ([1929] A.C. at p. 364):

"The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

I have no doubt about the category in which the plaintiff in the action under appeal must be placed. When he fell off the wall he was a trespasser. It was not, and could not be contended, that he was an invitee—that is, a person invited to come on to the wall for some purpose in which the defendants and the plaintiff were both interested. To justify anyone to be treated as an invitee he must be on the land for some purpose in which he and the proprietor have a joint interest: see per LORD DUNEDIN in *Addie's Case* (3) ([1929] A.C. at p. 371).

Was the plaintiff a licensee? Was he on the wall with the express or tacit permission of the defendants' servants in charge of the task of reconstructing the road? It seems to me quite certain that he was not. This is not like the cases in which the courts have drawn the inference of tacit permission from the defendants' knowledge of continuous resort to their property without any real objection by them. So far from tacitly permitting children to play on the wall and its approaches while their work was in progress, the defendants' servants drove them away when they had an opportunity of doing so. The plaintiff's two friends admitted this, and the only evidence as to the plaintiff himself was the unchallenged statement of Linton that he had warned the plaintiff not to come on this part of the work. It is impossible to hold that the plaintiff was a licensee.

"When a proprietor protests and goes on protesting, turning away people when he meets them . . . and giving no countenance in anything that he does to their presence there, then I think no court has a right to say that permission must be implied."

I quote those words from LORD DUNEDIN'S speech in *Addie's Case* (3) ([1929] A.C. at p. 372).

In my judgment, there was no evidence to be left to the jury that the plaintiff was either an invitee or a licensee. The defendants owed no duty to him except the duty

they owe to trespassers. To quote the words of LORD BUCKMASTER in *Addie's Case* (3) A ([1929] A.C. at p. 380):

"If it once be held that the child was a trespasser, innocent as the trespass was, there was no legal duty cast upon the appellants to afford protection against the danger which they must have known use of the land by the children almost necessarily involved."

In my opinion, the grass verge on which the mound of earth had been temporarily placed had not become part of the highway dedicated to the use of the public for the lawful exercise of rights of way; but this is of little moment, because, assuming that it had become part of the highway the wall was certainly not part of the highway. If it was the public would have had the right to walk on it. It was clearly neither suitable nor intended for such purpose. It was erected as a boundary to the highway for the purpose of protecting people using the highway for the lawful purpose of passage and re-passage. C

I may add that, even if the plaintiff was a licensee, he would still not be entitled to recover, as the danger was an open and not a "concealed" danger.

"It is well-established law that licensees must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they must run the risk of them." D

It must not be forgotten that in the case in which these words were used by LORD DUNEDIN, *Addie's Case* (3) ([1929] A.C. at p. 371), the claim was made on behalf of a boy of four years of age. In *Latham's Case* (4) and *Addie's Case* (3) HAMILTON, L.J., and their Lordships who decided the latter case expressly put the decision of the House of Lords in *Cooke v. Midland and Great Western Rail. Co.* (8), on the ground that the liability of the defendants was a liability arising by reason of injuries caused by a source of danger which was a trap or concealed danger to a child of tender years who was in the place of danger by the leave and licence of the defendants. E

The effect of *Addie's Case* (3) and *Latham's Case* (4) is to show that the actual decision in *Cooke v. Midland and Great Western Rail. Co.* (8) is consistent with the law as laid down in the two cases based on a long stream of authority, and that we must regard the general proposition I have cited from the speech of LORD MACNAGHTEN ([1909] A.C. at p. 234) as going beyond and as inconsistent with well-established rules of law. F

The plaintiff's counsel put his case in another way. He argued that the facts of this case are such that the considerations applicable to the liability of a landowner to visitors who are either invitees, licensees, or trespassers, have no application to the case of a child getting into danger on or near the highway so long as what he is doing is reasonably incident to the lawful use of the highway, and he cited *Harrold v. Watney* (14) in support of his contention that the defendants were liable. It may well be that a person, whether child or adult, leaning against a boundary fence adjoining a highway is doing something incidental to the exercise of his rights of passage along the highway; but, in my judgment, anyone sitting on such a wall as there was in the present case cannot be held to be doing something reasonably incident to the use of the highway. From the moment he sat on the wall the infant plaintiff was a trespasser using the wall for purposes for which it was never intended. Moreover, the rotten fence in *Harrold v. Watney* (14) was a nuisance, being a dangerous trap for those using the highway. In the present case the wall was a good wall completely satisfactory for the purpose for which it was used, and the heap of earth was placed where it was by the defendants' servants in the lawful course of the work they were doing for the improvement of the highway. G H I

Lynch v. Nurdin (12), on which also the respondents relied, does not help them. That was a case of nuisance, and the question involved in the case was whether the damage to the infant plaintiff could rightly be said to have been caused by the wrongful act of the defendant. As the act of the infant plaintiff in getting into the cart and the act of the other child who set it in motion were acts which anyone would anticipate would follow as a probable result of the defendant's wrongful act, the defendant was held liable. The story began with a wrongful act by the defendant. Here there was no wrongful act by the defendants unless it be a wrongful act not to prevent children

from trespassing. We have the high authority of HAMILTON, L.J., in *Latham's Case* (4) ([1913] 1 K.B. at p. 413) for this explanation of *Lynch v. Nurdin* (12):

"Children's cases are always troublesome. English law has been very ready to find remedies for their injuries. Scottish law has been less indulgent: see *Campbell v. Ord* (15), *Gavin v. Arrol & Co.* (16), *Cass v. Edinburgh Tramways* (17). They are the commonest cases of the general rule, which is as old as *Scott v. Shepherd* (18), that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird v. Holbrook* (19), *Lynch v. Nurdin* (12)) that injury would not have occurred. Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

It was also contended for the respondents that the heap of soil near the wall constituted a nuisance on the highway, and the accident and injuries to the infant plaintiff were not too remote to be regarded as having been caused by the nuisance. A nuisance must be something which is either an obstruction to the right of passage of His Majesty's subjects upon the highway, or something which is likely to endanger persons lawfully using the highway. In my judgment the defendants were not guilty of leaving a nuisance on the highway: (i) because the grass verge had not become part of the highway, and (ii) because it did not constitute a danger to those lawfully using the highway.

As, in my view, the plaintiff failed to give any evidence of a breach by the defendants of any duty imposed upon them by law, I find it a little difficult to address my mind to the question whether the accident and injuries suffered by the infant plaintiff were directly caused by a breach of duty, but I think it right to say that, if the duty was as wide as the learned judge appears to have thought it was, or as wide as LORD MACNAGHTEN'S words in *Cooke v. Midland and Great Western Rail. Co.* (8) ((1909) A.C. at p. 234) appear to imply, I should be inclined to think that the infant plaintiff's accident and injuries could in law be deemed to be the direct consequence of the breach of such duty, notwithstanding the fact that the infant plaintiff did something which he would not have done if he had not been guilty of some act which, though wrongful in an adult, is the kind of act which a private individual of common sense and ordinary intelligence might reasonably suppose would happen in the case of an infant of such a tender age as to be regarded in law as incapable of contributory negligence.

For the reasons stated above I think there was no evidence of any breach of duty by the defendants to the plaintiff, and that the judge ought to have entered judgment for the defendants. Therefore this appeal should be allowed, with costs here and below.

SLESSER, L.J.—I am of opinion that this appeal must be allowed, for the sufficient reason that the plaintiff, having been a trespasser at the place where he met with his accident, has failed to show that the defendants injured him intentionally or put dangerous traps for him intending to cause injury. I arrive at the conclusion that the plaintiff was a trespasser for the following reasons. I will assume in favour of the plaintiff that the verge of the recently widened highway upon which the earth had been thrown, by which the plaintiff had mounted the wall, was itself a part of the highway. It appears from the evidence that the notices stating that the road was being repaired had been removed on the Saturday afternoon of Sept. 24, 1932, before the time of the accident, which was the same day, and it may be that in these circumstances the public had been invited to use the newly widened part of the highway and the verge thereof, but I am unable to come to the conclusion that it was any part of the rights of the

plaintiff as a passenger upon the highway to leave it, even in its wider extent, and seat himself for purposes of amusement upon the retaining wall. In the language of LOPES, L.J., in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 154):

"If a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired he is a trespasser. The easement acquired by the public is a right to pass and re-pass at their pleasure for the purpose of legitimate travel."

In *R. v. Pratt* (21), ERLE, J., said (4 E. & B. at p. 867):

"I take it to be clear law that, if in fact a man be on land where the public have a right to pass and re-pass, not for the purpose of passing and re-passing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston v. Payne* (22)."

It may well be, as LORD ESHER, M.R., said in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 146):

"Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

An example of such reasonable use is given by A. L. SMITH, L.J., in *Hickman v. Maisey and another* (23) ([1900] 1 Q.B. at p. 756), in the case where "a man, while using a highway for passage, sat down for a time to rest himself by the side of the road"; and I think that in the present case, if the plaintiff could have shown that he sat upon this wall for the purpose of resting himself as a passenger, it would have been difficult to say that he was a trespasser; but the evidence is otherwise. The plaintiff himself was not called, but it is clear from the evidence of the boys who were called, who were with him at the time of the accident, that they went upon the mound and upon the wall to play and not to rest in their passage along the highway; and the question of intent is material, for as COLLINS, L.J., says in *Hickman's Case* (23) ([1900] 1 Q.B. at p. 758):

"If a person is found using a highway in a manner which is altogether outside the purpose for which it was dedicated, that raises the question with what intention he went on the highway; for the law judges by his subsequent action what his original intent was."

The case of *Earl of Coventry and others v. Willes* (24) seems to suggest that there would be no general right to stay upon a road in order to witness races on Newmarket Common, and, indeed, the only question occasioning any doubt on this matter is the extent to which acts done upon the highway may or may not be reasonably incident to its user. It is to be observed that in *Hickman v. Maisey and another* (23) A. L. SMITH, L.J., seems to think that, if a man took a sketch from a highway, no reasonable person would treat the act as an act of trespass, whereas in *Harrison v. Duke of Rutland and others* (20) ([1893] 1 Q.B. at p. 156) KAY, L.J., suggests that:

"If by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind."

LORD ESHER in the same case indicates (at p. 147):

"Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose."

A person leaning up against a fence by the side of the highway need not necessarily be a trespasser: per A. L. SMITH, L.J., in *Harrold v. Watney* (14) ([1898] 2 Q.B. at p. 322).

In the present case the accident took place by the plaintiff falling off a wall by the

side of the highway, a wall which was itself the property of the appellant local authority, but such a wall would come within the principles laid down in *Turner v. Ringwood Highway Board* (25), where it was decided that trees growing by the side of the highway belonged to the owner of the soil. Thus, by reason of the effect of user for purposes unconnected with passage, if the wall be treated as part of or incident to the highway, or if the conclusion, as I think it should be, is that the wall was not part of the highway, in any event the plaintiff, in getting upon it, was unlawfully trespassing upon the property of the appellant county council. It was not suggested that there was any direct intention to injure, but it is said, and so found by the jury, that the presence of the mound and the wall in conjunction constituted an allurement or a trap. This is not a case of an allurement arising after the child has entered upon the wall with leave or as of right, but is the contrary case mentioned by HAMILTON, L.J., in *Latham v. Richard Johnson & Nephew, Ltd.* (4) ([1913] 1 K.B. at p. 416) of a child that

"will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so."

The finding of the jury, therefore, that the heap of soil placed against the wall was in the nature of a trap or allurement will not avail him if he was a trespasser, unless such trap was put there with intention to injure, which is not suggested in the present case. This is clear from the judgment of this court in *Hardy v. Central London Rail. Co.* (10), where the matter is thus put by SCRUTTON, L.J. ([1920] 3 K.B. at p. 473):

"If the children were trespassers the landowner was not entitled intentionally to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

It may be said that this view is inconsistent with the decision of the House of Lords in the well-known case of *Cooke v. Midland and Great Western Rail. Co.* (8); but when that case is examined it is clear, as appears in the speech of LORD ATKINSON ([1909] A.C. at p. 239), that the children there were on the railway company's land with the leave and licence of the defendants.

The distinction between a child who is a trespasser and one who is not in this matter is made finally clear by LORD HAILSHAM, L.C., in *Robert Addie & Sons (Collieries), Ltd. v. Dumbreck* (3), where he says ([1929] A.C. at p. 366):

"The decision in *Cooke's Case* (8) rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap; it therefore throws no light upon the question as to any duty owed by the occupier of premises to a trespasser."

His Lordship goes on to express full agreement with the judgment of HAMILTON, L.J., in *Latham Case* (4), where, as I have pointed out, the distinction is clearly made. He cites many other cases to the effect that, where the children were trespassers, it is necessary to show an intention to injure, and says that there are none to the contrary effect; nor do there appear to be any, unless we find such authority in *Lynch v. Nurdin* (12) where judgment was given for the plaintiff, although he was a trespasser on the defendant's cart. Although *Lynch v. Nurdin* (12) remains an authority on the question of contributory negligence of children, the present state of the law seems to me to justify me in declining to think that it binds me to-day to say that the defendants are liable when they do not put a trap intentionally or intend to injure if the plaintiff is a trespasser.

The Divisional Court, in the recent case of *Donovan v. Union Cartage Co., Ltd.* (13) seeks to distinguish *Lynch v. Nurdin* (12) on the ground that in *Donovan's Case* (13) the children climbed upon an unhorsed van and that there was no inherent danger therein, whereas in *Lynch v. Nurdin* (12) the cart had a horse attached to it; but they do not seek to support their finding for the defendants on the ground that the children were trespassers, though ACTON, J., quotes ([1933] 2 K.B. at p. 73) the speech of LORD ATKINSON in *Cooke's Case* (8) ([1909] A.C. at p. 237), who extends the possibility of

liability to cases where the person was a trespasser at the moment the accident occurred, and ACTON, J., appears there to approve *Lynch v. Nurdin* (12) on the question of the rights of trespassers; but in so far as LORD ATKINSON was there speaking obiter (see per the same noble Lord in *Glasgow Corp'n. v. Taylor* (9) ([1922] 1 A.C. at p. 54)), I prefer to distinguish *Cooke's Case* (8) on the ground that the child was a licensee and hold that the problem was set at rest in the House of Lords in *Addie's Case* (3).

On the view which I have here expressed, the second ground of appeal, that the conjunction of the soil and the wall was not the cause of the accident, but that the infant caused his own injury by waving his arms about in imitation of an insect while he was sitting on the wall, does not arise; but, in case this appeal goes further, I would say that in the matter of the direct causation of the plaintiff's injuries by the negligence of the defendants, I think it was a matter of degree essentially for the jury and, in the absence of any clear evidence why this child did fall off the wall, having regard to the youth of the plaintiff, I think the jury were entitled to come to the conclusion that it was an essential result of the child being upon the wall. This view is consistent with the opinions expressed in *Harrold v. Watney* (14) where the test was applied:

"Ought what the child did to have been present to the mind of the person who created [in that case] the nuisance as a probable result of his act?":

(per VAUGHAN WILLIAMS, L.J., [1898] 2 Q.B. at p. 325). Here there was not only evidence from Ruddlestone, one of the boys called, that he did not see what it was that made the plaintiff fall backwards from the wall, but also that of Parkin, the foreman, who had told the children not to go on the wall, because they would tumble over; so that there was evidence that the defendants' foreman did foresee that being upon the wall might be a cause of danger to the children, and, therefore, if he were under a duty to guard against that danger, the mere fact that the accident arose in one or other of the particular ways in which a child might fall off a wall does not seem to me to constitute a novus actus interveniens, and, if the defendants were otherwise legally liable in placing the heap of soil against the wall without proper precaution, I think that the jury were entitled to find that this action on their part caused the plaintiff's injuries.

The direction on this matter to the jury seems to me to have placed the question sufficiently before them so that they knew on this point what they had to consider. Thus, at the beginning of his summing-up on this matter the learned judge presents the arguments for the parties thus: For the plaintiff: "I have been damaged as a result of their negligence"; and the defendants say: "If you had been a sensible little boy of six instead of a foolish little boy of six, you would never have been hurt and it is your fault and not ours." And then again: "Did the negligence of the defendants cause the plaintiff's injuries? If you think that, although they were negligent, it had nothing to do with the causing of Kenneth Liddle's injuries, then you will say so by answering that question in the negative."

Finally, it was sought to put the case upon nuisance. I do not think that, even if it were a nuisance to leave this earth upon the verge of the highway, it would in any way assist the plaintiff in this case. The plaintiff is not complaining of an obstruction in the highway which impeded his right of passage thereon and, although the judge quoted a definition of nuisance to the jury, he did not, I think, sufficiently distinguish between the endangering of the amenities of the public as such and this injury caused to this child, if at all, not as a member of the public but as an individual allured into danger. I cannot see that on any view this action could properly be founded upon nuisance and I decide this appeal in favour of the appellants upon the ground, as I have said, that once it is established that the plaintiff is a trespasser there is no evidence which can make the defendants liable for his injuries which would satisfy the requirements now established in such cases by the authorities.

Appeal allowed.

Solicitors: *Lambert & Hale*, for *H. G. Thornley*, Northallerton; *Reed & Reed*, for *Colin Brown & Co.*, Whitby.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

OFFICIAL ASSIGNEE OF MADRAS v. MERCANTILE BANK OF INDIA, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Macmillan, Lord Wright, Sir John Wallis, and Sir Lancelot Sanderson), July 17, 19, 20, October 15, 1934]

[Reported [1935] A.C. 53; 104 L.J.P.C. 1; 152 L.T. 170; 40 Com. Cas. 143]

Pawns and Pledges—Delivery—Documents of title—Railway receipt for goods in transit—Possession—Documents returned to enable borrower to arrange unloading of goods into lender's warehouse—Effect—Indian Contract Act, 1872 (No. IX of 1872), s. 102, s. 103, s. 172, s. 178—Bankruptcy—Property available for distribution—Reputed ownership—Goods in transit to bankrupt pledged and charged to creditor—Presidency Towns Insolvency Act, 1909 (No. III of 1909), s. 52 (2) (c)—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c).

Charge—General equitable charge—Goods in transit to borrower—Delivery of railway receipts to lender as security.

Privy Council—India—Madras—Pledge—Document of title—Moneys advanced on security of railway receipts—Receipts returned to pledgor to facilitate delivery of goods to pledgee—Whether valid pledge of goods—Letters of hypothecation—Equitable charge—Subsequent insolvency—Reputed ownership of goods—Property divisible among creditors—Indian Contract Act, 1872 (No. IX of 1872), ss. 102, 103, 172, 178—Indian Contract (Amendment) Act, 1930 (No. IV of 1930), s. 178—Presidency Towns Insolvency Act, 1909 (No. III of 1909), s. 52 (2) (c).

The M. Bank, the lenders, regularly lent money to a certain firm, the borrowers, on the security of consignments of ground nuts which were in transit to the borrowers. Before each loan was granted the borrowers were required to endorse and assign to the lenders the railway receipt for the consignment in question, to make and deliver a promissory note, and to sign and give a letter of hypothecation whereby the borrowers acknowledged having deposited the property as a collateral security for the due payment of the promissory note. On the arrival of each consignment the usual practice was for the lenders to hand the borrowers the appropriate railway receipt so that delivery might be obtained. The borrowers then presented the receipts, paid the freight, and unloaded the nuts into a particular warehouse where they came into the actual possession of the lenders. No notice of the transaction was given to the railway company. On Feb. 7, 1929, fourteen receipts were handed to the borrowers in the usual way, but the railway's agents refused to deliver the nuts as payment was not forthcoming, and unloaded the nuts into its own warehouses. On the same day the borrowers became insolvent, and on Feb. 11, 1929, they were adjudicated bankrupt. On the borrowers' insolvency, their property vested in the official assignee. The lenders held another thirty-two receipts in respect of nuts then in transit; they presented these receipts in due course, but the railway's agents refused delivery. Subsequently, all the nuts in question were sold under the order of the court.

By s. 178 of the Indian Contract Act, 1872, as amended by the Indian Contract (Amendment) Act, 1930: "A person who is in possession of any goods, or of any bill of lading . . . order for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents: provided that the pawnee acts in good faith. . . ."

By s. 172: "The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'."

In an action between the official assignee and the lenders as to the title to the proceeds of sale of the nuts, the official assignee contended, *inter alia*, that the nuts in question were "goods being at the commencement of the insolvency in the possession . . . of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner

thereof," and that the nuts were, therefore, property divisible among the creditors in accordance with s. 52 (2) (c) of the Presidency Towns Insolvency Act, 1909 (which corresponds with s. 38 (c) of the English Bankruptcy Act, 1914).

Held: the official assignee was entitled to the proceeds of sale because (i) the railway receipts were documents of title to the goods within the meaning of s. 178: *Ramdas Vithaldas Durbar v. S. Amerchand & Co.* (1) (1916), L.R. 43 Ind. App. 164, applied; (ii) the owner of the goods may be "a person who is in possession of any goods or of any bill of lading" within the meaning of s. 178: s. 3 of the English Factors Act, 1889, distinguished; (iii) the pledge of the documents amounted to a pledge of the goods, and the ground nuts had, therefore, been validly pledged to the lenders: *Ramdas, etc. v. S. Amerchand* (1) applied; (iv) the lenders, in handing over the fourteen receipts on Feb. 7, 1929, parted only with their custody, and did not part with possession of the goods or receipts in such a way as to affect the pledge; *North Western Bank v. Poynter and others* (2), [1895] A.C. 56, followed; *Re David Allester, Ltd.* (3), [1922] 2 Ch. 211, approved; (v) the letters of hypothecation constituted a good equitable charge of the nuts which was binding between the borrowers and the lenders, even though no notice of it had been given to the railway company, and was equally binding on the official assignee who merely stood in the borrowers' shoes; *Re Slee, Ex parte North Western Bank* (4) (1872), L.R. 15 Eq. 69, and *Re Hamilton, Young & Co., Ex parte Carter* (5), [1905] 2 K.B. 772, approved and applied; *Brandt & Co. v. Dunlop Rubber Co.* (6), [1905] A.C. 454, followed; (vi) even if the railway receipts were regarded as merely tokens of an authority to receive possession, their transfer for value by way of security for advances raised an equity as between transferor and transferee, entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts; (vii) the goods were not property divisible among the creditors by virtue of s. 52 (2) (c), because, having been validly pledged, they were not in the possession of the borrowers; *Fakeerappa v. Thippanna* (7) (1913), I.L.R. 38 Mad. 664, approved; (viii) the general course of business and the relationship of the interested parties to the consignments, and, in particular, the purpose for which the borrowers had custody of the fourteen receipts, were inconsistent with any reputation of their ownership within the meaning of s. 52 (2) (c): dictum of LORD SELBORNE in *Re Couston & Co., Ex parte Watkins* (8) (1873), 8 Ch. App. 520, at p. 528, applied.

Observations as to the English law as to the pledge of goods by delivery of documents of title.

Notes. Followed: *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52.

As to delivery of pledges, see 25 HALSBURY'S LAWS (2nd Edn.) 7-8, paras. 12-13, and for cases on the subject, see 37 DIGEST 4-7, 8-25.

As to reputed ownership in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 438-447, paras. 864-884, and for cases on the subject, see 5 DIGEST 793-801, 6785-6844.

As to creation of an equitable charge, see 23 HALSBURY'S LAWS (2nd Edn.) 239, para. 353, and for cases on the subject, see 35 DIGEST 265, 248-249.

For the Bankruptcy Act, 1914, s. 38 (c), see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to:

- (1) *Ramdas Vithaldas Durbar v. S. Amerchand & Co.* (1916), L.R. 43 Ind. App. 164; 85 L.J.P.C. 214; 39 Digest 634, q.
- (2) *North Western Bank v. Poynter, Son and Macdonalds*, [1895] A.C. 56; 64 L.J.P.C. 27; 72 L.T. 93; 11 R. 125, H.L.; 11 Digest (Repl.) 386, 464.
- (3) *Re David Allester, Ltd.*, [1922] 2 Ch. 211; 91 L.J.Ch. 797; 127 L.T. 434; 38 T.L.R. 611; 66 Sol. Jo. 486; [1922] B. & C.R. 190; 10 Digest (Repl.) 814, 5281.
- (4) *Re Slee, Ex parte North Western Bank* (1872), L.R. 15 Eq. 69; 42 L.J.Bcy. 6; 27 L.T. 461; 21 W.R. 69; 7 Digest 27, 135.
- (5) *Re Hamilton, Young & Co., Ex parte Carter*, [1905] 2 K.B. 772; 74 L.J.K.B. 905;

93 L.T. 591; 54 W.R. 260; 21 T.L.R. 757; 12 Mans. 365, C.A.; 7 Digest 27, 138.

(6) *Brandt & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, 230.

(7) *Fakeerappa v. Thippanna* (1913), I.L.R. 38 Mad. 664.

(8) *Re Couston & Co., Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bcy. 50; 28 L.T. 793; 21 W.R. 530, L.C. & L.J.; 5 Digest 803, 6863.

(9) *Spear v. Travers* (1815), 4 Camp. 251; 171 E.R. 80, N.P.; 39 Digest 523, 1378.

(10) *McEwan v. Smith* (1849), 2 H.L. Cas. 309; 13 Jur. 265; 9 E.R. 1109, H.L.; 39 Digest 522, 1367.

(11) *Inglis v. Robertson and Baxter*, [1898] A.C. 616; 67 L.J.P.C. 108; 79 L.T. 224; 14 T.L.R. 517, H.L.; 11 Digest (Repl.) 387, 471.

(12) *Dublin City Distillery, Ltd. v. Doherty*, [1914] A.C. 823; 83 L.J.P.C. 265; 111 L.T. 81; 58 Sol. Jo. 413, H.L.; 10 Digest (Repl.) 814, 5285.

(13) *Re Ambrose Summers* (1896), I.L.R. 23 Calo. 592.

Appeal by leave from the judgment of the High Court of Judicature of Madras, Appellate Jurisdiction (SIR OWEN BEASLEY, C.J., and STONE, J.), dated April 18, 1932.

The substantial question in this appeal was as to the consequences which in law flow from the endorsement and delivery by way of security to a financing bank of railway receipts belonging to the owner of goods and particularly whether such a transaction effects constructive delivery of the goods represented by these receipts. The appeal also raised questions as to the application and limits of the doctrine of reputed ownership.

The issue which fell to be determined in the proceedings was whether the appellant who was the official assignee in the insolvency of C. K. Narayana Ayyar & Sons (hereinafter referred to as the insolvents) or the respondent bank (hereinafter referred to as the bank) was entitled to the proceeds of sale of the various consignments of ground nuts hereinafter referred to.

Van den Berg, K.C., *Walter H. Moresby*, and *Henry Hope* for the appellant, the official assignee of Madras.

Stuart Bevan, K.C., and *Sir Thomas Strangman* for the respondents, the lenders.

Cur. adv. vult.

Oct. 15.—The judgment of their Lordships was read by

LORD WRIGHT.—The appellant is the Official Assignee of Madras in whom the property vested on insolvency of C. K. Narayana Ayyar & Sons (who will be referred to hereafter as the borrowers); the question in the appeal is whether the appellant or the respondent lenders are entitled to the proceeds of certain consignments of ground nuts; the primary issue is whether the lenders who had advanced moneys on the security of the railway receipts in respect of these ground nuts obtained a valid pledge of the goods. Certain further or alternative questions will be dealt with subsequently.

The official assignee succeeded before WALLER, J.; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate Jurisdiction; the official assignee now appeals to His Majesty in Council.

There is little dispute about the facts. The borrowers did a large business in ground nuts, which they purchased from the up-country growers; the nuts were then despatched by rail and arrived in Madras by one or other of two railways, the Madras and Southern Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the borrowers, but there was on it a signboard bearing the name of the lenders.

For many years the lenders had financed the consignments of nuts purchased and consigned by the borrowers; their method was to grant loans against particular consignments. The general course of business was for the borrowers to obtain from the railway companies in respect of each consignment or wagon load a railway receipt which will later be more particularly described; sometimes, however, the up-country seller appeared as consignor and consignee, in which event the receipt was endorsed and delivered to the borrowers; sometimes the seller was named on the receipt as consignor, while the borrowers were consignees; in other cases the borrowers were named on the receipt both as consignors and consignees. Each receipt gave full particulars relating to the goods, the wagon number, the marks of the bags, the number, and so forth. It contained the following condition:

"That the railway receipt given by the N.G.S. Rail. Co. for the articles delivered for conveyance must be given up at destination by the consignee to the railway company or the railway may refuse to deliver, and the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

The condition recognises a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading, whereby delivery is made on an indemnity if bills of lading are not forthcoming. As in general the borrowers wanted loans against consignments their practice was to bring or send to the lenders the railway receipts, duly endorsed by them in blank, with a letter of hypothecation and a promissory note, and, if the values were satisfactory and the transaction was in order, the loan was granted, the borrowers executing a promissory note for the amount and the letter of hypothecation, which was duly completed with full particulars of the security. The railway companies were, no doubt, aware of this general course of business, but were not notified that it had been followed in respect of any particular transaction. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts; these the lenders had retained, but in order to enable them to obtain delivery the practice was to hand the receipts to the representative of the borrowers, who paid freight and unloaded the goods from the wagons into the X warehouse where they came into the actual possession of the lenders.

The borrowers were adjudicated bankrupt on Feb. 11, 1929, the date of the insolvency being Feb. 7, 1929. At that latter date the goods, which are the subject of this appeal, consisted of 7,993 bags of ground nuts, represented by forty-six railway receipts; all the goods were at the time either in transit on the railway or in the transit sheds or godowns of the Port Trust. Of the forty-six receipts, fourteen representing 2,975 bags, had been presented on Feb. 7, 1929, to the Port Trust by the borrowers, who had received them from the lenders, in accordance with the method and for the purpose described above, but the Port Trust refused to give delivery and unloaded these bags into its own sheds or godowns because payment of the freight was not forthcoming; the remaining thirty-two receipts were presented by the lenders after the insolvency; in view, however, of the dispute which culminated in the present suit, delivery was refused by the Port Trust, and all the goods were eventually sold under orders of the court, the proceeds being held by the lenders to abide the result of these proceedings.

The main question (putting aside for the moment any consideration of the letter of hypothecation) is whether the pledging of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents, that is, what has been called a pledge of the *ipsa corpora* of the documents. The solution of the question depends on the true effect of s. 178 of the Indian Contract Act, 1872, as then in force; that section which has since been repealed by the Indian Contract (Amendment) Act, 1930, and replaced by a new s. 178, was in the following terms:—

"A person who is in possession of any goods or of any bill of lading, dock warrant,

A warehouse keeper's certificate, wharfinger's certificate or warrant or order for delivery or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: Provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them by means of an offence or fraud."

By s. 172 a pledge is defined as "a bailment of goods as security for payment of a debt or performance of a promise."

The first matter to be decided is whether a railway receipt such as those in question is a document of title to the goods within the section. Their Lordships are of opinion that it is. In *Ramdas Vithaldas Durbur v. S. Amerchand Co.* (1), this Board held that a railway receipt was an "instrument of title" within s. 103 of the Contract Act; the board said in that case that no distinction could be drawn between the term "document of title" and the term "instrument of title"; and accordingly also held that the railway receipts were documents of title to goods within s. 178. Their Lordships likewise in the present case see no reason for giving a different meaning to the term in s. 178 from that given to the terms in ss. 102 and 103; in addition a railway receipt is specifically included in the definition of "mercantile document of title to goods" by s. 137 of the Transfer of Property Act, 1882, which, in virtue of s. 4 of the Act, is to be taken as part of the Contract Act as being a section relating to contracts. A railway receipt is now included in the definition of documents of title to goods in s. 2 (4) of the Indian Sale of Goods Act, 1930.

The two questions which next arise on s. 178 are (1) Whether the words "a person who is in possession of any goods or of any bill of lading," &c., include the owner, and (2) whether a pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered; both depend on the words of the section read in connection with the rest of the Act.

However, the arguments advanced on behalf of the official assignee have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarised. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodian (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law, and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realised. So things have remained in the English law: a pledge of documents is not in general to be deemed a pledge of the goods; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the ipsa corpora of them; the common law continued to regard

them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in *Spear v. Travers* (9). The common law rule was stated by the House of Lords in *McEwan v. Smith* (10). The position of the English law has been fully explained also more recently in *Inglis v. Robertson and Baxter* (11) and in *Dublin City Distillery, Ltd. v. Doherty* (12).

However, there also grew up that legislation which is compendiously described as the Factors Acts, the first in 1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus entrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties bona fide and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Section 3 of the Factors Act, 1889, provides that "a pledge of document of title to goods shall be deemed to be a pledge of the goods." It has been held that this section only applies to transactions within the Factors Act (*Inglis v. Robertson, and Baxter* (11)).

Thus the curious and anomalous position was established that a mercantile agent acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodian and obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the official assignee that s. 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on s. 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in s. 3 of the English Act of 1889.

However, s. 178 of the Contract Act, 1872, has omitted the word "agent," and has without express qualification made the section apply to "a person who is in possession of any goods or of any bill of lading, &c." The Appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out by this Board in *Ramdas's Case* (1) that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian legislature having taken the lead in a legal reform.

A It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended to pledge the goods and not merely the railway receipts and the lenders have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England in the like case is no argument against their Lordships' conclusion, nor is it an argument that s. 178, as subsequently amended in 1930 and now in force, has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that "any person, &c.," includes owner; the decisions appear to have turned on the meaning of the word "possession," and on such distinctions as that between mere custody and juridical possession. An examination of ss. 103 and 108 of the Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

E The other question arising under s. 178, namely, whether under its terms a pledge of the documents amounts to a pledge of the goods should also, in their Lordships' judgment, be answered as it was by the Appellate Court, in favour of the lenders. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained; the actual words of s. 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of s. 178 is abbreviated; but "a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by "bill of lading," the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the pledging of a bill of lading. This was the view adopted in regard to railway receipts in *Ramdas's Case* (1). In that case it was held that the pledging of a railway receipt had the same effect on the right of stoppage in transitu under s. 103 as a pledging of the goods; the railway receipt quoad this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under s. 178 to a pledge of the documents, especially as the board held in *Ramdas's Case* (1) that documents and instruments of title had the same meaning in both sections. A "pledge" is defined as stated above to be a bailment of goods as security (s. 172), hence it seems that s. 178, the marginal note to which is "pledge by the possessor of goods or of documentary title to goods," can only be dealing with pledges of goods, though the section uses the words "pledge of such goods or documents." In other words, it is describing a pledge of goods, either by pledging the goods eo nomine or by pledging the relative documents.

On this construction of s. 178 the lenders were, on the facts of the case, entitled to their security in the ground nuts represented by the forty-six railway receipts as being validly pledged to them.

It was contended that even on this view the goods represented by the fourteen railway receipts presented on Feb. 7, 1929, were in a different position, because, it was said, the lenders had parted with their pledge on these goods by giving back possession of the railway receipts to the borrowers. In their Lordships' judgment this contention is based on a misuse of the word "possession." The borrowers did not part with the

possession of the goods or receipts in the juridical sense of that word; they merely parted with the custody, by entrusting the receipts to the borrowers as their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and unloading them from the railway wagons or transit sheds and putting them into the X godown warehouse on behalf of the borrowers. Such action does not involve a parting with possession and accordingly, it does not in any way affect rights of pledge; the re-delivery by the pledgee to the pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by *North Western Bank v. Poynter and others* (2) and the more recent case of *Re David Allester, Ltd.* (3). In both these cases the limited purpose was in order that the goods should be realised by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the lenders, who were bankers, but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient, for the conduct of the business in question. This point also fails the official assignee.

The above conclusions are sufficient to dispose of the appeal, but a further point taken on behalf of the lenders would in itself, in the opinion of the Board, be sufficient to decide the appeal in their favour. Reference has already been made to the letter of hypothecation, which, in the case of each advance, was completed by the borrowers. The finding of the trial judge on this point is that

“in order to finance the transaction the borrowers took the railway receipts to the bank with promissory notes and letters of hypothecation.”

The letter of hypothecation was in terms an acknowledgment by the borrowers, that they had deposited the property documents and securities thereunder-mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter, in their Lordships' judgment, constitutes a good equitable charge which is binding between the borrowers and the lenders, and is equally binding on the official assignee who, for this purpose, merely stands in the borrowers' shoes, and has as against the lenders no higher or better right than the insolvent had at the date of the insolvency. An analogous case was considered in *Re Slee, Ex parte North Western Bank* (4), where a letter of lien over wools of the bankrupt which were in his warehouse was held to create a good equitable charge in favour of bankers who had made advances; no delivery of the warrant for wools had been made; but it was held that the bankers had a good title against the trustee in bankruptcy. This authority was followed and approved in *Re Hamilton, Young, & Co., Ex parte Carter* (5). In that case the traders who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. The Court of Appeal rejected the argument that the letters of lien were void under the Bills of Sale Acts: such matters are not here material because in India there is no legislation corresponding to the Bills of Sale Acts. Apart from that question, VAUGHAN WILLIAMS, L.J., thus summed up the general position ([1905] 2 K.B. at p. 784):

“The result of the practice detailed seems to be that, in respect of the matter and preparation and shipment of the goods, the management and direction of these goods, for the purposes of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with [the debtors], and that no property, other than by way of a lien or charge, would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining [the debtors] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank.”

There was in that case notice by the bank of their lien to the bleachers shortly before the insolvency, but the statement of the bankers' rights in equity as against the debtors, and consequently as against the trustee in bankruptcy, is not made with reference to any question of notice. The rights between the immediate parties do not depend on notice, just as in the case of an equitable assignment of a debt notice is not necessary

to complete the equitable right as between assignor and assignee. Thus in *Brandt & Co. v. Dunlop Rubber Co.* (6) it is clear that there was a good equitable assignment as between the merchants as assignors and the financiers as assignees, though the assignment was not completed in the sense that the debtors to the merchants were bound by it or bound to pay the assignees, without receiving notice of it. Thus LORD MACNAGHTEN says ([1905] A.C. at p. 462):

“As between Kramrisch & Co. [the merchants] and Brandts’ [the bankers] the assignment was perfect without them.”

(sc. the documents giving notice to the debtors). In the same way, in the present case, although it is true that no third party holding the goods or dealing with them without notice of the lenders’ lien would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the lenders and the borrowers. In this case nobody’s rights are concerned except the rights as between these immediate parties: the appellant merely stands in the borrowers’ shoes.

A similar course of reasoning has been applied in India, for instance, in *Re Ambrose Summers* (13).

Some objection was raised on the hearing of the appeal that the question of the effect of the letters of hypothecation had not been an issue in the courts below, and indeed that the letters of hypothecation had not been proved except in general terms. But both in the first court and in the Appellate Court this issue is referred to, and the trial judge finds the facts. Before this board the point was argued as an alternative, and in view of the conclusions stated above as to the application of s. 178 of the Contract Act, it may be regarded as not calling for decision. But this point by itself would be enough to decide the case against the official assignee, even if he were right in the construction of s. 178, for which he has contended.

A still further point was raised on behalf of the lenders; it was argued that, if under s. 178 the lenders did not get a good pledge at law by the delivery of the railway receipts, still that delivery, considered on all the facts of the case, was evidence of a good equitable charge at least as between the immediate parties even ignoring the accompanying letters of hypothecation. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts. If so, the official assignee must be subject to the same equity.

There still remains for consideration a final point raised on behalf of the official assignee, which is that on any view of the case the consignments of nuts in question constitute property divisible among the creditors in virtue of s. 52 (2) (c) of the Presidency Towns Insolvency Act, 1909, which corresponds with s. 38 (c) of the English Bankruptcy Act, 1914, as

“goods being at the commencement of the insolvency in the possession order and disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof.”

This point can be shortly here disposed of. If the goods in question were validly pledged under s. 178 as their Lordships have held, they were not in the possession of the borrowers, because the railway company held the goods as bailees of the lenders, the possession by the lenders of the documents of title being equivalent to the possession of the goods: hence these goods were not within the possession order and disposition of the borrowers at all; it is the lenders who were entitled to obtain delivery of the ground nuts from the railway company. A similar conclusion was arrived at on analogous facts in *Fakeerappa v. Thippanna* (7). It was argued that a distinction must be drawn in this connection in regard to goods represented by the fourteen railway receipts that were handed over to the borrowers’ representative for the special purpose explained above, of unloading the goods into the X warehouse. Their Lordships, however, do not think that these goods are in any different position from the remainder for this purpose.

The pledge was not affected by the handing over of the railway receipts for the limited purpose; it was only for that purpose that the borrowers had the temporary possession, or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession order and disposition of the borrowers, still less that they were so with the consent of the true owners, that is the lenders, as pledgees. Nor could it be said, either as to the consignments as a whole or as to the fourteen consignments, that the circumstances were such as to make the borrowers the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know

"those facts which are capable of being generally known to those who make inquiry on the subject,"

in the sense explained by LORD SELBORNE in *Re Couston & Co., Ex parte Watkins* (8) (L.R. 8 Ch. at p. 528): the general course of business and the relationship of the interested parties to the consignments and, in particular, the purpose for which the borrowers had custody of the fourteen receipts were inconsistent with any reputation of ownership in that sense. Reference may be made in this connection to the English cases of *Re Slee, Ex parte North Western Bank* (4), and *Re Hamilton, Young, & Co.* (5). The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also.

In the result the appeal should, in their Lordships' opinion, be dismissed with costs. They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *Burton, Yeates & Hart; E. F. Turner & Sons.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SIMMONS v. RUSSELL FINANCIERS, LTD.

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.J.J.), June 26, 1934]

[Reported [1934] 2 K.B. 487; 103 L.J.K.B. 724; 151 L.T. 472]

Moneylender—Memorandum—Sufficiency—Terms of contract set out—No explanation of effect of terms on number of instalments to be paid—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6 (2).

The note or memorandum of a contract for the loan of money, after stating the date on which the loan was made, the amount of the principal of the loan, the interest charged on the loan expressed in terms of a rate per cent. per annum, and the fact that the loan was made on the terms of a bill of sale, set forth a copy of the bill of sale, which was in statutory form. The memorandum contained the further clause: "The mortgagor doth further agree and declare that he will duly pay to the [moneylenders] the principal sum aforesaid together with the interest then due by equal monthly payments of £3, the first of such payments to be paid on June 22, 1930, and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount, including principal and interest, be repaid." On objection that the note or memorandum did not contain all the terms of the contract and so comply with the provisions of sub-s. (2) of s. 6 of the Moneylenders Act, 1927, in that it did not set out what proportion of each instalment was referable to the repayment of principal and what proportion to the payment of interest and so did not specify the number of the instalments and the time within which they would take to be paid,

Held: to comply with the provisions of s. 6 (2) of the Act of 1927, a memorandum

must contain all the terms of the contract and the other matters mentioned in the subsection, but it need not contain an explanation to the borrower of what the effect of the terms of the contract will be with regard to the length of time he will have to keep up his payment of instalments; in the present case the memorandum complied with the provisions of s. 6 (2); and, therefore, the objection taken by the borrower must fail.

Notes. Applied: *Bullock v. Lloyds Bank, Ltd.*, [1954] 3 All E.R. 726.

As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190-192, and for cases, see DIGEST SUPPS., tit. MONEY AND MONEYLENDING, cases 353a et seq. For Moneylenders Act, 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 377.

Case referred to:

- (1) *Rosefield v. Provincial Union Bank*, [1910] 2 K.B. 781; 79 L.J.K.B. 1150; 103 L.T. 378; 17 Mans. 319, C.A.; 7 Digest 61, 343.

Appeal from an order of MACNAGHTEN, J.

The plaintiff, Elias Simmons, by his action claimed a declaration that a contract of loan for the sum of £45 advanced to him by Russell Financiers, Ltd., the defendants, who were registered moneylenders, was unenforceable. It was admitted before MACNAGHTEN, J., that the sum of £45 was lent by the defendants to the plaintiff on May 22, 1930, and that the plaintiff, before the money was advanced, signed the following note or memorandum of the contract of loan, purporting to be made in compliance with the provisions of s. 6 of the Moneylenders Act, 1927.

"Note or memorandum of contract made the twenty-second day of May One thousand nine hundred and thirty between Russell Financiers, Ltd. of 96, Mile End-road, E. 1, registered offices, and Elias Simmons, of 27, St. Peters-road, Mile End, E. 1, master tailor.

"(1) The said loan was made on May 22, 1930.

"(2) The amount of principal of loan is £45 (forty-five pounds).

"(3) The rate of interest charged is 48 per cent. per annum.

"(4) The loan is made on the terms of a bill of sale, copy whereof is as follows:

"This bill of sale made the twenty-second day of May One thousand nine hundred and thirty between Elias Simmons (master tailor) of 27 St. Peter's-road Mile End E. 1, in the county of London (hereinafter called the "mortgagor"), of the one part, and Russell Financiers, Ltd., of 96 Mile End-road, E. 1, registered office in the county of London, registered moneylenders (hereinafter called "the mortgagees"), of the other part, witnesseth that in consideration of the sum of forty-five pounds now paid to the mortgagor by the mortgagees the receipt of which the mortgagor hereby acknowledges he the mortgagor doth hereby assign to the mortgagees their executors administrators and assigns all and singular the several chattels and things specifically described in the schedule hereunder written by way of security for the payment of the sum of forty-five pounds and interest thereon at the rate of 48 per cent. per annum. And the mortgagor doth further agree and declare that he will duly pay to the mortgagees the principal sum aforesaid together with the interest then due by equal monthly payments of £3 the first of such payments to be paid on the twenty-second day of June one thousand nine hundred and thirty and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount including principal and interest be repaid. And the mortgagor doth also agree with the mortgagees that he will forthwith insure the said chattels and things during the continuance of this security against loss or damage by fire in the Licensees and General or other insurance company to be approved by the mortgagees and will punctually pay the premiums on such insurance and will when required produce to the mortgagees the receipt for the current premium and will expend any moneys paid in consequence of loss or damage by fire under such policy in discharge of the money secured by these presents. And also will punctually pay all rent

taxes rates and outgoings to become due and payable in respect of the premises on which the said chattels and things or any of them are or shall be and also will produce the last receipts for such rent taxes and rates. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagees for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.'

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.' [Then followed a schedule of the furniture assigned.]

"Signed and sealed by the said Elias Simmons in the presence of (Sgd.) HARRY RUSSELL, 13, Addington-road, E. 3, Clerk to Russell Financiers, Ltd. Sgd. ELIAS SIMMONS (L.S.)."

"I, Elias Simmons (the borrower) hereby acknowledge that since the signature by me of the above memorandum of agreement made between myself and Russell Financiers, Ltd. of 96 Mile End Road E. 1 registered offices (hereinafter called "the lenders") I have received from the lenders the principal sum of £45, and that I have received from the lenders a copy of the above written bill of sale which contains all terms of the contract between us. And I acknowledge that I signed the note or memorandum of contract before the execution of the bill of sale. Dated this twenty-second day of May 1930. Signed by the said Elias Simmons in the presence of (Sgd.) Elias Simmons (2d. stamp). (Sgd.) HARRY RUSSELL, 13, Addington-road, E. 3. Clerk. 22/5/30."

The plaintiff, by his counsel, took the preliminary point that the note or memorandum of the contract of loan did not comply with the provisions of s. 6 (2) of the Moneylenders Act, 1927, in that it did not set out all the terms of the contract, namely, the number of the instalments and so the time within which they would have to be paid, or what proportion was referable to principal and what to interest or the amount of the last instalment. Counsel for the plaintiff took the further point that on the true construction of the bill of sale the mortgagor was bound to pay £3 a month until the principal had been paid off, the subsequent payments being in respect of interest. As a result the interest charged was in excess of 48 per cent. per annum.

Section 6 of the Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), provides:

(1) "No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act, or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.

(2) "The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan, expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the first schedule to this Act."

MACNAGHTEN, J., gave effect to the preliminary point taken by the plaintiff and gave judgment in his favour. The moneylenders appealed.

Quass for the moneylenders.

The plaintiff in person.

SCRUTTON, L.J.—This is an appeal from a decision of MACNAGHTEN, J., who has held that in a contract for the loan of money there is no valid memorandum of the terms

of the contract, and that, therefore, under s. 6 of the Moneylenders Act, 1927, the contract is unenforceable. The action was brought by the borrower, claiming a declaration that the contract was unenforceable.

When this action by the borrower came on for trial, his counsel said that he desired to take a preliminary point. The point was this. The memorandum, which was, we are to take it, given to the borrower, before the loan was made, was in these terms:

"Note or memorandum of contract made May 22, 1930, between Russell Financiers, Ltd. [the moneylenders] and Elias Simmons [the borrower]. (1) The said loan was made on May 22, 1930; (2) the amount of principal of loan is £45 (forty-five pounds); (3) the rate of interest charged is 48 per cent. per annum; (4) the loan is made on the terms of a bill of sale, copy whereof is as follows. . . ."

Then the bill of sale was set out verbatim. It contains this clause:

"The mortgagor doth further agree and declare that he will duly pay to the mortgagees the principal sum aforesaid, together with the interest then due, by equal monthly payments of £3, the first of such payments to be paid on June 22, 1930, and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount, including principal and interest, be repaid."

Counsel for the borrower put forward this argument. He said: It is true that this memorandum sets out the date on which the loan was made; it is true it sets out the amount of the principal of the loan; it is true it sets out the interest expressed in terms of a rate per cent. per annum, but it does not set out how many instalments are to be paid. That is a matter, said counsel, which should be set out, and, as it is not set out, the contract cannot be enforced. What the memorandum does do is to set out the whole of the bill of sale containing the terms on which the money is lent. It is said by counsel for the moneylenders: By s. 6 (2) of the Act of 1927 the note or memorandum is to contain all the terms of the contract. It does. It sets out all the terms of the contract as contained in the bill of sale, and, in particular, it sets out the particular matters which are mentioned in sub-s. (2). A memorandum in that form complies with the terms of s. 6 (2). It ought to set out all the terms of the contract; it does set out all the terms of the contract. What it does not set out is the construction which has been given by certain decisions of the courts as to what the terms of the contract, which in the case of a bill of sale are in the statutory form, mean. It is quite true you have to calculate to find out how many instalments will be required to pay the principal and interest at the rate stated in the contract, but that merely means that the effect of the terms is not stated; the terms themselves are stated in the note or memorandum of the contract. The terms of the contract are in certain words which are in statutory form, and the decisions of the courts have given explanations as to what those words mean.

In my opinion, that argument, made on behalf of the moneylenders, is correct. It would have been better, no doubt, if Parliament had imposed an obligation on a moneylender to state more precisely how many instalments the borrower had to pay and when those instalments would be completed. The construction of words in this form has been considered in cases to which we have been referred, and the majority of the Court of Appeal in *Rosefeld v. Provincial Union Bank* (1), and particularly BUCKLEY, L.J., stated exactly what a contract expressed in the statutory terms does mean, namely, that each instalment covers so much interest as is due on the principal at that time due, and the balance of the instalment is paid in reduction of principal, with the consequence that in each instalment when punctually paid there will be rather less for interest and rather more for repayment of principal. That is really the whole point. No doubt, it is rather hard on borrowers that a statutory form of this sort should leave them to do a calculation which they are probably quite incapable of doing, but Parliament has committed to provide that any such information as this, namely, what the terms of the contract mean, should be given in the memorandum or note of the contract. It is enough if the memorandum sets out all the terms of the contract, as it does in this case.

For these reasons I think that MACNAGHTEN, J., came to a wrong conclusion when

he decided that a memorandum in the statutory form of the Bills of Sale Acts was bad because, although it expressed all the terms of the contract, it did not state what was their effect in the particular case involved in that particular document. I think the learned judge took a wrong view of the meaning and effect of s. 6, and consequently this appeal must be allowed.

GREER, L.J.—I agree. The Moneylenders Act, 1927, is, in some sense, a hardship on lenders far more than it is a hardship on borrowers; it was intended to protect borrowers from their own improvidence in agreeing to hard terms with regard to the repayment of money which they had borrowed. There are a number of provisions, quite apart from s. 6, which deal with avoiding the contract of loan. For instance, it was thought proper by Parliament to say that, if a moneylender was not registered under the Act he could not enforce any of his contracts, and, if he made a contract of loan under any other name than his registered name, he was not entitled to enforce that contract. Those provisions are directed to the avoiding of the contract of loan, and are quite independent of any question as to what shall happen after the contract of loan is made. Then s. 6 of the Act, in order to give further protection to the borrower, provides that, even if the loan is in other respects within that which is a lawful contract for the lender to make with the borrower, still the borrower is to be protected if he does not get a copy of the terms of the agreement of loan, and the lender, if a moneylender, has to see that a correct memorandum of the contract is given to the borrower before the contract is signed. That provision has nothing to do with the question whether the contract of loan is avoided by any of the other sections of the Act or by reason of any principle of law; it is only concerned with the question whether the memorandum which has been given to the borrower is an accurate copy of that which has been agreed between the parties with regard to the loan.

The memorandum in this case is a complete memorandum of all the terms that had been agreed, and, in my judgment, such a memorandum is a sufficient memorandum within the provisions of s. 6. It must contain all the terms of the contract, but there is no obligation that it must contain an explanation to the borrower of what the effect of the terms of the contract will be with regard to the length of time he will have to keep up his payment of instalments. If it is a correct memorandum of the terms that have been actually agreed, it is a sufficient compliance with s. 6. Subsection (2) provides as follows:

"The note or memorandum aforesaid shall contain all the terms of the contract. [I think that it is clear that this memorandum did contain all the terms of the contract] and, in particular, shall show the date on which the loan is made [it did show that date] the amount of the principal of the loan [it did show the amount of the principal] and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

The latter words seem to me to mean that, if the rate charged on the loan is not expressed in terms of a rate per cent. per annum, it must be expressed as a rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the schedule. But here the rate per cent. per annum is expressed in the memorandum of the agreement.

In my judgment, the learned judge was wrong in thinking that there had been any breach of the provisions of s. 6 of the Moneylenders Act, 1927, and the appeal must be allowed with the usual consequences.

MAUGHAM, L.J.—I agree. I myself take the same view, and hold that the decision of the learned judge was erroneous, but with some regret and hesitation. My regret and hesitation is due to the circumstances that a contract for the repayment of a loan by instalments, as for instance in the present case, of £3 on the twenty-second day of each month is one which is or may be very difficult for a borrower to understand. That is not the less so if the form of the contract complies exactly with the statutory form which is to be found in the Bills of Sale Act, 1882. What does such a contract or

provision mean when it is expressed in the terms of an obligation to pay the principal sum due together with the interest then due by equal monthly instalments of, say £3? It is impossible to suggest there is no ambiguity in such a provision, since no less a judge than FLETCHER MOULTON, L.J., in *Rosefield v. Provincial Union Bank* (1) differed from VAUGHAN WILLIAMS and BUCKLEY, L.JJ., as regards the interpretation of precisely similar language. FLETCHER MOULTON, L.J., pointed out that one interpretation was that with the obligation so to repay the principal, that is to say the monthly payments of £x, there was to be coupled the obligation to pay the interest due at the time of the payment of each instalment. The other interpretation, and the one which commended itself to the majority of the Court of Appeal in that case, was that the instalments payable should be equal instalments of £x, and they were to include the payment of the interest then due as well as such amount of the instalment in discharge of principal as remained after payment of the interest due at that date. To a lawyer I think there could be no doubt that since the decision of that case the latter is the true construction of the provision, and, accordingly, the bill of sale in this case, which was set out verbatim in the memorandum of contract made between the parties and dated May 22, 1930, is one which involved the payment month by month of the interest then due with a balance out of the £3 which went in reduction of the principal sum due. In my opinion, the memorandum complies strictly with the terms of s. 6 (2) of the Moneylenders Act, 1927. It seems to me that following that provision all the matters therein referred to have been set out in the note or memorandum in the present case. I venture to express the opinion that the legislature might well have included a provision to the effect that the note or memorandum must be so worded that the borrower shall be made aware of the duration of the loan or shall be told in plain language precisely what it is that he is expected to pay on each occasion when a sum becomes payable. But, in view of the terms in which the statute has been enacted, I am satisfied that on the true construction of the statute it is impossible to say that any such term or provision can be implied in s. 6 of the Act, and, accordingly, with some hesitation, I have come to the conclusion that the judgment of the learned judge must be reversed and the consequences mentioned by my brethren must follow.

Appeal allowed.

Solicitors: *Osborn & Osborn; Howard A. Laurance & Co.*

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

DOYLE v. WHITE CITY STADIUM, LTD. AND BRITISH BOXING BOARD OF CONTROL (1929)

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), July 10, 11, 1934]

[Reported [1935] 1 K.B. 110; 104 L.J.K.B. 140; 152 L.T. 32; 78 Sol. Jo. 601]

Infant—Contract—Opportunity to earn professional remuneration—Contract affording protection in exercise of profession—Contract as whole beneficial.

Rules—Unincorporate body—Agreement by plaintiff to abide by rules or alterations thereof—Alteration not brought to notice of plaintiff—Amendment not fundamental alteration of purpose of rule—No provision that alteration to bind plaintiff only if brought to his attention.

In March, 1932, the plaintiff, D., an infant and a professional boxer, applied for and was granted a licence from the British Boxing Board of Control (1929), by which he bound himself to adhere strictly to the rules of the Board and to abide by any further rules or alteration to existing rules. Between March, 1932, and July 12, 1933, when the plaintiff fought for the heavyweight championship of Great Britain, the original rule that a boxer's money was to be stopped only when he was disqualified for committing a deliberate foul had been altered, and under the altered rule boxers in case of disqualification were only to receive certain expenses. D. was to receive £3,000 win, lose or draw, and was disqualified for fouling in the second round. The stewards of the board called D. before them and decided to withhold the £3,000 except £5 a week to be paid to D. and £5 a week to be paid to his mother for six months. In an action by D. to recover the £3,000,

Held: (i) the contract between the plaintiff and the board (per LORD HANWORTH, M.R.), although not one for employment, was one the effect of which was to enable the plaintiff to earn remuneration in, and to obtain protection in the exercise of, his profession (per SLESSER and ROMER, L.JJ.) was closely associated or bound up with the class of contracts of service; although some of the incidents of the contract, viewed by themselves, might be thought to be onerous to the plaintiff, the contract, regarded as a whole, was beneficial to him; and, therefore, the contract was one which, if made by an infant, would be binding on him;

(ii) the amendment of the rule did not fundamentally alter the purpose for which the rule had originally been drawn up; there was no provision in the rules that an amendment was only to bind the plaintiff if brought to his notice; and, therefore, the plaintiff was bound by the amended rule;

(iii) accordingly, the plaintiff's action failed.

Notes. Distinguished: *Sun Life Assurance Co. of Canada v. Jervis*, [1944] 1 All E.R. 469. Referred to: *Mercantile Union Guarantee Corp'n., Ltd. v. Ball*, [1937] 3 All E.R. 1.

As to contracts binding on infants, see 21 HALSBURY'S LAWS (3rd Edn.) 142 et seq., and for cases, see 28 DIGEST 152 et seq., and 34 DIGEST 41-44.

Cases referred to:

- (1) *Thellusson v. Viscount Valentia*, [1907] 2 Ch. 1; 76 L.J.Ch. 465; 96 L.T. 657; 23 T.L.R. 445; 51 Sol. Jo. 427, C.A.; 8 Digest (Repl.) 653, 23.
- (2) *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch.D. 94; 59 L.J.Ch. 298; 62 L.T. 342; 38 W.R. 385, C.A.; 12 Digest (Repl.) 126, 787.
- (3) *Ryder v. Wombwell* (1868), L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 W.R. 167, Ex.Ch.; 22 Digest (Repl.) 25, 61.
- (4) *Peters v. Fleming* (1840), 6 M. & W. 42; 9 L.J.Ex. 81; 28 Digest 167, 236.
- (5) *De Francesco v. Barnum* (1890), 45 Ch.D. 430; 60 L.J.Ch. 63; 63 L.T. 438; 39 W.R. 5; 6 T.L.R. 463; 28 Digest 154, 146.
- (6) *Corn v. Matthews*, [1893] 1 Q.B. 310; 62 L.J.M.C. 61; 68 L.T. 480; 57 J.P. 407; 41 W.R. 262; 9 T.L.R. 183; 37 Sol. Jo. 190; 4 R. 240, C.A.; 28 Digest 154, 144.

- (7) *Clements v. London and North-Western Rail. Co.*, [1894] 2 Q.B. 482; 63 L.J.Q.B. 837; 70 L.T. 896; 58 J.P. 818; 42 W.R. 663; 10 T.L.R. 539; 38 Sol. Jo. 562; 9 R. 641, C.A.; 28 Digest 156, 168.
- (8) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp. M.L.C. 373, C.A.; 12 Digest (Repl.) 686, 5274.
- (9) *Martin v. Gale* (1876), 4 Ch.D. 428; 46 L.J.Ch. 84; 36 L.T. 357; 25 W.R. 406; 28 Digest 172, 330.
- (10) *Maddon d. Baker v. White* (1787), 2 Term Rep. 159; 100 E.R. 86; 28 Digest 202, 619.
- (11) *Wood v. Fenwick* (1842), 10 M. & W. 195; 11 L.J.M.C. 127; 152 E.R. 439; 34 Digest 41, 179.
- (12) *Burke v. Amalgamated Society of Dyers*, [1906] 2 K.B. 583; 75 L.J.K.B. 533, D.C.; 43 Digest 101, 1051.

Appeal from an order of MACKINNON, J.

The following statement of the facts is taken from the judgment of MACKINNON, J.:—
The plaintiff, Joseph Doyle, who is an infant, sues the White City Stadium, Ltd., a company, and a number of gentlemen, who are sued as the administrative stewards of the British Boxing Board of Control (1929), to recover a sum of £3,000, or, in the alternative, from one or other of these defendants. In March, 1932, the plaintiff applied to the British Boxing Board of Control for a licence as a boxer. He gave his age as eighteen years; specified the name of his manager, Dan Sullivan; supplied a passport photograph, and signed a printed form, the material part of which is:

"I hereby apply for a licence as a boxer, and if this licence is granted me I declare to adhere strictly to the rules of the British Boxing Board of Control (1929) as printed, and abide by any further rules or alterations to existing rules as may be passed."

Following upon that form of application he had issued to him a boxer's licence. In May or June, 1933, there is no doubt that the plaintiff entered into a contract with someone—with whom is one of the questions in this action—that he would fight a man named Petersen on July 12 at the White City, and there is no doubt that it was part of that contract that after the fight he should be paid the sum of £3,000, whether he won or lost, or whether it was a draw.

On July 12 the fight took place at the White City. It came to an end after a very short period—in the second round—by order of the referee, who stopped the fight and disqualified the plaintiff. Thereupon, the secretary of the British Boxing Board of Control on July 14 wrote to the plaintiff this letter:

"Respecting your contest with Jack Petersen for the heavyweight championship of Great Britain which took place at the White City on Wednesday last, wherein you were disqualified by the referee, I have been instructed to place the two following items on the agenda of a 'board' meeting which takes place on Wednesday next, July 19, 1933, at the head office of the B.B.B. of C., Dean-street, London. [Then the two items are given:] Disqualification of Jack Doyle (boxer) in contest for the heavyweight championship of Great Britain with Jack Petersen, White City, 12/7/1933. Disposal of purse money of Jack Doyle (boxer) owing to his disqualification against Jack Petersen at the White City, 12/7/1933. You are asked to appear before the 'board' (administrative stewards) under reg. 17, to explain your conduct in incurring the disqualification, and, also, to give any information to the stewards to enable them to decide how the purse money shall be disposed. Please be in attendance at 5 p.m."

The plaintiff did attend that meeting as requested. He was asked questions, and he stated in evidence that he apologised for what had happened, but nothing material turns upon what passed at that meeting. The report of the referee to the secretary of the British Boxing Board of Control, which was dated July 14, 1933, was in these terms:

"I wish to confirm my verbal report to you on the disqualification of Jack Doyle in his contest with Jack Petersen for the heavyweight championship of Great Britain, in which I told you I was called upon to caution Jack Doyle twice during

the first round for hitting low and on one occasion I also cautioned him for holding, and just before the bell was rung for the termination of the round he hit low again. During the interval I cautioned him for hitting low again, which warning, I told him, would be definitely the last. Immediately after the resumption of the second round, in my opinion, he hit Petersen again low twice, which brought about his disqualification. I consider his offence a rather serious one and was caused by him completely and totally losing his head; such offence is more serious owing to it being a contest for the heavyweight championship of Great Britain.—Yours faithfully, C. H. DOUGLAS.”

As a result of the meeting and the hearing by the stewards who were present, on July 19 the secretary of the board addressed this letter to the plaintiff by registered post:

“I beg to confirm the decision of the board (administrative stewards) given to you verbally at their meeting to-day: ‘The board (administrative stewards) at a meeting to-day have suspended forthwith for six months your British Boxing Board of Control (1929) boxer’s licence. The stewards further decided that of the purse money deposited you be paid £5 per week for six months. Your mother be paid £5 per week for six months, and the balance be forfeited. The method of dealing with the balance be left to the discretion of the general joint committee of the British Boxing Board of Control (1929).’”

That speaks of “the purse money deposited.” The Board of Control was in possession of £3,000 by reason of an oral request made by someone on their behalf to one Jeff Dickson. They came into possession of the money pursuant to a letter written by Jeff Dickson, signing on behalf of Jeff Dickson’s Sports Promotions, Ltd., of July 14. That letter was this:

“The General Secretary, British Boxing Board of Control (1929), 68 Dean Street, London, W.1.—Dear Sir,—In response to your request and in accordance with your regulations, I herewith enclose cheque for £3,000, being the amount due to Jack Doyle (boxer) as balance of his purse for the contest with Jack Petersen, when he was disqualified. I wish it to be clearly understood that, under reg. 20, para. 17, the items B, C, and D have been disbursed and the £3,000 represents Doyle’s nett share. I shall be glad if you will kindly acknowledge receipt of the cheque.”

Following upon these proceedings and the communication of the secretary of the board that the balance, all but £260, of his £3,000 was forfeited, the plaintiff by his next friend issued a writ on Aug. 2, 1933, against the two defendants, and he claims alternatively £3,000 from one or other of those sets of defendants. The two claims are quite distinct, and based upon different grounds.

The first claim is against the White City Stadium, Ltd., and is asserted upon the ground that the plaintiff’s contract to receive £3,000 after his fight with Petersen was a contract made with the White City Stadium, Ltd. The plaintiff at all material times had a man named Dan Sullivan as his appointed agent and manager. He stated that Dan Sullivan was manager in his application for the licence. That appointment apparently has never been revoked or cancelled, and there was in evidence a letter in which, long after these events, Dan Sullivan is still acting, or purporting to act, as his manager. It is apparent from the evidence that negotiations in regard to this fight were going on in a rather complicated form between Dan Sullivan, Jeff Dickson, or the Jeff Dickson Sports Promotions, Ltd., and the White City Stadium, which is in various ways mixed up with three companies, namely, the Greyhound Racing Trust, Ltd., the White City Stadium, Ltd., and the Greyhound Racing Association, Ltd., of which three companies Mr. Gentle is a director. Mr. Gentle had taken part in these negotiations. These complicated negotiations arose because Jeff Dickson, as promoter, was arranging for this fight, but it was to take place at the White City Stadium, in which Mr. Gentle and his three companies were interested.

According to the rules of the British Boxing Board of Control, which in form are very elaborate and deal with almost every conceivable form of event that might arise, any

contract made by a promoter (who was Dickson) with a manager (who was Dan Sullivan) for a contest in which a licensed boxer is to take part must be in writing, and upon a form of contract issued by the Board of Control. There is further a provision under rule 19 that when a contest is to take place the board is to appoint inspectors, and a part of the duty of those inspectors is to see that written contracts are produced by the promoters. In this case all those elaborate precautions were disregarded. Whatever was the contract entered into by anybody on behalf of Doyle, no written contract was used. Inspectors were appointed by the board to attend this fight, but apparently they took no care to ask for the production of the written contract, and there is no written contract in existence.

The plaintiff relies upon what he alleges to be an oral contract made, not by Dan Sullivan, his appointed agent, but by himself with Mr. Gentle, which is said to be evidenced by two letters of June 29 and July 3, in these terms. Mr. Gentle writes to the plaintiff on June 29:

"This confirms our conversation that the terms for the fight with Petersen are: That you are to receive £3,000 after the fight. Best of luck in your training. Yours sincerely, F. S. Gentle. This is, of course, clear to you, and is exclusive of percentage and training expenses."

To that the plaintiff replied:

"Dear Mr. Gentle, Thank you for your letter agreeing that I am to receive £3,000, win, lose or draw, after the Petersen fight, clear of training expenses and commission."

MACKINNON, J., found that the contract was made between Dan Sullivan, as the authorised agent of the plaintiff, and Jeff Dickson, and that was the contract which, according to the rules of the Board of Control, ought to have been reduced to writing on the appropriate form, and when Mr. Gentle wrote the letter he was not confirming an oral contract that he had personally made with the plaintiff, but was informing the plaintiff in writing of the terms that had been agreed on his behalf between his agent, Sullivan, and Dickson, or Dickson's company, the promoters. His Lordship, therefore, decided that the plaintiff's claim against the White City Stadium, Ltd., as having contracted with him, failed, and there must be judgment for the White City Stadium.

Regarding the alternative claim against the gentlemen who represent the Board of Control and are sued because that board is not a legal entity, his Lordship said that a contract was made by the plaintiff's authorised agent with Dickson that Dickson should pay him £3,000 at the end of the fight, whatever the result of that fight was. That money, it appeared, at the request of the board had been paid by Dickson to the board instead of being paid to Doyle, as under his contract he would be entitled to receive it. The board had received his £3,000 and had purported to forfeit it. They could only be entitled to do that if they were authorised to do it by virtue of their contract with Doyle. That contract with Doyle must exist beyond question, by reason of his application for a licence as a boxer, and the granting to him of a certificate or a licence as a boxer, which constituted him a member of the association. His Lordship held that the contract with the Board of Control under which the plaintiff was granted a licence and became liable to observe the rules of the board was for the benefit of the plaintiff and so was not voidable by him, but that an amended rule of the board under which the £3,000 had been forfeited had not been brought to his notice, and he, therefore, gave judgment for the defendants, the White City Stadium, Ltd., with costs, and judgment for the plaintiff against the other defendants for £3,000 with costs.

The British Boxing Board of Control (1929) appealed.

Sir Patrick Hastings, K.C., and *Tristram Beresford* for the board.

Serjeant Sullivan, K.C., and *Martin O'Connor* for the plaintiff, who cross-appealed against the decision that the contract was binding on him though an infant.

The arguments are sufficiently shown in the judgments.

LORD HANWORTH, M.R.—This case has been fully argued and raises some interesting points. The action was brought by Joseph Doyle (professionally known as Jack

Doyle), who is an infant, by his next friend. The statement of claim says: "The plaintiff is an infant and he obtains his livelihood by professional boxing." The pleading then goes on to say that certain terms were arranged for a boxing match which was to take place, and in fact did take place, on July 12, 1933. Paragraph 4 says:

"The said contest took place between the plaintiff and the said Petersen as agreed, on July 12, 1933, and the said Petersen was declared the winner."

The statement of claim further sets out that by terms which are contained in a letter written by Mr. Gentle to the plaintiff:

"You are to receive £3,000 after the fight. This is, of course, clear to you and is exclusive of percentage and training expenses,"

and that term or condition is accepted by Mr. Doyle. More than that, there is a letter that Mr. Doyle writes which states the terms, which were these: "I am to receive £3,000 win, lose or draw, after the Petersen fight." There is no question that that fight took place under the auspices and the rules and conditions laid down by the British Boxing Board of Control, which is established to control boxing and is a body of standing, the stewards being persons of some eminence. The objects for which it is stated to be formed are:

"To control and regulate professional boxing in the United Kingdom and to act as a 'board of appeal,' and 'To promote and safeguard the interests of British professional boxers throughout the world.'"

That fight, as I have said, it is plain, and it is agreed on both sides, was to take place under the auspices of this board.

The board require that if persons are to act within the ambit over which they express their approval, or in fights to which they give countenance, there shall be licences granted to the fighters and also that the promoters as well are to be members, of this association. In effect, the rules which are before us clearly indicate that the board have taken steps to secure that all persons, whether promoters or managers or boxers, shall be members of this society or association and under the control of this Boxing Board of Control. This fight was a fight recognised by the board. The secretary wrote on June 23, 1933, to Messrs. Jeff Dickson: "The 'board'"—that is the administrative stewards—"at a meeting yesterday decided to recognise the above-mentioned contest"—that is the contest which ultimately took place on July 12—"as being for the heavyweight championship of Great Britain. Officials for the contest will be appointed later." The board give a personal notice to Mr. Jack Doyle, care of Mr. Sullivan, his manager, in the following terms:

"The 'board' (administrative stewards) at a meeting yesterday decided to recognise the above-mentioned contest as being for the heavyweight championship of Great Britain,"

and another similar letter was written to Mr. Petersen.

The result of those letters and the facts which are not in contest is that this fight was one in which the heavyweight championship of Great Britain was in issue, and one which was under the regulations set out by the Board of Control. It will be found that at the end of the rules there is a number of what are called boxing rules relating to the contests. They contain some minutiae in respect of the contests. For instance: "All contests to be decided in a roped ring not less than 14 ft. or more than 20 ft. square." You find powers given to the referee who has power to disqualify a contestant for any of the following acts, and then there are certain acts set out. Then it is provided:

"The breaking of any of these rules by a contestant or his seconds shall render such contestant liable to disqualification. A contestant disqualified for any cause whatever shall not be entitled to any prize, except in accordance with reg. 20, para. 16,"

and reg. 20, para. 16, is one which says that:

"Boxers in case of disqualification are only entitled to receive bare travelling expenses pending the decision of the board or branch on the circumstances of the

case, when the board or branch may deal with the money as it thinks fit. Every disqualification must be reported to the board or branch by the referee within twenty-four hours of the contest taking place."

It will be seen, therefore, that these rules are framed for the purpose of securing what I will call clean fighting—disqualifying persons who exercise certain strokes such as hitting below the belt, using the pivot blow, and a number of others which are technical, but which are at any rate barred by the regulations relating to the boxing rules. It must be plain that the board does endeavour to promote and safeguard the interests of professional boxers throughout the world by laying down these rules. In fact a sum of £3,000, as referred to in the letter, was put up, and that was to be the amount receivable by the plaintiff whatever happened in the course of the fight, win, lose or draw. But, as I have said, the rules as I have read them contain the definite statement that a boxer who is disqualified shall only be entitled to receive bare travelling expenses, and so on, and that the board may deal with the money as it thinks fit. There is no question at all that on July 12, 1933, the plaintiff was disqualified in the contest, he was disqualified at the second round, and he was called upon to go before the board or their representatives for the purpose of their investigating the circumstances, and it is in evidence given by him that he apologised for his conduct. The learned judge's note of the evidence on that point is:

"I appeared before the board. I apologised for my conduct. I did not appeal under the rules."

A great number of points have been raised in the course of the case, but I should like, first of all, to consider what is the meaning and purpose of these rules and of the adhesion of the plaintiff to them. That adhesion was secured by the plaintiff himself seeking to become a licensee of the board. In order to do that he made application for a licence. That application was made in March of 1932, it was approved on March 15, 1932, and the year, for that is the term for which it runs, began on March 5, 1932. He is said to be in age an infant at the time aged eighteen years, though perhaps the term "boy" which was used by his counsel seems a little inapt to the case, because his exact fighting weight at the time of the application for the licence is given as 15 st. If he is granted a licence it is granted on these terms:

"I hereby apply for a licence as a boxer, and if this licence is granted me I declare to adhere strictly to the rules of the British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed. I agree to pay the fee in accordance with the above."

The fee was paid, and he obtained his licence. The licence for 1932 was granted and ran until March 4, 1933; it was then extended and ran until March 3, 1934. So that at the time when the fight took place as it did on July 12, 1933, the plaintiff entered the ring as a licensee of the board and as one who had agreed to adhere strictly to the rules of the Board of Control and to abide by any further rules, or alteration to existing rules as might be passed.

The rules were altered on June 17, 1932, and they had to be confirmed at a general meeting, but no point arises upon that. It was faintly questioned yesterday afternoon whether or not the rules were validly passed. An examination of that point, however, indicated that the rules as changed had been properly set out, and that by the terms of one of the rules they are valid until confirmed by a general meeting, and in fact there is no point now taken as to the validity of the rules. But it is said that, inasmuch as the licence was originally granted at an earlier date before the rules had been changed, the rules as they stood at a later date and at the time of the fight were not binding upon the plaintiff. It will be observed that the terms of the application for the licence which I have referred to give a plain leave for an alteration of the rules to be made, or for further rules to be promulgated. Upon this point, where the rules which are made are still for the purpose of carrying out the original purpose of the society or body of persons or club, then an alteration of them under such a power is given. If there was an attempt under such a rule fundamentally to alter the purpose for which the rules had

been originally drawn up, such a prospective adherence to fresh rules, or alteration in the rules, would not be covered by that liberty. In *Thellusson v. Viscount Valentia* (1), it is quite plain from the decision in that case that if and so long as the rules are akin to the purpose for which the society exists there is no inherent objection to an alteration of those rules or further rules for the same purpose. So here these rules that had been altered are for such, I might say, limited a purpose—if the alterations had been to turn a society connected with British boxing into a society for conducting horse-racing, the position might have been far different. It is said that the terms of the rule as altered, r. 8, are such that it does involve a very considerable alteration, because it provides that boxers, in case of disqualification, are only entitled to receive their bare travelling expenses, the rule before being, boxer's money to be stopped only when disqualified for committing a deliberate foul, for not trying, or for retiring without sufficient cause, the earlier rule being one of limited application, the later rule being one of disqualification at large. That enlargement of the rule may well have been in the interests of the contestants themselves. It may well be that the board did not find that they had sufficient authority in respect of those persons who broke the rules, and that it was too difficult to justify a disqualification on a particular ground—when blows are struck rapidly, and the question of whether or not the foul was deliberate may be a matter of opinion—and so the rule was passed giving greater power to the board, as it seems to me, entirely for the purpose of preserving clean fighting according to the legitimate rules, and that enures, be it remembered, as much for the contestant who fails as for the contestant who succeeds. It is a rule which is applicable on both sides, and cannot be looked at merely from the particular point of view of one person such as the plaintiff in this case.

In fact, the plaintiff having been disqualified, the board after inquiry and after the plaintiff had appeared before them and apologised, decided to withhold the £3,000, as they had power to do under this rule in their discretion. The action was brought to recover the money, it being alleged that the particular defendants, that is, the individual members of the board against whom the action succeeded, were not entitled to intervene and stop the money from being handed over to the plaintiff. The action was brought alternatively against the White City Stadium, Ltd.; the learned judge held that there was no cause of action against them; judgment was entered for the White City Stadium, Ltd. and there is no appeal as to that. The appeal is taken by these individual members of the board, the administrative stewards of the board, against whom judgment passed in favour of the plaintiff recovering this sum of £3,000.

The learned judge considered the question, and he first had to consider whether or not these rules bound the plaintiff, who is an infant, and he came to the conclusion that the contract is

“so nearly concerned with his entering upon a form of employment or occupation that I think I ought to hold that it is within the type of contract which, if found to be for his benefit, the court ought to hold is not voidable by the infant.”

Dealing with the question whether he was bound by the rules the learned judge came to the conclusion that, although the application for the licence contained the wide term that I have read, he ought to add to that a term which he suggested himself, namely: “Provided that the new rules or alterations are brought to my attention and a copy of them given to me.” There are no such words in the rules themselves or in any document which was the basis of or ancillary to the contract. Those words were introduced by the learned judge himself.

I turn now to consider whether or not the contract as found by the learned judge—the contract that is contained or partly contained in the terms on which the licence was asked for—is good and binding upon the infant. It was argued with force by counsel for the plaintiff that the law will not presume an obligation on the part of an infant unless the contract is to pay for what are called necessities, necessities including employment and services to be rendered by the infant's labour. Counsel finds that limited range of contracts binding upon the infant from passages which are to be found in SIR EDWARD COKE'S INSTITUTES, and are also to be found confirmed in a number of

the DIGESTS, and of those a number of illustrations are to be found in cases to which our attention has been called. To my mind, that statement of the law is too narrow. It is unnecessary at the present moment to decide it, but I confess that as at present advised I find difficulty in acceding to the view that there is nothing that can be called a contract on the part of an infant—that all that can be inferred is an obligation on his part which is improperly termed a contract, an obligation on his part to pay money spent in obtaining necessaries. There is authority for that view in *Re Rhodes, Rhodes v. Rhodes* (2), but it seems to me that those words must be taken in relation to the subject-matter which they were then considering, the particular case of necessaries. I say that for this reason, that in *Ryder v. Wombwell* (3), a court which was manned by learned judges to whom we must all pay deep respect, namely, WILLES, J., BYLES, J., BLACKBURN, J., MONTAGUE SMITH, J., and LUSH, J., they refer in terms in the year 1868 to the fact that the infant can make a contract. WILLES, J., in giving the judgment of the court says:

“BARON PARKE, in *Peters v. Fleming* (4), said (6 M. & W. at pp. 46, 47) ‘From the earliest time down to the present, the word “necessaries” was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word “necessaries” in its unqualified sense, but with the qualification above pointed out’.” [And later on he said]

“The true rule I take to be this—that all such articles as are purely ornamental are not necessary, and are to be rejected.”

Throughout that case the reference is to a contract, and that was in the year 1868. In 1874 when the Infants’ Relief Act was passed, s. 1 provides: “All contracts whether by specialty or simple contract henceforth entered into by infants,” and so on; and later we find cases in which a definite reference is made to the contracts of infants.

I say no more upon that view expressed in *Rhodes v. Rhodes* (2), but I turn now to three cases which to my mind are binding upon this court. The first is *De Francesco v. Barnum* (5). In that case FRY, L.J., says this (45 Ch.D. at p. 439):

“I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant’s benefit, that therefore the whole contract is not for the benefit of the infant. The court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact.”

In *Corn v. Matthews* (6) the matter came again before the Court of Appeal, and LORD ESHER definitely said ([1893] 1 Q.B. at p. 314):

“It seems to me that the judgment of FRY, L.J., is one with which one would agree, and, although it makes the major premise larger than it had been previously enunciated in such cases, it does not alter the law applicable to them.”

He repeats what FRY, L.J., had said, and particularly that the mere fact that some of the conditions in the deed are against an apprentice does not enable the court on that ground to say that the agreement is void. He says this, that the question is whether or not the terms are such as would on the whole be beneficial to the infant, and it seemed to him in the particular case that there was a term which was unfair to the infant and solely in favour of the master. The term was one that if there was either a strike, or what we call a lockout now, the master could cease to pay the apprentice’s wages though the master himself had caused the lockout, and it was on that ground, and that ground only, that they held the term to be unreasonable and against the interest of the infant;

but *Corn v. Matthews* (6) is one which definitely confirms the principles laid down by A
FRY, L.J.

Then in *Clements v. London and North-Western Rail. Co.* (7) we have once more the statement made that the whole contract is to be looked at. That was a case in which the infant, when being employed by the railway company, joined an insurance society formed among the employees of the railway company towards the funds of which the railway company contributed, and in return for being a member and getting that B
contribution, and so on, the infant agreed not to bring any proceedings under the Employers' Liability Act. He set aside, in other words, a very considerable advantage given to him by statute, but it was held by LORD ESHER that the contract was one which was for the benefit of the infant, and he says ([1894] 1 Q.B. at p. 489):

"I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; C
but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate."

A. L. SMITH, L.J., in his judgment in that case quotes the passage from *Corn v. Matthews* (6) and says (at p. 495): D

"In my judgment, the agreement, instead of being detrimental to the infant is, on the whole, manifestly to his advantage."

It was, therefore, held effective and binding. Those cases are binding upon us. The learned judge on the question of fact has held that these terms are favourable and to the advantage of the infant, and it seems, therefore, that the rules cannot be held to be E
defeated by reason of the plea of infancy.

I should just like to add a few more words by way of emphasis to show that I have both appreciated and at the same time reject the view which has been advanced by counsel for the plaintiff. He spoke of the position of the plaintiff as if he was one who had agreed to render services, indeed, I think he said he provided an exhibition for the defendants on the terms that win or lose or draw he should receive £3,000, that he was, F
therefore, entitled in any event to receive that sum for services rendered, and that this withholding of the money was in the nature of a penalty and there could not be a penalty imposed upon the infant to his advantage. To my mind, all those observations involve a complete misreading of these rules and of the terms and conditions under which the fight took place. It is as much in the interests of the plaintiff himself as in the case of any other contestant that there should be rules of clean fighting, that he should be protected against his adversary's misconduct or hitting below the belt, or anything of the sort. That is absolutely to the advantage of the plaintiff. There is no question of his rendering services to employers. The position is that he himself has the opportunity of exercising his livelihood by professional boxing on terms and conditions which safeguard him as a contestant from any improper conduct on the part of those with whom he may engage in a fight, and, more than that, the rules contain specific H
provisions under which the interests of the boxer are safeguarded in respect of any conduct of the promoter or manager with whom or through whom he may have to make arrangements and terms.

On all these grounds I come to the same conclusion as that of the learned judge, namely, that this plea of infancy does not avail to prevent the plaintiff from suffering from or being bound by the rules and conditions which are to be found and are provided I
for in his application for a licence.

Let me say one more word about the alteration of the rules. It appears to me, as I have said, that the rules were properly altered, validly altered. What reason have we then for introducing the proviso which the learned judge added in his judgment, the words, "Provided that they are brought to my attention and a copy of them given to me?" Why should that term be implied? We have not to adduce the principles laid down in the case of *The Moorcock* (8) where an indication is made necessary for the purpose of carrying out the intention of the parties. It is a proviso which is introduced

to the benefit of the infant, to the disadvantage of those with whom he had made these conditions, and it is introduced, so far as one can find, without any basis or foundation or suggestion having been made in the course of the negotiations between the parties. It might be a very difficult one to fulfil. Inasmuch as the application for the licence gave this authority to the board it appears to me that there is no ground whatever for introducing this proviso of no notice.

That really deals with the points which have been raised subject to one other. It is said that the plaintiff was here entering a competition for a prize and that the board have withheld from him some money in respect of which he had a vested right. I object to the use of that expression "a vested right." I think "prize" is not to be read in the rules as only meaning something in respect of which there has been a competition or contest. The word "prize" does not necessarily mean that. I take the second definition as given in an old copy of JOHNSON'S DICTIONARY of the meaning of the word "prize": "A reward gained by any performance." He would have gained the £3,000 if he had not by his conduct been disqualified, but he was disqualified.

Upon these grounds I am of opinion that the plaintiff is not entitled to recover. The appeal must, therefore, be allowed with costs here and below, and judgment entered for the present appellants who were the defendants to the claim.

SLESSER, L.J.—On March 5, 1932, the plaintiff, who was at that time and still is an infant, applied for a licence from the British Boxing Board of Control (1929) in order that he might partake in prize fights which were to be carried out under their licence and control. In that application he agreed to abide by the rules and regulations of the British Boxing Board of Control in the following words:

"I hereby apply for a licence as a boxer, and if this licence is granted me I declare to adhere strictly to the rules of the British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed. I agree to pay the fee in accordance with the above."

He did so pay the fee, and upon those terms he was granted a licence, and we are told that a year later that licence was renewed—it is required under the new rules, apparently, to be renewed in similar terms. The effect of applying for that licence in those terms, and the acceptance of those rules, was to make him a member of the British Boxing Board of Control for by reg. 3 it is provided that: "'The members' of the British Boxing Board of Control (1929) are all the licence holders," and by reg. 15, para. 3, it is provided that any person to whom a licence is issued after payment of the fee

"shall be deemed to have read the regulations of the British Boxing Board of Control and shall further be deemed to be a member and to have agreed to accept any decisions under all or any of these regulations, and to submit himself to the constitution and code of the regulations of the British Boxing Board of Control."

In those circumstances, subject to the particular matters which have been argued before us and considered in the court below and in this court, it would appear that the plaintiff had agreed, first, by his application, which was accepted, and, secondly, by the actual provisions of the rules themselves, to be a member of this society and to be bound by its rules and its regulations. If that had been the case it would follow that the rules and regulations would authorise the society dealing with the money which was to be his prize or reward for taking part in this contest in the way in which they have dealt with it. But in substance two arguments have been used to support the view that they are not so entitled to deal with this money and that the plaintiff is entitled himself to have paid over to him by the promoters the £3,000.

The first of those arguments logically considered rests upon the fact that he is an infant. It is said that whatever contract or alleged contract he has entered into under these rules is not binding on him on account of his infancy. If that contention is right, it is an answer to the defendants keeping this money. It is an argument which has not found favour with MACKINNON, J., and it does not find favour with me either. It depends really on two separate considerations, first, whether this agreement is of the order of agreement under which an infant can properly bind himself; and secondly, if it

does come within that order, is this particular agreement one which can be stated to be so for the benefit of the infant as to be binding upon him? On the first point counsel for the plaintiff has relied very strongly on the argument that for many years the types of agreement which are binding upon infants have been narrowly prescribed and defined, and that, if you find that this particular agreement is not within that narrow definition and prescription, it is not one which can properly be said to be binding upon the infant. A

I would like to associate myself with what has been said by KAY, L.J., in *Clements v. London and North-Western Rail. Co.* (7) ([1894] 2 Q.B. at p. 493), to the effect that it is doubtful whether there is a general principle that if an agreement be for the benefit of the infant it shall bind him. KAY, L.J., there quotes the dictum of SIR GEORGE JESSEL in *Martin v. Gale* (9), where he says: "There must be some mistake in the report of what BULLER, J., is stated to have said" in *Maddon d. Baker v. White* (10): B

"No case can be found in which LORD MANSFIELD or LORD HARDWICKE had laid down any such general principle"; C

and I am not prepared here to say that there is any general principle that all agreements for the benefit of an infant will necessarily bind him. In my view, the question in the present case does not arise, because I think that the case which we have here to deal with is so analogous, so similar in character to the classes of agreement which have been held to be binding upon infants if for their benefit that it might properly be brought within the old category of decisions without having to rely on any more general principle. D

The origin so far as we know of this definition of the class of contract binding upon infants on which counsel relies (and nothing earlier has been suggested) is to be found in COKE UPON LITTLETON, p. 172a, where he says:

"An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards," E

and to that has been added in the course of years contracts of service which are to his benefit.

The problem which we have here to consider, how far that principle ought to be extended, was considered by this court in *Clements v. London and North-Western Rail. Co.* (7) to which I have already referred. That was the case where, although it was stated by some members of the court that it might be considered that the contract was part of the contract of labour, yet at least two members of the court were at pains to point out that, even if strictly it was not part of the contract of labour, it was so incidental or ancillary to the contract of labour as properly to be one where the infant might bind himself. That case, I think, has dealt with the very problem which counsel for the plaintiff has put before us to-day. KAY, L.J., for example ([1894] 2 Q.B. at p. 492), says: F

"Suppose, however, as has been argued, that this is not a labour contract, would the same rule apply?" G

He says, as I have already pointed out: H

"I will not attempt to say how far the rule extends, but that it does apply to some contracts that are not contracts of labour is clear from many decided cases."

He then proceeds to cite a number of cases, I agree, dealing mostly with the marriage settlements of infants, but he is dealing with it for the purpose of showing that you can apply liability of the infant under the contract to cases which are not contracts of labour, and, having mentioned those cases, at the end he sums the matter up thus at p. 494: I

"Even if this contract were not, as I think it is, a contract concerning the terms of employment of the infant, I think it would come within the rule that I have been discussing, and that the court might say that the contract was for the benefit of the infant, and elect for him, while he is an infant, to confirm it, treating it as not being a void contract but at most only voidable."

A. L. SMITH, L.J., as I read his judgment, does not think, or does not clearly express the

view, that the contract there was a part of the contract of service at all. He, as I read it, rather takes the view that it was a contract which was sufficiently near to the contract of service to be one to which the infant might properly be bound. He says this, that the contract is binding upon the infant, and it is a fair contract, because he avoids litigation, and if successful will have a fund out of which he can recover; he avoids the uncertainty of a verdict, and so forth.

If the realities of this present case be looked to, and the dicta which are to be found scattered in the authorities that the opportunity of an infant to earn his living is one of the matters which may properly be said to be binding when that opportunity has been given to him by a contract, it becomes clear, I think, that the licence which this infant obtained was the means whereby he was able to enter into a contract of service or a contract of performance, or whatever it may be, as a boxer by means of which he was able to earn his living. It was, therefore, ancillary and incidental to the contract which he was making with the promoter of the fight that he should have this licence and make this agreement with this society without which he could not have obtained his licence and could not have earned his living. As counsel for the board pointed out in the course of the case, although, of course, it is not conclusive, if counsel for the plaintiff were right, the result would be that no infant could ever obtain a licence from this society, because it would be very unlikely that they would give him one unless he in his turn was bound to some obligation of proper fighting, and he would be debarred for ever from taking part in any boxing contests at all. Whether that would be a good thing in the national interest is not a matter for me to consider, but that that would be the result it seems difficult to deny.

In all those circumstances, therefore, I think that, without laying down any general principle, and looking at the facts of this case, for it is very largely a question of fact, the learned judge was right when he said that he could find in the case of *Clements v. London and North-Western Rail. Co.* (7) ample authority for saying that this contract was so associated with the class of contracts of service which an infant may make as to be binding upon him that it was binding upon him.

There remains the question, Was it for his benefit? His counsel has called our attention to the fact that there are many dicta to the effect that where a contract imposes a penalty or a forfeiture, that is not good as against the infant. But I, on the other hand, have been impressed with this consideration which has been pointed out in several of the cases—in *Corn v. Matthews* (6) and in an older case, *Wood v. Fenwick* (11) that an infant cannot make a contract of service without having in it some incidents which may not in themselves be directly beneficial to him, but may be beneficial to the master. In *Wood v. Fenwick* (11), the head-note says:

“A contract of hiring and service, for wages, is a contract beneficial to and binding upon an infant, though it contain clauses for referring disputes to arbitration, and for the imposition of forfeiture in case of neglect of duty, to be deducted from the wages.”

In contracts of apprenticeship, which are admittedly contracts binding upon an infant, the rights of the master to proceed not only financially, but in the old days corporeally, against the infant have not made the contract of apprenticeship invalid as against the infant. Therefore, I start with an agreement with the learned judge that this contract is for the benefit of the infant and is one binding upon him.

If that be so, his position is the same as that of any other member of any association which contains within its rules a power to alter the rules. Here, with respect, I differ from the learned judge in his conclusion that because this particular member did not receive a notice of the alteration of the rule it is not binding upon him. At one time I thought it was going to be argued that the general meeting itself which altered the rule was not a valid meeting because this member did not receive a notice. Such an omission to send him a notice would not in itself, I think, invalidate the meeting in any event. There are several authorities to that effect. But apart from that, in reg. 9, para. 4, it is expressly provided that:

"The non-receipt of any notice by any member shall not invalidate the proceedings at any general meeting,"

and I cannot read that as being so limited as merely to mean that when a notice has been sent and not received, the meeting shall not be invalid. I think it is reasonable in the case of a society with a large number of members that you cannot upset the proceedings of the society by merely pointing to the fact that a particular member has not had a notice sent to him. But as a matter of fact I do not think that argument is open in this court at all. It apparently was never raised in the court below, and it formed no part of the judgment of the learned judge.

I come, therefore, to the learned judge's judgment which is based upon the fact that the plaintiff is not bound by this alteration of rule because he did not receive a notice. In my opinion, that is unarguable. My Lord has referred to *Thellusson v. Viscount Valentia* (1), and it is sufficient to quote one passage from the judgment in that case where LORD COZENS-HARDY, M.R., after quoting a rule of a club which gave power to alter the rules in a certain way at an annual general meeting, says ([1907] 2 Ch. at p. 6):

"That seems to me to be not a very skilfully drawn rule, I agree, but nevertheless a rule expressly stating that a proposal for adding to or altering the rules of the club is within the competence of the members of the club, and that every member of the club, by joining this club, takes it subject to the contingency that the rules may be altered by this particular majority, at a particular meeting held according to those rules."

Finally, I would mention *Burke v. Amalgamated Society of Dyers* (12), which was a case dealing with the alteration of the rules of a trade union where the person complaining was insane. It was said, and, perhaps, said with some force, that in such a case the amended rule was not binding upon him, because he was not mentally in a position to appreciate what had been done. A. T. LAWRENCE, J., said ([1906] 2 K.B. at p. 591):

"We have had an able argument to the effect that the alteration of r. 39 was ineffective as against the deceased member, because it was made after he had become a lunatic and at a time when it was out of his power to dissent from it. The analogy was suggested of the determination of the authority of an agent—[that was an argument which junior counsel for the plaintiff addressed to us here to-day]—and no doubt the analogy is plausible; but it is not true, for the authority of the majority is not really that of agents. The real ground on which the power of the majority to make an alteration rests is that the original contract entered into between the society and each of its members contained a power of alteration of the rules by the stipulated majority. That power is a fundamental part of the constitution of the society, and no member can claim the benefits while ignoring the existence of the rule."

At one time the plaintiff's leading counsel was inclined to answer to ROMER, L.J., that the plaintiff could claim the benefits, while disowning the obligations, imposed upon him by the rules. I think that observation is sufficient to dispose of such a contention.

For all these reasons therefore I am of opinion that this appeal should be allowed as stated by my Lord.

ROMER, L.J.—I agree. By reg. 17, para. 6, of the constitution and regulations of the British Boxing Board of Control it is provided that "No person other than a member shall be permitted to take part in any contest" held under the sanction of the British Boxing Board of Control. A member is defined by reg. 3 as being a licence holder. Regulation 3 says the members are all the licence holders. By reg. 15, para. 3, it is provided as follows:

"Any person or persons to whom a licence is issued, after payment of the fee as herein stated, shall be deemed to have read the regulations of the British Boxing Board of Control and shall further be deemed to be a member and to have agreed to accept any decisions under all or any of these regulations, and to submit himself to the constitution and code of the regulations of the British Boxing Board of Control."

We have seen the form of application for a licence that is required to be signed by anyone desirous of becoming a member, and that application contains these words:

"I hereby apply for a licence as a boxer, and if this licence is granted me I declare to adhere strictly to the rules of the British Boxing Board of Control (1929) as printed, and abide by any further rules or alteration to existing rules as may be passed."

The practical effect of all that is this, that anyone who wishes to carry on the profession of a boxer in this country must become a member of the British Boxing Board of Control (1929) and must enter into a contract with that association to be bound by its rules, present and future. One of the rules which in those circumstances the plaintiff agreed to be bound by is reg. 20, para. 16. That, as it stands at present, was not one of the original rules when he became a member, but it was altered in pursuance of the power to that effect contained in the regulations which were in existence when he became a member. The amended rule provided as follows:

"Boxers in case of disqualification are only entitled to receive bare travelling expenses pending the decision of the board or branch on the circumstances of the case, when the board or branch may deal with the money as it thinks fit."

When, therefore, at the contest for the heavyweight championship of Great Britain, held at the White City on July 12, 1933, the plaintiff, in the course of the first two rounds, which became the only two rounds of the contest, unintentionally committed five fouls, his share of the purse, which was £3,000, became liable to be dealt with by the board under para. 16 of reg. 20. They did deal with it under that paragraph and came to the conclusion that the plaintiff should not receive any part of the £3,000, though they offered to pay over to him and his mother, I think it was, some £260, part of it.

Of course, if the plaintiff had been an adult there would have been no question as to the action of the Board of Control. The £3,000 would have been lost to the plaintiff. But it has been argued by the plaintiff's counsel Serjeant Sullivan that inasmuch as the plaintiff at the date of his purporting to become a member of the Board of Control was a minor, and still is a minor, the contract of membership between him and the association is not binding on him. It is said that it is not binding on him because, in the first place, the contract is not of a class which an infant can enter into, whether it be favourable to him or unfavourable; and, secondly, that, if it be a contract of that class, this particular one is so detrimental to his interest that it ought not to be held to be binding upon him. Dealing with the first of those two points, it appears to me, for the reasons which I have already given, that this contract of membership, being an essential in practice to the plaintiff for obtaining a contract of employment as a professional boxer, is so bound up with those contracts of employment which he hopes to enter into that it falls to be decided by the considerations that are applied to a contract of service in the case of an infant. In other words, I think that the case is governed by, and falls within the principles enunciated in, *Clements v. London and North-Western Rail. Co.* (7), which has already been referred to by my Lords. I cannot doubt myself that this is a contract of a class into which an infant can enter assuming the contract be for his benefit.

It is then said by counsel that this contract is so detrimental to the interests of the infant that the court ought not to hold him to be bound by it. The learned serjeant, I think, referred us to one matter in respect of which he said this contract was detrimental to the interests of the infant. There were others, but the learned serjeant only concentrated on one as being the one that is most apposite to the present case. He said that it is very detrimental to the interests of an infant that he should not be at liberty to commit unintentional fouls in boxing except at the risk of losing his share in the purse. Of course, this contract does contain some clauses which impose some limit on the unrestricted liberty of the boxers, as one would expect it to. But in considering whether the particular one, or any particular one, is detrimental to the interests of the infant the court has to look at the contract as a whole, and if it comes to the conclusion, looking at the contract as a whole, that it is for the benefit of the infant, it disregards the fact that it may contain, and does contain, some restrictions or clauses which,

standing by themselves, might not appear to be for the benefit of the infant. I agree entirely with what the Master of the Rolls has said that these clauses imposing restrictions upon the liberty of action of the boxer are in the interests of clean boxing in this country, and therefore are in the interests of the boxers as much as of anyone else. I am of opinion that all these clauses restricting the liberty of the boxer are for the benefit of all boxers including the plaintiff in this case. This particular clause, reg. 20, para. 16, is merely one of the sanctions, and I think necessary sanctions, which is available for purposes of securing the fulfilment of the rules imposed upon boxers and others who are subjected to them.

I, therefore, come to the conclusion that this contract is binding upon the plaintiff. I am very glad to be able to come to that conclusion, because if this court came to any other it would necessarily come to the conclusion that at no time during the last three or four years during which, as I understand, the plaintiff has been boxing has he been eligible to take any part in a contest held under the sanction of the British Boxing Board of Control, a conclusion I should have thought from which the plaintiff would shrink. However that may be, I agree that the contract is binding on him and that he is a member of this association. If the contract were not binding upon him, he would not be a member of this association, with the consequences I have just indicated.

It only remains for me to say one word about the ground upon which the learned judge decided in favour of the plaintiff. He held that this contract was for the plaintiff's benefit and was binding upon him except for this one point. He said towards the end of his judgment:

"If a contract is made merely by reference to other documents, the party to the contract seeking to rely upon those other documents must establish that the terms of those other documents were reasonably brought to the knowledge and attention of the other party."

With all respect to the learned judge, I can only say this, that I know of no authority for that proposition when applied to such a contract as we are dealing with in the present case—in fact, the authorities to which reference has already been made by the other members of the court are in direct opposition to it. In point of fact, at the time the plaintiff did become a member of this association he was handed a copy of the rules as they then existed, and those rules contained the rule which enabled the rules from time to time to be altered. He had, therefore, full notice of the documents which were incorporated in his contract by reference.

For these reasons I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Ellis & Ellis; Edmund O'Connor & Co.*

[*Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.*]

PHILLIPS v. PARNABY

[KING'S BENCH DIVISION (Lord Hewart, C.J., Talbot and Macnaghten, JJ.), May 16, 1934]

[Reported [1934] 2 K.B. 299; 103 L.J.K.B. 575; 151 L.T. 400; 98 J.P. 383; 50 T.L.R. 446; 32 L.G.R. 270; 30 Cox, C.C. 146]

Coal—Sale by weight—Short delivery—No notice of alleged offence before charge preferred—“Retailer”—Delivery of coal under contract—Weights & Measures Act, 1889 (52 & 53 Vict., c. 21), s. 21 (2)—Sale of Food (Weights & Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 12 (6), s. 15 (1).

By s. 15 (1) of the Sale of Food (Weights & Measures Act, 1926: “This Act . . . shall be construed as one with the Weights & Measures Acts, 1878 to 1926 . . .” By s. 12 (6): “A prosecution in respect of an offence by a retailer . . . shall not be instituted . . . unless . . . notice in writing of the date and nature of the alleged offence has been served on . . . the defendant.” Section 21 (1) and (2) of the Weights & Measures Act, 1889, prescribes a penalty for the short delivery of coal.

The appellant, a coal merchant, had a contract with a customer under which from time to time he supplied the customer with coal. On Oct. 4, 1933, a servant of the customer ordered from the appellant two tons of coal. On the same day the appellant delivered at the customer's premises 1 ton, 9 cwt. of coal, the amount shown on the ticket delivered to the customer under s. 21 (1) of the Act of 1889 being two tons. The appellant was charged with an offence against s. 21 (2), but no notice under s. 12 (6) of the Act of 1926 was served on him.

Held: there being no manifest discrepancy between the provisions of s. 12 (6) of the Act of 1926 and those of s. 21 of the Weights & Measures Act, 1889, the provisions of s. 12 (6) applied; on the facts the appellant was a “retailer” within s. 12 (6); and, therefore, he was entitled to have served on him the notice prescribed by s. 12 (6), and, in its absence, to have the charge against him dismissed.

Notes. As to sales of coal, see 33 HALSBURY'S LAWS (2nd Edn.) 684 et seq., and for cases, see 44 DIGEST 138 et seq. For Weights & Measures Act, 1889, and Sale of Food (Weights & Measures) Act, 1926, see 26 HALSBURY'S STATUTES (2nd Edn.) 1258 and 1292, respectively.

Cases referred to:

- (1) *Hart v. Hudson Bros., Ltd.*, [1928] 2 K.B. 629; 97 L.J.K.B. 804; 139 L.T. 663; 92 J.P. 170; 44 T.L.R. 820; 72 Sol. Jo. 584; 26 L.G.R. 565; 28 Cox, C.C. 550, D.C.; 44 Digest 133, 26.
- (2) *Canada Southern Rail. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723, P.C.; 42 Digest 664, 745.
- (3) *Treacher & Co., Ltd. v. Treacher*, [1874] W.N. 4; 43 Digest 60, 624.
- (4) *Willingale v. Norris*, [1909] 1 K.B. 57; 78 L.J.K.B. 69; 99 L.T. 830; 72 J.P. 495; 25 T.L.R. 19; 7 L.J.R. 76; 21 Cox, C.C. 737, D.C.; 42 Digest 780, 2105.

Case Stated by Pembrokeshire justices.

An information was preferred before a court of summary jurisdiction by the respondent, Parnaby, an inspector of weights and measures of the Pembrokeshire County Council, under s. 21 (2) of the Weights and Measures Act, 1889, against the appellant, Phillips, for that he on Oct. 4, 1933, being the seller of a certain quantity of coal exceeding 2 cwt. in weight, to wit, 1 ton 9 cwt., unlawfully did deliver by means of a vehicle to the county council a certain quantity of coal less than the quantity expressed in the note delivered to the servant of the council.

On the hearing of the information the following facts were proved:—(i) The appellant was a coal and general merchant at Crymmych, Pembrokeshire. (ii) One Evans, an employee of the county council, on Oct. 4, 1933, for and on behalf of the council, ordered from the appellant 2 tons of coal to be consumed in or by a steam roller, the property of the council. (iii) The quantity of coal expressed to be sold and delivered in the weight

ticket was 1 ton 9 cwt., and the quantity actually delivered was 1 ton 5½ cwt. (iv) The appellant was present and was given a reasonable opportunity to check the weight when the coal was re-weighed. (v) No notice in writing of the date and nature of the alleged offence had been served on or sent by registered post to the appellant within seven days after the alleged commission of the offence. (vi) The appellant had a contract with the council under which the coal was ordered and supplied, but no evidence as to the nature and terms thereof was given.

On behalf of the appellant it was contended that the Weights and Measures Act, 1889, and the Sale of Food (Weights and Measures) Act, 1926, were two of the statutes comprised in the series known as the Weights and Measures Acts, 1878 to 1926, and were to be construed as one; that the expression "construed as one" meant that every part of each of the statutes must be construed as if it had been contained in one statute, unless there was some manifest discrepancy; and that, because no notice in writing of the date and nature of the alleged offence had been served on or sent to the appellant as required by s. 12 (6) of the Act of 1926, there could be no lawful conviction; and further that the existence of a contract did not prevent the appellant from being a retailer within the meaning of the Act. On behalf of the respondent it was contended that s. 12 (6) of the Act of 1926 related only to the retail sale of articles of food, and did not apply to the sale of coal, and that, as the coal was ordered and supplied under a contract, the transaction was not a retail dealing within the meaning of the Act.

The justices were of opinion that, as s. 12 (6) was framed in the alternative, and as the appellant had been given an opportunity of checking the weight when the coal was re-weighed, it was not necessary for notice in writing of the date and nature of the alleged offence to be served on the appellant; and that, because the coal was sold by contract and not purchased from a retailer, the subsection did not apply. They convicted the appellant and fined him 10s. and ordered him to pay £1 8s. 10d. costs.

The appellant appealed to the Divisional Court.

The Weights and Measures Act, 1889, provides:

Section 21 (1):

"Where any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered . . . to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note. . . ." (2) ". . . If the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine. . . ."

The Sale of Food (Weights and Measures) Act, 1926, provides:

Section 12 (6):

"A prosecution in respect of an offence by a retailer under this Act . . . shall not be instituted . . . unless within seven days after the alleged commission of the offence notice in writing of the date and nature of the alleged offence has been served on or sent by registered post to the defendant, nor unless in the case of any alleged deficiency the person against whom the allegation is made has been given reasonable opportunity to check the weight, measure or number of the article or articles in respect of which such allegation is made."

Section 15 (1):

"This Act . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926. . . ."

Moelwyn Hughes for the appellant.

J. L. Willis for the respondent.

LORD HEWART, C.J.—I have come to the conclusion, not without hesitation, that this appeal ought to be allowed. In the court below the respondent contended that s. 12 (6) of the Sale of Food (Weights and Measures) Act, 1926, related only to the sale of articles of food, and did not apply to the sale of coal. In my opinion, that contention was wrong. There is no manifest discrepancy between the provisions of s. 12 (6) of the

Act of 1926 and those of s. 21 of the Weights and Measures Act, 1889. It seems to me, therefore, that the decision of this court in *Hart v. Hudson Bros., Ltd.* (1) applies to the present case, so far as that point is concerned. In that case reference is made to *Canada Southern Rail. Co. v. International Bridge Co.* (2), where LORD SELBORNE, L.C., referring to two Acts which were there in question, said (8 App. Cas. at p. 727):

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

Here it is clear that the legislature has thought fit to provide by s. 15 of the Act of 1926 that that Act is to be construed as one with the Weights and Measures Acts, 1878 to 1926. That series of Acts includes the Weights and Measures Act, 1889. I think that there is no manifest discrepancy between the provisions of the two Acts in this respect at least which would prevent effect being given in a proper case to s. 12 (6) of the Act of 1926. The justices have held that the provisions of s. 12 (6) of the Act of 1926 are alternative. That view seems to me to be erroneous, and the contention was abandoned in argument. The provisions of the subsection are cumulative, and all have to be fulfilled in the case of a prosecution to which the subsection applies.

The only remaining point is whether this prosecution was a prosecution in respect of an offence by a retailer under these Acts. Where a defendant seeks to obtain the benefit of s. 12 (6) of the Act of 1926 he must make it clear either by his own evidence or otherwise that he was a retailer. It seems to me that it was shown on the facts found in this case that the appellant was a retailer. He was described as a coal and general merchant. He was to have delivered 1 ton 9 cwt. of coal, and in fact he delivered 1 ton 5½ cwt. He was given a reasonable opportunity of checking the weight when the re-weighing took place, but no notice in writing of the date and nature of the alleged offence had been served on him or sent to him by registered post. It is true that in his evidence he said that he had a contract with the county council under which the coal was ordered and supplied, but no evidence as to the nature and terms thereof was given. In other words, the prosecution seem to have been content to leave the matter there, and the justices seem to have been content too, for they say:

"It was not necessary for notice in writing of the date and nature of the alleged offence to be served on the appellant, and, because the coal was sold by contract and not purchased from a retailer, the subsection did not apply."

Those words seem to imply that any antecedent contract of any kind is sufficient to take the sale out of the category of a sale by retail. In my opinion, that view cannot be supported. It may be unfortunate that the question of contract was not further pursued and that it would have been worth while to ask the appellant to produce the contracts, or, if an oral contract was relied on, to state the terms of it. On the material before the justices it was clear that on the particular day and in connection with the particular transaction the appellant was a retailer.

It is, no doubt, to be regretted that the statute did not define the meaning of the term "retailer" for the purposes of the statute, but, if the words of *BACON, V.C.*, in *Treacher & Co., Ltd. v. Treacher* (3) are to be applied, the appellant was clearly a retailer. The Vice-Chancellor in that case said that

"as a general rule 'wholesale' merchants dealt only with persons who bought to sell again, whilst 'retail' merchants dealt with consumers."

Here it is found as a fact that the two tons of coal ordered were to be consumed in or by a steam-roller, the property of the county council. In that state of the evidence I am of opinion, though not without hesitation, that the appellant was entitled to take the point that one of the conditions mentioned in s. 12 (6) had not been fulfilled. I venture to repeat what I said in *Hart v. Hudson Bros., Ltd.* (1), quoting the language used by WALTON, J., in *Willingale v. Norris* (4) ([1909] 1 K.B. at p. 66):

"This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes."

One is tempted to wonder whether in s. 15 of the Act of 1926 the legislature was consciously applying the provisions of that statute to a sale such as the present, but that section in terms provides that the two Acts are to be construed as one. I do not think that any course is open to this court except to apply the provisions of s. 12 (6) of the Act of 1926 to this sale. The appeal must, therefore, be allowed and the conviction quashed.

TALBOT, J.—I am of the same opinion for the reasons which my Lord has given.

MACNAGHTEN, J.—I also agree.

Appeal allowed.

Solicitors: *Amphlett & Co.*, for *Roy, Evans, & Nell*, Newcastle Emlyn; *Smith, Rundell, & Co.*, for *R. A. Wheatley*, Haverfordwest.

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

LONDON JEWELLERS, LTD. v. ATTENBOROUGH

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.JJ.), May 14, 15, 16, 1934]

[Reported [1934] 2 K.B. 206; 103 L.J.K.B. 429; 151 L.T. 124; 50 T.L.R. 436; 78 Sol. Jo. 413; 39 Com. Cas. 290]

Sale of Goods—Sale on approval—False representations by buyer as to intention to re-sell—Goods pawned and proceeds retained by buyer—Right of seller to recover goods from pawnbroker—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 18, r. 4.

W. represented to the plaintiffs, who were retail jewellers, that he had the opportunity of selling jewellery to well-known actresses, and the plaintiffs handed to him jewellery for that purpose. In respect of each article W. signed a note as debtor for the value or price of the article which was marked upon it, and the note was marked "appro." or "on appro." It was agreed between the parties that he should be entitled to retain the difference between the sum for which he sold the article and the price marked on the appro. note. W. intended, when he obtained the jewellery, and throughout, to pledge it and retain the proceeds, and this he did, pawning the goods by means of women agents. The pawnbrokers received the jewellery in good faith. W. was arrested and pleaded Guilty to larceny as a bailee. In an action for detinue and conversion of the jewellery brought by the plaintiffs against the pawnbrokers,

Held: where a person obtains the possession of goods "on appro." by making false representations about what he intends to do with them, and other such fraudulent representations, that was a case of obtaining goods by false pretences and not one of larceny by a trick so that there was a good title in that person until the contract or the possession obtained by those representations was avoided; W. adopted the transaction between the plaintiffs and himself when, through his agents, he pledged the goods, an act which he could only properly perform if he was the owner of them, and thereupon the property passed to him under s. 18, r. 4, of the Sale of Goods Act, 1893; and, therefore, he was able to pass the property in the goods to the pawnbrokers and the plaintiffs' action must fail.

Notes. Approved: *Jacobs v. London County Council*, [1950] 1 All E.R. 737. Referred to: *Dennant v. Skinner*, [1948] 2 All E.R. 29; *Armstrong v. Strain*, [1951] 1 T.L.R. 856. As to transfer of the title to goods, see 29 HALSBURY'S LAWS (2nd Edn.) 103 et seq.,

and for cases, see 39 DIGEST 482 et seq. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

- (1) *Kirkham v. Attenborough, Kirkham v. Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, 1252.
- (2) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 39 T.L.R. 77; 67 Sol. Jo. 227; 28 Com. Cas. 110; 86 J.P. Jo. 552, C.A.; Digest Supp.
- (3) *Kempler v. Bravingtons, Ltd.* (1925), 133 L.T. 680; 41 T.L.R. 519; 69 Sol. Jo. 639, C.A.; 39 Digest 508, 1259.
- (4) *Clayton v. Le Roy*, [1911] 2 K.B. 1031; 81 L.J.K.B. 49; 105 L.T. 430; 75 J.P. 521; 27 T.L.R. 479, C.A.; 1 Digest 22, 176.
- (5) *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 1 Digest 335, 495.
- (6) *Whitehorn Brothers v. Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 39 Digest 535, 1458.
- (7) *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93; 47 L.J.Q.B. 481, H.L.; 39 Digest 534, 1454.
- (8) *Phillips v. Brooks, Ltd.*, [1919] 2 K.B. 243; 88 L.J.K.B. 953; 121 L.T. 249; 35 T.L.R. 470; 24 Com. Cas. 263; 39 Digest 533, 1451.

Appeal from an order of SWIFT, J., in consolidated actions in which the plaintiffs claimed the return of certain articles of jewellery which had been pawned by one Waller with the defendants, who were pawnbrokers.

Waller, who had pleaded Guilty to a charge of the larceny of the articles as a bailee, and had been sentenced to a term of imprisonment, had obtained the goods from the plaintiffs by dishonestly representing that he could sell them to actresses. In fact, he handed them over to certain women, his agents, who pawned them with the defendants. The defendants took them in good faith and without knowledge of the fraud perpetrated by Waller. With each article the plaintiffs handed to Waller a note marked "On appro.", or words to that effect. SWIFT, J., found that Waller had no intention of buying the articles himself or of showing them to any customer, but that he intended to get his accomplices to pawn them and to retain the proceeds for himself, and that he was fraudulently obtaining possession of the plaintiffs' property for the purpose of converting it to his own use.

The defendants relied on four separate grounds of defence. First, they said that there had been no demand for delivery before action brought, and that that was an essential element in an action of detinue. Secondly, they relied on s. 18 of the Sale of Goods Act, 1893, and said that by pawning the goods through his agents Waller had done an act adopting the transaction and had converted the sale or return contract into a contract of sale. Thirdly, they said they were protected by s. 25 (2) of the Sale of Goods Act, 1893, as Waller was a person who had agreed to buy goods and had obtained possession with the consent of the owner, and was, therefore, in a position to give a good title to an innocent buyer or pawnee. Fourthly, they relied on s. 2 (1) of the Factors Act, 1889, and said that Waller was a mercantile agent in possession of goods with the consent of the owner, and had disposed of them in the ordinary course of his business as such mercantile agent.

By s. 1 (1) of the Factors Act, 1889:

"For the purposes of this Act, the expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

By s. 2 (1):

"Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall . . . be as valid

as if he were expressly authorised by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

The Sale of Goods Act, 1893, s. 18, r. 4, provides:

"When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer . . . when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

By s. 25 (2):

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods . . . , the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods . . . under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner."

SWIFT, J., gave judgment for the plaintiffs. The defendants appealed.

Trappnell, K.C., and *A. Safford* for the defendants.

Hallett for the plaintiffs.

SCRUTTON, L.J.—This is another chapter in the chronicles of the judges dealing with a well-known commercial transaction, commonly known as "sale on appro." or "on sale or return." I hope counsel for the plaintiffs will pardon me if I deal with this case comparatively shortly because, in my view, whatever may happen before a superior tribunal, so far as this court is concerned, this matter is determined by two decisions of this court—*Kirkham v. Attenborough* (1) and *Folkes v. King* (2). I am also excused for being brief in that I have already given two very long judgments about this matter which, at present, I am inclined to think were right, and I see no object in repeating, either in the same or slightly different words, these two very detailed judgments which will be found, in *Folkes v. King* (2) and *Kempler v. Bravingtons, Ltd.* (3), where I endeavoured to give a historical explanation of a series of cases which had been decided by the courts.

The question arises out of a conflict of judicial opinion succeeding a conflict between two views of a commercial transaction. A person desiring to sell goods does it in a well-known commercial transaction by handing the goods to a person "on appro." or "on sale or return," and that person, in my view, is given power to make a sale. He is in possession of goods, and being in possession of goods he, perhaps, deals with them contrary to his mandate—being sent out to sell, he may pledge. On the other hand, various people in the world of commerce, including pawnbrokers, may find themselves buying or taking in pledge the goods which the person who has been entrusted with them has been handed to sell. The question arises: On whom is the risk to fall if the person in possession of the goods exceeds his mandate or acts contrary to it? On the one hand, the original owner of the goods says: "I never gave the person to whom I entrusted the goods authority to do this; he had no title, therefore, to pledge the goods with you." On the other hand, the person who has come into possession of the goods through the action of the person entrusted with them, says: "Here is a man who has ostensible authority to sell or to pledge these goods; the risk must fall on the person who has employed an untrustworthy agent, not on me, if I have acted in good faith." That is the sort of question which, ever since the decision in *Kirkham v. Attenborough* (1), and probably ever since the passing of the Sale of Goods Act, 1893, has occasioned difficulty in the courts. In particular, the difficulty which has arisen, and has caused acute division of opinion between judges of great eminence, is: If I, the owner of goods, have entrusted them to an agent to sell and he is fraudulent, gets the goods by fraudulent misrepresentation, intends from the first to use them for his own advantage and not for mine—are the goods in his possession with my consent? At that stage one is

introduced to the subject of larceny by a trick, a most bewildering subject, and the question then arises: Are the circumstances of this case such that the agent has obtained the goods by false pretences, and, therefore, there is a contract passing to him the property in the goods, until it has been avoided, or are the circumstances such that he is simply a thief, and therefore has acquired no right to deal with the goods at all, because the owner gives no consent to a thief dealing with his goods?

The facts of this case are, so far as I can see, very much like the facts of every other case of this sort. We are told that there are a number of pawnbrokers interested in this case because a man named Waller, the person who has either been guilty of fraudulent misrepresentation in this case, or has been the thief, appears in a number of cases to have got goods from the plaintiffs, London Jewellers, Ltd., either by specific representations that he knew somebody who might like to buy them if he saw them, or by general representations that he was in a position in which he could meet a number of people who were likely to buy that class of goods or to have that class of goods bought for them. The case was nominally tried on two particular instances. I say "nominally" because I think it is obvious on the evidence that the representative of the plaintiffs had no very clear idea about the facts of those two instances, but had a very clear idea of what he thought happened on the general run of these transactions, most of which are not before us. Of the two particular instances before the court, in the one relating to a watch bracelet, the document given by the plaintiffs to Waller was this:

"Oct. 12, 1932. Mr. L. Waller, Dr. to London Jewellers, Ltd., 418, Strand, W.C. 2. Diamond and Sapphire Platinum Bracelet £350, on appro. (Sgd.) L. WALLER."

The £350 is the price at which London Jewellers, Ltd., were willing to sell, and it appears to be common ground that the agreement with Waller was that anything he got for the goods above £350 would be his remuneration for what he did. The other document was dated Nov. 1, 1932:

"Mr. Waller, Dr. to London Jewellers, Ltd., 418, Strand, W.C. 2. On Appro. One Dia. and Plat. Watch, £185. L. WALLER."

That is a similar document to the first; the £185 is the sum which London Jewellers, Ltd., were willing to take; Waller could sell for anything he could get above the £185, and keep the surplus for himself as his remuneration or profit on the transaction.

The case was tried before SWIFT, J., and it appeared that the representatives of the pawnbrokers, who were defendants, took four points in answer to the claim of London Jewellers, Ltd., for the property on which they, as pawnbrokers, had advanced money, and which the plaintiffs said was their own property, which Waller had no business to pledge with the defendants. Counsel for the defendants took four points which are dealt with in order in the learned judge's judgment: first, that an action for detinue would not lie as there had been no "demand" for the delivery up of the goods before action brought. That probably has some relation to the well-known case of *Clayton v. Le Roy* (4), although that case is not mentioned in the judgment. The learned judge was of opinion that the defendants failed in that point, because (i) he thought "demand" was not necessary in detinue; and (ii) in his opinion, there had been a "demand" when at the police court Waller pleading Guilty to a criminal offence, the plaintiffs applied to the learned magistrate for an order for the return of the goods. I need not deal further with that point, because it was not argued by counsel for the defendants in this court.

The second point for the defendants was based upon r. 4 of s. 18 of the Sale of Goods Act, 1893, which is in these terms:

"When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction: (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

That statutory provision appears to contemplate that the person who has goods delivered to him on approval becomes a buyer, not when he receives the goods, but when he does one of two things: (i) either approves or accepts the transaction or does any act adopting it, or (ii) being under an obligation to return the goods does not do so within a reasonable time. He is then taken to be a buyer to whom the property passes. Looking casually at such transactions as those of Waller, it does seem odd if a man who is employed to sell, and pledges contrary to his mandate, should be treated as a "buyer." It may be that the wording of that statutory provision is not so happy as one could have wished, but we have the authority of the Court of Appeal by which we are bound, in *Kirkham v. Attenborough* (1) that when a person who has received goods on sale or return pledges them, he does an act adopting the transaction within the meaning of r. 4 of s. 18 of the Sale of Goods Act, 1893, so that the property in the goods passes to him, the reason being that he has no right to pledge the goods unless he is the owner and does an act adopting the transaction by pledging, an act which he could only do if he were the owner. I am not aware that the decision in *Kirkham v. Attenborough* (1) has ever been doubted in any of the subsequent cases, and, therefore, unless the difficulty can be surmounted in some way, Waller adopted these two transactions and made himself a "buyer" of them when he pledged the goods, an act he could only perform properly if he was the owner.

Connected with this second point is what the learned judge calls the third point, that if s. 18 did not protect the defendants, s. 25 (2) of the Sale of Goods Act, 1893, protected them. That subsection is in these terms:

"Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

The learned judge's view either of that or of that and the second point—because it is not clear from his judgment exactly which he was dealing with—is that Waller was not a "buyer," and it is, of course, true that when Waller received the goods he was not a buyer because he was dealing with them either "on appro." or "on sale or return." But what emerges from the decision in *Folkes v. King* (2), to which I am about to refer, is that London Jewellers, Ltd., were giving to Waller a right to sell, not selling to him at the time, but giving him a right to sell, and that that being so, when he exercised his right to buy under the right to sell, either by selling to somebody else or by selling to himself, with full disclosure and not contrary to any term on which he was entrusted with the goods he was a "buyer."

The last point made for the defendants before SWIFT, J., was under s. 2 (1) of the Factors Act, 1889, because to assist transactions of commerce a series of Factors Acts have been enacted intended to protect the man who buys in good faith, or takes a pledge in good faith, from a person who has apparent authority to deal with the goods which are in his possession. The subsection is in these terms:

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time the disposition notice that the person making the disposition has not authority to make the same."

A mercantile agent is defined in the first clause of the Act:

"'Mercantile agent' shall mean a mercantile agent having in the customary course

of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

In the court below SWIFT, J., dealt with the case in this way. He said:

"First of all, I am quite clear that Waller was not a 'mercantile agent' at all, and, secondly, that he was not dealing with the goods in the ordinary course of business of a mercantile agent, because what he did was not to go near the pawnbrokers himself, and not to send any clerk of his who usually did the business of a mercantile agent, but to send various ladies of his acquaintance who represented that they were individual owners, as their private property, of this jewellery, and desired to pledge it";

and, thirdly, SWIFT, J., said that there was a decision of the Court of Appeal in *Folkes v. King* (2) which, though he did not like it, and though he himself would have decided otherwise, bound him, and although he, the learned judge, should have thought that goods obtained by a thief were not in the possession of the agent with the consent of the true owner, the Court of Appeal had decided to the contrary in *Folkes' Case* (2). SWIFT, J., said that though he should have decided this point the other way, agreeing with the judgment of GREER, J., as he then was, in the court below in *Folkes' Case* (2) as he understood it, yet he thought he was bound by the decision in *Folkes' Case* (2).

The point of difference—not so much on the Factors Act, 1889, because I doubt whether my brother GREER had his attention specially called to the provision of the Factors Act—between the members of the court in *Folkes v. King* (2) who took an opposite view to that of GREER, J., whose decision was reversed, was this. There had been in the history of the previous cases two contradictory opinions expressed by judges of high eminence; but, unfortunately, both opinions were obiter to the case that each had to decide. First of all, in *Oppenheimer v. Frazer and Wyatt* (5), MOULTON, L.J., the other two members of the Court of Appeal not expressing a very clear view on the subject, had expressed the opinion that, if there was larceny by a trick by which the agent got possession of the goods, that showed that the owner of the goods had not consented to the goods being in the possession of that person. I do not read in detail the passage because it will be found referred to in full in the report of *Folkes v. King* (2). On the other hand, four years afterwards in *Whitehorn Brothers v. Davison* (6), also before the Court of Appeal, BUCKLEY, L.J., and, I think, VAUGHAN WILLIAMS, L.J., had expressed the opposite opinion, in the sense that they thought that in these cases of "on appro.", with one exception, if the consent was obtained by misrepresentation it was not larceny by a trick, but was obtaining goods or property by false pretences, and inasmuch as if you obtain possession by false pretences the possession was valid until the contract which gave it was determined, the owner of the goods had assented to the agent having possession of goods, and there was a true consent. The exception, with which it is not necessary to deal in this case, was: Supposing there was a mistake in the identity of the person receiving the goods, supposing the case was one like the well-known case of *Cundy v. Lindsay* (7) where the man represented himself to be Blenkiron & Co., a firm of high character, when, in fact, he was Blenkarn, a person of no character at all, there was a mistake as to the identity of the person and no true consent because the parties were never at one. In such a case different considerations arise. I think the cases show that it is a matter for separate consideration when the consent of the owner to the agent having the goods in his possession is obtained by a difference of opinion as to the identity of the agent, the parties not being *ad idem* as to who the agent was, the owner thinking he was one person, and the agent well knowing he was another person, but making representations which induced the owner to believe he was the reliable person. I do not express any opinion about this class of case, but in the judgment of HORRIDGE, J., in *Phillips v. Brooks, Ltd.* (8), the matter is discussed and the authorities cited. It is a matter which may need to be considered in some future case.

SWIFT, J., said quite plainly that he would have decided *Folkes v. King* (2) the other way—as GREER, J., decided it—but that he felt he was bound by this decision of the Court of Appeal. He made this observation when giving his reasons for rejecting the

defence put forward by the pawnbrokers that they got a good title under the Factors Act, 1889. Counsel for the pawnbrokers very wisely, I think, has not rested his case here upon the Factors Act, 1889, because it seems to me to be impossible to say that Waller was acting in the ordinary course of business of a mercantile agent, he being a person who did not himself pledge the goods, who did not pledge the goods by any authorised clerk of his well known to be his agent, but who sent various women to say, quite untruly, that the jewels were their private property, and that they were merely pledging them as private owners of jewellery. But what puzzles me a little is that SWIFT, J., recognising that he was bound by the decision in *Folkes v. King* (2) has, so far as I can see, entirely failed to observe that this decision is also fatal to his view under the second point which was taken for the defendants under s. 18, r. 4, of the Sale of Goods Act, 1893. As I understand, he avoids the difficulty of the decision in *Kirkham v. Attenborough* (1), by saying that it only applies where the goods are in possession of the agent, a buyer, by consent of the true owner. If what the agent has done—I am using the word “agent”, as a neutral term in this case, for the person who has the goods “on appro.”—is to get the goods by making false representations about what he intends to do with them when he gets them and other such fraudulent representations, that is a case, in my opinion, of false pretences, and, being a case of false pretences, there is a good title in the agent until the contract or the possession obtained by those representations is avoided. Secondly, the agent, having the possession and the right to dispose of the goods, until that contract is rescinded, can pass the property in them either by selling them or by pledging them with pawnbrokers. I do not propose to repeat what I have expressed, and what BANKES, L.J., has expressed at considerable length on this subject in *Folkes v. King* (2). BANKES, L.J., said ([1923] 1 K.B. at p. 294):

“Primâ facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud.”

Then the lord justice goes on to support that view by reference to the authorities. I took the same line. After pointing out the difference of opinion between MOULTON, L.J., on the one hand, and BUCKLEY, L.J., on the other, in *Oppenheimer v. Frazer and Wyatt* (5) and *Whitehorn Brothers v. Davison* (6), I proceeded to deal with the question of the sort of transaction that happens where a sale “on appro.” goes wrong through the fraud of the agent in this way. I first dealt with the question whether to prove larceny by a trick negatived a defence under the Factors Act, 1889, as excluding consent of the true owner, and, discussing the series of authorities, I came to the conclusion that it did not. Then I said that there was further the question whether the facts in that case constituted larceny by a trick. On this point, I took the view taken by CHANNELL, J., and VAUGHAN WILLIAMS and KENNEDY, L.J.J., all very experienced in trying criminal cases, that where an owner delivered goods to an agent, intending not only that he should have possession, but should dispose of the property, it was immaterial that the agent, ostensibly agreeing to the contract of agency, yet secretly intended to disregard it. Then, again, I dealt with a series of authorities which supported my view.

In my view, that decision of the Court of Appeal, with the reasons for which it is given, negatives the view taken by SWIFT, J., of the decision in *Kirkham v. Attenborough* (1), and how it affects the facts in this case. I do not repeat the reasons which I gave for my conclusions; they are there to be studied and agreed with or disagreed with by a superior court, but so far as this court is concerned I am bound by them, and, in my

view, the court is bound by them, with the result that we have two decisions of the Court of Appeal, *Kirkham v. Attenborough* (1) and *Folkes v. King* (2), which, in my opinion, show that SWIFT, J., came to an incorrect conclusion on the authorities which bound him. Therefore, in my opinion, the appeal must be allowed, the judgment for the plaintiffs set aside, and judgment entered for the defendants with costs.

GREER, L.J.—I am of the same opinion. In this case judgment was given by SWIFT, J., at the trial in favour of the plaintiffs, London Jewellers, Ltd., for the return of certain articles of jewellery that had been pledged with the defendants, who are pawnbrokers. The learned judge came to that conclusion on the ground that these articles of jewellery were unlawfully pledged by a man named Waller, who had stolen them from the plaintiffs just as much as if, instead of his making a pretence to be a purchaser "on appro.", he had broken into their shop, pocketed the articles, taken them away and pledged them. If the case were one in which it was open to me to decide in accordance with my own view of what ought to be the law, I should be very much disposed to agree with the decision of the learned judge. The history of the development of the ordinary common law, both with regard to civil liability and criminal liability, is a very interesting one. It is the history of the gradual development of the law by means of something very much in the nature of fictions in order to enable the judges to do justice in cases that came before them, whether civil or criminal cases, notwithstanding the fact that they had to exercise a certain amount of imagination in bringing the case within the forms of indictment or the forms of action in which all litigation had to be framed. There came a time when the judges had to decide this question: Suppose a man obtains possession of goods intending from the very start that he should steal them and use them for his own purposes, fraudulently, and he does not then obtain the property in the goods, can he then be described as a thief? Can he be prosecuted for larceny at common law without the assistance of any statutory definition of what larceny means? According to the history of the law contained in SIR JAMES STEPHEN'S HISTORY OF THE CRIMINAL LAW (1883), vol. III, at p. 160, the question was decided in this way:

"It was held at a very early period in the history of the law that, though a wrongful taking is essential to theft, it is nevertheless theft to obtain the possession of a thing by fraud and then to appropriate it. A. asks B. to allow him to try B.'s horse, and having got leave to mount for that purpose rides off with the horse. Here the taking is permitted by B., and is so far lawful, but, inasmuch as the leave of B. is obtained by a fraud, the taking under the fraud is regarded as wrongful, and the subsequent conversion as theft."

So as to bring the case within an indictment which contains the old word that indictments for larceny always contained, namely, *asportavit*—took and carried away—from the true owner—that being the position with regard to the law—the judges had to consider what was the position where not merely possession was obtained, but property also was obtained, and they found themselves unable to bring that case within the law of larceny as it was at common law, and therefore recourse had to be had to Parliament to alter the law and make the obtaining of property by false pretences a substantive crime. It was made not a felony but a misdemeanour, larceny being still a felony. In those circumstances, the courts have had to decide in a number of cases what is the position where in the first instance possession only is obtained, but it is obtained under an arrangement or contract whereby at some subsequent period a possession can be converted into property and ownership.

Counsel for the plaintiffs says, in the first place, the present case is a case of an agent selling on behalf of the principal; it is not a case where the agent was ever intended to become the owner of the property in goods at all; it is the case of an agent who is to sell on behalf of his principal, his commission being measured by anything he can get over a fixed price. If I thought that was the real meaning of the transaction I should be of the opinion that this appeal failed, but, having regard to the documents that passed every time when anyone of these articles of jewellery was handed to Mr. Waller, I have come to the conclusion that it is impossible for any court to hold that he was an agent for sale, notwithstanding that there was in the mind of Mr. Howard, the director of the

plaintiff company, some sort of confused idea that he might be selling under a mandate from them. But business people who sign documents must be bound by the documents they sign, and in every case Mr. Waller signed a document which treated him as the person who was dealing with the plaintiffs on the terms that unless the goods were returned in accordance with the agreement he should be their debtor and he was taking the goods "on sale or return." In those circumstances I fail to see how it is possible to argue with success that Waller was a mere agent of the plaintiffs, selling on behalf of his principals, though, if there were any such possibility, I am quite certain that the ingenuity and ability displayed by counsel would have been able to produce a sufficiently convincing argument. Section 18 of the Sale of Goods Act begins by providing:

"Unless a different intention appears the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer,"

and r. 4 provides:

"When goods are delivered to the buyer on approval or 'on sale or return,' or other similar terms the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

Supposing this were an honest and not a dishonest transaction, applying the terms of this section, it seems to me quite clear that the goods were delivered to Waller on approval or on sale or return or other similar terms and that the property would pass to him at some future time; that is to say, whenever he signified his approval or acceptance to the seller or did any other act adopting the transaction. Such a contract leaves the seller in the hands of the buyer to a large extent, because the buyer has the opportunity behind the back of the seller of doing something which shows that he is adopting the transaction, and in *Kirkham v. Attenborough* (1) it was held in a way that I think is binding on this court that pledging is an act which adopts such a transaction. That is, I think, the solution of the first point raised by counsel for the plaintiffs.

But he has not given up by any manner of means the other point. He says that here there was, from the very commencement of these transactions on the part of Waller, the intention to steal. He was from the very start a thief who had not any property in the goods and could not, by fraudulently acting under an arrangement which he had made with the proposing seller, get any property in this jewellery, because he was from beginning to the end of the transactions a thief, and it is common ground that a thief neither by a sale nor by pledge can convey any interest in the stolen property to a third person unless he sells in market overt. There is no question of market overt here, or indeed of a sale. I cannot help feeling that if the court were unhampered by authority there would be a good deal to be said for this proposition which commended itself to SWIFT, J., and which, in the case which I tried and which ultimately went to the Court of Appeal, commended itself to me, but I think, for the reasons that have been stated by SCRUTTON, L.J., it is not open to this court, having regard to the decision in *Folkes v. King* (2), to come to the conclusion that that argument should prevail, because in *Folkes v. King* (2) there were two reasons given by all the members of the Court of Appeal for their decision. One has no more right to pick out the first reason as the ratio decidendi of the case and neglect the second reason than to pick out the second reason as the ratio decidendi and neglect the first reason. I think one must take both the reasons stated by the members of the court as the ground for their judgment. The second reason is that where you have a case of a man obtaining possession of property with subsequent authority to sell or to become the owner himself and then sell, where he appropriates the goods and pledges the goods, that is not a case which can be treated as one of larceny by a trick. If that is right, it concludes the present case and binds this court to hold that in this case there was no larceny by a trick. Though it is very difficult to understand, at any rate very difficult for me to understand, the logic of the position, there was at the time of the pledging an obtaining of this property by false pretences. However, whether I agree with that proposition or disagree with it, it is binding on me, and I hope as long as I sit here I will not fail to recognise the binding

force of the judgments which have been given unanimously by my brothers in another case. I think for these reasons this appeal must be allowed.

MAUGHAM, L.J.—I am of the same opinion and do not desire to go exhaustively through the grounds for coming to that conclusion having regard to what my brethren have said. I would observe, however, in the first place that this is a case of a class with which the courts, especially of equity, have had too often to deal—where the question is which of two innocent people is to suffer. The basis of the learned judge's judgment in the court below, I think, is essentially that the man Waller was a thief *ab initio*, if that phrase can be used. There was, accordingly, in the alleged contract between the plaintiffs and Waller no buyer and no contract, and Waller was no more a "buyer" of the goods than, to use the picturesque phrase of the learned judge, a person who throws a brick through a jeweller's window, although in this particular case he may, by sufficiently concealing his criminal intent, have deceived the plaintiffs into thinking he was a "buyer."

To my mind, the first thing to determine is whether the effect of Waller's pledge was to reduce the contract between the plaintiffs and Waller to a nullity, and, although I think it is attractive to take the view the learned judge took, it seems to me clear that, having regard to authorities which have been all in one direction since the year 1866, it is now finally settled in a case of this kind, whether it be a case as between vendor and purchaser or whether it be a case as between vendor and agent for sale, the sale being subsequently effected by the agent, that if it was the intention of the vendor that the property should pass as well as the possession, the result is that whatever the fraud of the other contracting party, the contract is voidable only and not void *ab initio*. The cases in support of that doctrine are to be found in *BENJAMIN ON SALE* (7th Edn., at pp. 474 et seq.). The exception to that general rule is exemplified in the case of *Cundy v. Lindsay* (7), which my brother SCRUTTON has already referred to, that being a decision which ultimately was given by the House of Lords, following some previous cases to the same effect. They were all cases where there was no contract with anybody in the events which were there established—in *Cundy v. Lindsay* (7), because the person who had pretended to contract was not the person with whom the vendor thought he was contracting. Leaving this exception on one side, I am of opinion upon the authorities that the original contract with Waller, taking one for the purposes of an example, was voidable at the election of the vendors. It was not void *ab initio*; and, if the contract was one under which the property passed as well as the possession, then the fraudulent Waller was entitled, whether the property he acquired was of a general or special character, to transfer to an innocent third party for valuable consideration a special property in those goods. That, I think, is beyond question on the authorities apart from the provisions of the Sale of Goods Act, 1893, assuming that the sale were one of an out-and-out sale with a provision for payment in the future.

In this case there is the distinction that the sale was a sale "on appro.", and logically the next point we consider is what was the true nature of the transactions between the vendors and Waller. On that I have little to add to what my brethren have said. It seems to me that, having regard to the terms of what are called the "appro." notes or invoices, which are prepared in exactly the same way as if Waller was the purchaser, starting with the words, "Mr. L. Waller, Dr. to London Jewellers, Ltd.," and headed with the date and with the words "on appro.", with, following, a description of the goods and the price, and in some cases the words, "To be settled on or before" a particular date, and to the fact that those documents are signed by L. Waller, it will take a very strong case to satisfy me that, contrary to the terms of the document, Waller was not intended to have the right to purchase those goods for the purpose of transferring the property in them to a third party. When it is added that he was at liberty to sell the goods for any price he liked, and that his only duty was to pay the amount mentioned in these invoices, or to return the goods, the conclusion is, I think, inevitable that he was a conditional purchaser of the goods—that is to say, when he himself found one of the customers that he said he was in touch with, he was at liberty, as soon as he had arranged for a sale of the goods to that customer, to approve of the conditional sale to

him, and to pay the amount mentioned in the invoices to London Jewellers, Ltd. I can see no distinction between a contract on sale or return and a contract on "appro.", at any rate for the purpose of the present case. I think, to apply the language which is to be found in *Whitehorn Brothers v. Davison* (6), in the judgment of KENNEDY, L.J., to this case ([1911] 1 K.B. at p. 485),

"there was a bailment and delivery and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property."

Having come to that conclusion, the question is whether the fact that the property did not pass at once to Waller enables the plaintiffs to succeed. That point, as I think, is no longer a question of doubt in this court having regard to the decision of the Court of Appeal in *Folkes v. King* (2), which the lords justices have already referred to in some detail. It is true that there the defendant acquired a good title in the view of the Court of Appeal by virtue of s. 2 of the Factors Act, 1889, and that the effect of that section is not a matter under discussion on this appeal. The defendants, the pawnbrokers, quite properly did not rely on it, and I may say for myself that I entirely agree with the learned judge that s. 2 of the Factors Act could not possibly be applicable to any circumstances of this case. But in *Folkes v. King* (2) the Court of Appeal, following the dicta of another Court of Appeal in *Whitehorn Brothers v. Davison* (6), came to the conclusion beyond all doubt that the mercantile agent in that case had not rendered himself liable to be convicted of larceny by a trick inasmuch as he was authorised by the plaintiff to pass the property in the car to a purchaser. I hope I am not being guilty of pedantry if I say that in this case the point which arises is not whether Waller could have been convicted of larceny by a trick, the question is whether there was an intention, subject to a condition of approval by him, to transfer the property as well as the possession to Waller, and the question whether he could be guilty of larceny by a trick is an example, or rather a test, of whether the property would or would not pass by this agreement on the fulfilment of the condition. To my mind, the decision in *Folkes v. King* (2) establishes that the property as well as the possession would pass, and would pass on the performance of the condition, and inasmuch as the plaintiffs had not exercised their right of avoiding the contract for sale, the effect was that Waller was entitled to pledge the property to an innocent third party for a valuable consideration. For that *Kirkham v. Attenborough* (1) is, I think, conclusive.

In the case where the goods are on sale or return, or "on appro.", the Sale of Goods Act, 1893, s. 18, r. 4, would apply, and with regard to that rule I do not wish to add anything to what has already been said, merely mentioning that if the goods had simply been sold with provision for payment in the future there would have been no necessity whatever to rely upon the provisions of the Sale of Goods Act, 1893, since according to the old common law rules, it would be a case where a person who obtained property in the goods by fraud was entitled before the vendor had exercised his power to disaffirm the transaction to confer the property to somebody taking innocently that property for value. On the whole it seems to me, that having regard to the decisions of the Court of Appeal which are binding on us, and the other considerations which have been mentioned by my brethren, this appeal must succeed with the consequences mentioned by SCRUTTON, L.J.

Appeal allowed.

Solicitors: *Attenboroughs; White & Co.*

[Reported by C. G. MORAN, ESQ., *Barrister-at-Law*.]

O'CONNOR v. WALDRON

[PRIVY COUNCIL (Lord Atkin, Lord Tomlin, Lord Macmillan, Lord Wright and Sir Lancelot Sanderson), July 10, 12, 13, November 8, 1934]

[Reported [1935] A.C. 76; 104 L.J.P.C. 21; 152 L.T. 289; 51 T.L.R. 125; 78 Sol. Jo. 859]

Slander—Privilege—Absolute privilege—Tribunal with function to inquire whether offences committed—Function merely administrative, but tribunal bound to act judicially—Words spoken by tribunal in exercise of function—Applicability of doctrine of absolute privilege—Combines Investigation Act (R.S.C., 1927, c. 26).

Privy Council—Canada—Ontario—Slander—Privilege—Absolute privilege—Words spoken by commissioner while conducting combines investigation inquiry—Applicability of doctrine of absolute privilege—Combines Investigation Act (R.S.C., 1927, c. 26).

A commissioner, appointed under the Canadian Combines Investigation Act to inquire whether offences had been committed, with power to enter premises and examine the books, papers and records of suspected persons, but with no power to determine rights, or the guilt or innocence of any person, during the course of an inquiry uttered words which were *primâ facie* defamatory of one of the counsel appearing before him. In an action by the counsel for slander,

Held: the words uttered were not protected by absolute privilege because—

(i) the investigation by the commissioner was merely administrative machinery for inquiring whether offences had been committed: *Proprietary Articles Trade Association and others v. A.-G. for Canada and others* (1), [1931] A.C. 310, applied;

(ii) if a tribunal is exercising merely administrative functions it is immaterial that the tribunal must act judicially and is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders: *Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation* (2), [1931] A.C. 275, followed;

(iii) the commissioner did not, therefore, have similar attributes to a court of justice or act in a manner similar to that in which a court of justice acts, and so was not protected by judicial privilege: dictum of LORD ESHER, M.R., in *Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson* (3), [1892] 1 Q.B. 431, at p. 442, approved and applied.

Notes. As to tribunals to which the doctrine of absolute privilege is applied, see 20 HALSBURY'S LAWS (2nd Edn.) 463-465, para. 563, and for cases on the subject, see 32 DIGEST 102-104, 1338-1347.

Cases referred to:

- (1) *Proprietary Articles Trade Association and others v. Attorney-General for Canada*, [1931] A.C. 310; 100 L.J.P.C. 84; 144 L.T. 577; 47 T.L.R. 250, P.C.; Digest Supp.
- (2) *Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation*, [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421; 47 T.L.R. 115, P.C.; Digest Supp.
- (3) *Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, 1592.
- (4) *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex. Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 23 W.R. 931, H.L.; 32 Digest 102, 1339.
- (5) *Barratt v. Kearns*, [1905] 1 K.B. 504; 74 L.J.K.B. 518; 92 L.T. 255; 53 W.R. 356; 21 T.L.R. 212, C.A.; 32 Digest 104, 1346.
- (6) *Heart of Oak Assurance Co., Ltd. v. Attorney-General*, [1931] 2 Ch. 370; 100 L.J.Ch. 340; 145 L.T. 662; 47 T.L.R. 579; 75 Sol. Jo. 615, C.A.; reversed [1932] A.C. 392; 147 L.T. 41; 101 L.J.Ch. 177; 48 T.L.R. 296; 76 Sol. Jo. 217, H.L.; Digest Supp.

Appeal by the plaintiff from a judgment of the Supreme Court of Canada (ANGLIN, C.J.C., and RINFRET, LAMONT, SMITH and CANNON, JJ.) dated Dec. 22, 1931.

The action was for damages for alleged slanders spoken by the defendant. The words relied on to constitute the slanders were spoken during the course of proceedings which the defendant was conducting as commissioner appointed, by letters patent under the Great Seal of Canada, by the Governor-General in Council under the Combines Investigation Act, 1927, and the Enquiries Act, 1927. The defendant moved to dismiss the action upon the grounds that the statement of claim disclosed no reasonable cause of action and that the action was frivolous and vexatious in that the defendant was acting judicially on the occasion on which he spoke the words complained of, and that the words were therefore absolutely privileged.

The facts are set out in the judgment.

A. T. Miller, K.C., and I. W. G. Barry for the plaintiff.

Ronald Smith for the defendant, the commissioner.

Cur. adv. vult.

Nov. 8. The judgment of their Lordships was read by

LORD ATKIN.—This is an appeal from a judgment of the Supreme Court of Canada affirming a judgment of the First Appellate Division of the Supreme Court of Ontario affirming a judgment of ORDE, J. The original judgment was given on a motion by the defendant to dismiss the plaintiff's action for slander on the ground that it was frivolous and vexatious. The question is whether the defendant in uttering the words was protected by the absolute privilege which is given to words spoken by a judge. The statement of claim alleges that the plaintiff is a barrister-at-law of the provinces of Ontario and Nova Scotia, and that the defendant published, concerning the plaintiff in relation to his profession and practice, to seven named persons, the words following:—

"A very odious counsel. A lawyer cannot advise a wrong or a crime any more than anybody else. He has no privilege to do that. Well, then, you had full knowledge of the scheme. Was it you who gave to O'Connor the contrivance of effecting a crime without effecting a crime, of making a false pretence to the public and to the law? Was it you who gave that to O'Connor or did he give it to you? I will describe it more clearly. Did you give to O'Connor the idea that you might beat the law by false pretence? I say it is a thing any lawyer ought to be ashamed of. I do not care who he is. It is an outrageous, scandalous exhibition. It ought to be reported to the Law Society. Anybody who had an evil mind or disposition to commit crime would be completely carried away by the eloquence of Mr. O'Connor."

The defence admits that the words alleged were spoken except "it ought to be reported to the Law Society," and alleges that when speaking the words the defendant spoke them in his office of a commissioner appointed by the Governor-General in Council under the Combines Investigation Act, R.S.C., c. 26, while he was acting judicially and that the speaking the said words was absolutely privileged.

The statement of claim did not allege the defendant's office: and it is obvious that the pleading could not be struck out as disclosing no cause of action. The plaintiff, however, on examination for discovery admitted that the words were spoken by the defendant while purporting to act under his commission. On that admission the motion in question was made and decided.

Their Lordships are of opinion that the words uttered were not protected by absolute privilege, and the order dismissing the action should be set aside. The result will be that the action may come on for trial, and in these circumstances it is desirable that their Lordships should confine their opinion strictly to the matter in issue so as to avoid prejudicing the case of either party on a future occasion.

The law as to judicial privilege has in process of time developed. Originally it was intended for the protection of judges sitting in recognised courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an

established court of justice. In their Lordships' opinion the law on the subject was accurately stated by LORD ESHER, M.R., in *Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson* (3) ([1892] 1 Q.B. at p. 442), where he says that the privilege

"applies wherever there is an authorised inquiry, which though not before a court of justice, is before a tribunal which has similar attributes. . . . The doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act."

The question, therefore, in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act? This is of necessity a differentia which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other; and the final decision must be content with determining on which side of the line the tribunal stands. There must be remembered, on the one hand, the public policy which protects the independence of the judges, and, on the other, the public policy which requires that a citizen's reputation must be protected against false and malicious defamatory statements.

Has then a commissioner appointed under the Combines Investigation Act attributes similar to those of a Court of Justice; or does he act in a manner similar to that in which such courts act? In their Lordships' opinion the answer must be in the negative. Their Lordships had occasion recently to examine the provisions of the Act in question in *Proprietary Articles Trade Association and others v. Attorney-General for Canada and others* (1) and find it unnecessary to review in detail its provisions. The constitutional validity of the Act was in that case expressly impugned on the ground that it constituted an interference with the administration of justice. The Judicial Committee negatived that contention, and it seems clear from the judgment that they came to the conclusion that the sections dealing with the investigations by commissioners and others were merely administrative machinery for inquiring whether offences had been committed. It is only necessary to remember that the commissioner by the Act is empowered to enter premises and examine the books, papers and records of suspected persons to see how far his functions differ from those of a judge. His conclusion is expressed in a report; it determines no rights, nor the guilt or innocence of anyone. It does not even initiate any proceedings, which have to be left to the ordinary criminal procedure. While it is true that some tribunals charged with the duty of inquiry whether an offence or breach of duty has been committed have been held entitled to judicial immunity, such as a military court of inquiry (*Dawkins v. Lord Rokeby* (4)), or an investigation by an ecclesiastical commission (*Barratt v. Kearns* (5)), there were in those cases conditions as to the way in which the tribunal exercised its functions, and as to the effect of its decisions which led to the conclusion that such tribunals had attributes similar to those of a court of justice. On the other hand, the fact that a tribunal may be exercising merely administrative functions though in so doing it must act "judicially" is well established, and appears clearly from the *Royal Aquarium Case* (3) above cited. If it is exercising such functions it seems to be immaterial whether it is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders made for the purpose of effectuating its inquiries. See *Shell Co. of Australia v. Federal Commissioner of Taxation* (2).

SMITH, J., in the Supreme Court, found his view confirmed by the decision in the Court of Appeal in *Hearts of Oak Assurance Co. v. Attorney-General* (6). That decision was reversed in the House of Lords, since the decision in the Supreme Court. That was a case of an inquiry by an inspector under statutory powers given by the Friendly Societies Act. It seems to their Lordships probable that if the learned judges of the Supreme Court had had the advantage of considering that decision and the statement therein of LORD DUNEDIN that such an inquiry was not a judicial proceeding, and that privilege in it would be qualified not absolute, they might have come to a different conclusion. In the result their Lordships find themselves in agreement with the reasoning and decision of the late HODGINS, J., in the Appellate Division of the Supreme Court

of Ontario. The defendant in this case will be protected if he establishes that he spoke the words complained of on a privileged occasion, and the plaintiff fails to prove express malice. This is the measure of protection given to other administrative officers exercising similar duties, and their Lordships know of no legal principle which affords any further or better protection. The appeal should be allowed, and the orders in the court below discharged with costs; and their Lordships will humbly advise His Majesty accordingly. The appellant plaintiff must have his costs of the appeal.

Appeal allowed.

Solicitors: *Bischoff, Cox, Bischoff, & Thompson; Blake & Redden.*

[*Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.*]

DE BEÉCHE AND OTHERS v. SOUTH AMERICAN STORES (GATH AND CHAVES), LTD. AND OTHERS

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Blanesburgh, Lord Tomlin, Lord Russell and Lord Macmillan), October 22, 23, 25, 26, December 11, 1934]

[Reported [1935] A.C. 148; 104 L.J.K.B. 101; 152 L.T. 309; 51 T.L.R. 189; 40 Com. Cas. 157.]

Conflict of Laws—Contract—Contract to be performed abroad—Supervening lex loci solutionis rendering performance illegal—Enforceability of contract in England.

Foreign law—Evidence of—Foreign statute—Expert evidence—Duty of English court as to construction.

Custom—Usage—Evidence of usage as to meaning of contractual term in Chile—"First-class bills on London"—Expert evidence by banker and lawyers—Admissibility—Competence of witnesses.

Contract—Construction—"First-class bills on London"—Expert evidence of usage as to peculiar meaning in Chile—Admissibility—Competence of banker and Chilean lawyers to give.

By various leases, sub-leases and guarantees made in and between the years 1909 and 1918 tenants and sub-tenants agreed to pay landlords rent for property in Chile "in Santiago de Chile monthly in advance . . . in first-class bills on London at ninety days' sight." The rent was so paid until in 1931 a Chilean statute forbade various specified exchange operations without the permission of a specified committee. The tenants and sub-tenants made repeated and bona fide, but unsuccessful, applications to this committee to authorise drafts at ninety days on London, and as these applications failed they paid the rent into court in Chile. On the hearing of the landlords' claim for arrears of rent in the English court the tenants and sub-tenants tendered expert evidence by a banker (which was contradicted by a Chilean lawyer called by the landlords) of a commercial usage that the words "first-class bills on London" bore, in Chilean contracts relating to bills of exchange, the peculiar meaning of bills drawn in Chile by one of a selected list of bankers and mercantile houses in Chile upon one of a selected list of bankers and mercantile houses in London. Both parties also called expert evidence by Chilean lawyers, who disagreed as to whether, on the true construction of the Chilean law, the exchange operations forbidden without the permission of the committee included the drawing of bills in the manner described above. Agreed translations of the relevant Chilean statutes were put before the court.

Held: the English court would not enforce the payment of the arrears because (i) the expert evidence of the banker as to the meaning of "first-class bills on

London" was admissible because the meaning of the words was ambiguous and the evidence (a) did not conflict with any statutory definitions; (b) was of a usage common to the place in question; and (c) expounded and did not contradict the terms of the contract;

(ii) on the facts of the case this evidence should be accepted;

(iii) although the witnesses as to foreign law might refer to any passages in the code of their country as containing the law applicable to the case, the English court was bound to construe the relevant provisions and to determine their meaning and effect after consideration of the English version before it: *Concha v. Murrieta, De Mora v. Concha* (1) (1889), 40 Ch.D. 543; and *Buerger and another v. New York Life Assurance Co.* (2) (1927), 137 L.T. 431, approved and applied;

(iv) the relevant Chilean laws prohibited the drawing of bills in the manner described above without permission of the committee, and payment of rent in the manner prescribed by the lease had, therefore, been rendered illegal by Chilean law;

(v) English law will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do.

Per LORD SANKEY, L.C. (LORDS BLANESBURGH, TOMLIN and MACMILLAN concurring): An English court will have regard not merely to their own views of the foreign law, but to the interpretation put upon it by a competent foreign authority (approving *Paley (Princess Olga) v. Weisz and others* (3), [1929] 1 K.B. 718).

Per LORD RUSSELL: I do not regard the two lawyers as proper witnesses to depose to matters of commercial usage.

Notes. Referred to: *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Alst. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; *R. v. Secretary of State for India in Council, Ex parte Ezekiel*, [1941] 2 All E.R. 546; *Frankman v. Prague Credit Bank*, [1948] 1 All E.R. 337; *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621.

As to contracts illegal by the *lex loci solutionis*, see 7 HALSBURY'S LAWS (3rd Edn.) 79, para. 148, and for cases, see 11 DIGEST (Repl.) 441-443, 328-340.

As to the admission of evidence of usage to explain that which is doubtful, and to explain words used *primâ facie* in a peculiar meaning, see 11 HALSBURY'S LAWS (3rd Edn.) 193, 195, 196, and for cases, see 22 DIGEST (Repl.) 508, 5630-5644 and 17 DIGEST (Repl.) 504-527, 42-44.

As to the competency of witnesses and the duty of the court with regard to evidence of foreign law, see 15 HALSBURY'S LAWS (3rd Edn.) 329, and for cases, see 22 DIGEST (Repl.) 619-623, 7124-7157.

Cases referred to:

- (1) *Concha v. Murrieta, De Mora v. Concha* (1889), 40 Ch.D. 543; 60 L.T. 798, C.A.; on appeal, sub nom. *Concha v. Concha*, [1892] A.C. 670, H.L.; 22 Digest (Repl.) 614; 7083.
- (2) *Buerger v. New York Life Assurance Co.* (1927), 96 L.J.K.B. 930; 137 L.T. 431; 43 T.L.R. 601, C.A.; Digest Supp.
- (3) *Paley (Princess Olga) v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 45 T.L.R. 365; 73 Sol. Jo. 283, C.A.; 11 Digest (Repl.) 612, 421.
- (4) *Smith v. Wilton*, 3 B. & Ad. 728.
- (5) *Krall v. Burnett* (1877), 25 W.R. 305, D.C.; 41 Digest 309, 1701.
- (6) *Brown v. Byrne* (1854), 3 E. & B. 703; 2 C.L.R. 1599; 23 L.J.Q.B. 313; 23 L.T. O.S. 154; 18 Jur. 700; 2 W.R. 471; 118 E.R. 1304; 41 Digest 611, 4388.

Appeal from an order and judgment of the Court of Appeal (SCRUTTON and LAWRENCE, L.J.J.; GREER, L.J., dissenting), dated Nov. 23, 1933, reversing a judgment and order of DU PARCQ, J., dated July 13, 1933, whereby he directed that judgment should be entered for the landlords, the present appellants who were the plaintiffs in the action for the sum of £53,359 17s. 9d. arrears of rent with costs.

The question raised by this appeal was whether the tenants or sub-tenants were

excused from the performance of certain obligations to pay rent to the landlords for premises in Santiago de Chile, the tenants' and sub-tenants' contention being that the laws of Chile had rendered the performance of such obligations impossible or illegal.

The facts which are summarised in the headnote are fully stated in the judgment of LORD SANKEY, L.C.

Pritt, K.C., and *Ernest Hancock* for the landlords.

Evershed, K.C., and *Harold Murphy* for the tenants and the sub-tenants.

The House took time for consideration.

Dec. 11. **LORD SANKEY, L.C.**—The appellant landlords are the successors in title of the late Hector Beéche in certain buildings and sites in Santiago de Chile. Mr. Beéche was at all material times a Chilean subject though, for the most part, resident in Paris. By an instrument executed at Buenos Aires on June 18, 1909, before the Chilean Consul there, he undertook to erect a building on a site forming part of his property in Santiago de Chile and granted a lease of the building from its completion to an Argentine company for twenty-five years at a rent for the first five years of £7,500 sterling per annum plus 10 per cent. of the cost of the building, increasing by £1,000 sterling for each subsequent period of five years. After stipulating for penal interest in the event of default in punctual payment the agreement provided in the fifth place as follows:

"Payment shall be effected monthly in advance in Santiago de Chile on the first day of each month by first-class bills on London at ninety days' sight."

In 1912 the Argentine company transferred all its assets and liabilities, including its rights and liabilities under the above-mentioned lease, to the tenant respondents the South American Stores (Gath and Chaves), Ltd., a company registered in England, hereinafter called the tenants. On Sept. 4, 1913, Mr. Beéche by an instrument, also executed at Buenos Aires before the Chilean Consul there, ratified this transfer and authorised the South American Stores Co. to sublet the premises to the other respondents the Chilean Stores (Gath and Chaves), Ltd., a company also registered in England and hereinafter called the sub-tenants. In the exercise of this authority the tenants by the same document sub-let the premises to the sub-tenants, who also bound themselves directly to Mr. Beéche to fulfil all the terms of the principal contract of lease. Both companies were to continue jointly bound to Mr. Beéche.

Meantime on Aug. 28, 1913, Mr. Beéche had granted a twenty-two years' lease of other premises belonging to him at Santiago de Chile to the sub-tenants. The rent was fixed at £600 monthly, with periodical increments,

"payable in Santiago de Chile at the residence or office of the owner or his representatives monthly in advance on the first working day of each month in first-class bills on London at ninety days' sight."

On Dec. 15, 1913, Mr. Beéche granted to the sub-tenants a further lease of certain additional premises in Santiago de Chile for twenty years from Sept. 1, 1915, at a rent of £50 sterling per month with periodical increments, payable as in the preceding lease. Both of the two last-mentioned leases were executed at Buenos Aires before the Chilean Consul there. Finally on Dec. 3, 1918, at Santiago de Chile, Mr. Beéche granted a lease to the sub-tenants of further premises in Santiago de Chile for sixteen years and ten months from Nov. 1, 1918, at a rent of £800 sterling per month with periodical increments, payable as in the two preceding leases. The sub-tenants undertook to obtain a guarantee from the tenants for the strict fulfilment of all the obligations contained not only in this last-mentioned lease but also in the two preceding leases of Aug. 28 and Dec. 15, 1913. This guarantee was subsequently given by the tenants on Dec. 12, 1918.

It will thus be seen that in each of the four leases the stipulated medium of payment was "first-class bills on London at ninety days' sight," and the place of payment was in each case Santiago de Chile.

The rents reserved by the four leases were duly paid by the sub-tenants up to and including, Nov. 1, 1931, although the stipulated medium of payment was not adhered

to. Since that date the tenants and the sub-tenants maintain that they have been disabled by supervenient Chilean legislation from paying their rents as stipulated, and they have deposited in court in Chile the amount of the rents in Chilean pesos at the current rate of exchange for sterling, subject to a 20 per cent. deduction directed by Chilean law.

The Chilean legislation in question consists of two statutes. The first of these statutes is dated July 30, 1931, and by its first article establishes "control of the international operations of exchange and the transfer of funds abroad," and entrusts this control to a committee. The third article of the statute empowers the committee to prohibit, *inter alia*, "(a) any operation of international exchange which does not come within the regular and legitimate movement of the economical and normal financial requirements or the dealing with special requirements"; and provides that "the classification of the operations will rest with the said control committee." Article 4 enacts that

"the Central Bank of Chile will be the only entity which can purchase and to which international exchange may be freely sold;

that other banking undertakings can purchase . . . international exchange . . . by permission of the control committee";

and that the operations with which the article deals "may only be carried out with the previous authorisation of the control committee." International exchanges are defined by art. 6 as

"every class of operations connected with bills of exchange, cheques, drafts, letters of credit, transfers of funds or orders for payment in foreign currency or national money if these are payable or should be completed abroad and every description of operations with banknotes or foreign currency with credits existing abroad in favour of persons domiciled or residing in Chile or with personal securities in foreign currency by undertakings domiciled abroad."

By art. 7 it is provided that

"without the previous authorisation of the control committee it is not permissible, *inter alia*, (a) to enter into contracts in the country in foreign currency nor require fulfilment of contracts of this description of currency entered into outside the country subsequent to this law."

Article 13 imposes penalties for breach of the statute.

The second statute, which is dated April 20, 1932, annulled the previous statute. Article 1 subjected "all international exchange transactions" to the provisions of the Act and defined international exchange transactions as denoting

"the purchase and the sale of all kinds of currency and gold in any form and bills of exchange, cheques, drafts, letters of credit, telegraphic orders, and documents of any other nature requiring the transfer of funds from Chile or vice versa."

By art. 2 the control of international exchange transactions was vested in an exchange control commission; art. 3 provided that "only the Central Bank of Chile shall buy and sell international exchange"; art. 4 required the commission to

"consider the particulars which may justify authorising the respective applicants to acquire instruments of international exchange and it shall fix the amount which each applicant may acquire. . . ."

Article 9, after providing for the liquidation by instalments of foreign currency deposits in commercial banks and of foreign currency obligations in favour of any bank, enacted that

"other obligations in foreign currency shall be demandable after authorisation of the commission of exchange control and in the amounts which the latter shall indicate. . . ."

Article 11 provided that "the payment of the prices stipulated in foreign currency in sales, contracts and rental of properties in Chile may be demanded in Chilean currency on the date of its maturity and at the exchange of the day of repayment."

In the present action the landlords sued the tenants and sub-tenants for £53,359 17s. 9d., being the agreed amount in sterling of the arrears of rent under the four leases, with accrued interest. The tenants and sub-tenants in their defence relied on the Chilean statutes whose material provisions I have summarised and alleged that these laws rendered it illegal or impossible to acquire foreign exchange in Chile or to pay the rents in Santiago de Chile by drafts in London without the authorisation of the control committee or commission, which they had been unable to obtain. It appeared that the tenants and sub-tenants had repeatedly applied to the committee or commission to authorise a draft at ninety days on London for the purpose of paying their rents as they fell due, but that their applications had been uniformly rejected.

It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do. The only questions accordingly which arise for decision in this appeal are (i) What is the true interpretation of the obligation which the tenants and sub-tenants have assumed in the matter of the payment of the rents due under the four leases? and (ii) What is the effect of the Chilean legislation upon this obligation?

DU PARCQ, J., gave judgment for the sum sued for. He was not satisfied that the critical words "first-class bills on London" meant, as the tenants and sub-tenants contended and Mr. Keik, a director of Erlangers, Ltd., testified, bills drawn by persons of well-known credit in Chile on bankers in London. If the words bore this meaning the learned judge was of opinion that such bills could not be obtained in Chile without the sanction of the statutory authority. As, however, he held that payment could, within the meaning of the leases, be made by bills drawn by a banker in Chile on a banker in London and that the tenants and sub-tenants had not established that it was impossible for them to procure such bills, the defence failed. On appeal, SCRUTTON and LAWRENCE, L.JJ., both accepted Mr. Keik's evidence and held that under the Chilean statutes it was impossible without the sanction of the statutory authority to obtain in Chile first-class bills on London within the true meaning of the leases. GREER, L.J., rejected Mr. Keik's evidence and agreed with the interpretation placed on the critical words by the trial judge, but he was of opinion that the second, but not the first, Chilean statute rendered it illegal to make payment in the stipulated manner, even as so interpreted, without the sanction of the statutory authority; he was accordingly in favour of holding that that part of the sum sued for which was applicable to the period before the enactment of the second Chilean statute was recoverable, but that the action should be dismissed as regards the balance.

I now turn to the two questions which arise for decision.

As to (i), what is the true interpretation of the obligation which the tenants and sub-tenants have assumed in the matter of the payment of the rent due under the four leases? The difficulty here arises on the words

"payable in Santiago de Chile at the residence or office of the owner or his representatives monthly in advance on the first working day of each month in first-class bills on London at ninety days' sight."

What is the meaning of "first-class bills on London"? Upon this point both parties tendered evidence, the first witness for the landlords being Mr. Jose Serrano and the first witness for the tenants and sub-tenants Mr. Keik. They took opposite views of the meaning of the words, and it becomes necessary to decide whose evidence the court ought to prefer. Having regard to the facts (i) that the term is a commercial one rather than a legal one; (ii) that Mr. Serrano is a young man who was only called to the Chilean Bar some four years before this case came on; (iii) that Mr. Keik is a director of Erlangers, Ltd., who has had forty-seven years' experience of banking in the City of London, and whose firm do a very large business in South America, including Chile; I am of opinion that the House ought to accept the evidence of Mr. Keik, which was to the effect that the words in question bear in Chile a special mercantile meaning, namely bills drawn in Chile by one or other of a select list of bankers and mercantile houses in Chile upon one or other of a select list of bankers and mercantile houses in London, and known technically as F.C.L. bills.

It was objected at your Lordships' Bar that evidence of this character was inadmissible. With that contention I do not agree. Without such evidence the court could not have come to a proper conclusion on what "first-class bills on London" mean in Chile. If the words are plain and unambiguous, it would be wrong, unless for exceptional reasons (as to which see *Smith v. Wilson* (4)), to admit evidence as to their meaning. For example, "freight," which is a well-understood term in a contract, cannot be explained by usage (*Krall v. Burnett* (5)), though its method of payment, which varies in each port, can (*Brown v. Byrne* (6)). Rent is rent, but the meaning of words prescribing the method of payment of rent may in some cases be explained by evidence. Undoubtedly the line between admissible and inadmissible evidence of usage or custom is difficult to draw, and some of the cases are hard to reconcile with any clear principle.

Without endeavouring to give an exhaustive definition of what evidence may be admitted, there are in cases like the present three conditions precedent to its being accepted: (i) the evidence must not conflict with a statutory definition; (ii) the evidence must be of a usage common to the place in question; and (iii) the evidence must expound and not contradict the terms of the contract.

In my view, the words "first-class bills on London" in this context are a term of art and point plainly to a specific thing which is to be handed over to the landlord, or his representative, as and for payment of rent at Santiago on the first working day of each month. The evidence as to what that specific thing really was, was, in these circumstances, admissible. The construction of the lease, therefore, is that it called for payment of the rent by bills on London drawn in Chile as hereinbefore described.

As to (ii), what is the effect of the Chilean legislation on this obligation? Evidence upon this point was given by Mr. Serrano, whose name I have already mentioned, and Dr. Enrique Bermudez. If one had to choose between them, I should prefer the evidence of Dr. Bermudez, having regard to his greater experience and knowledge. Dr. Bermudez had practised as an advocate in Chile for twenty years. He had been President of the Chamber of Deputies, Minister of the Interior, Minister of Justice, Minister in Mexico and ambassador to the Argentine and Spain.

While it is true that witnesses called to prove foreign law may refer to any passages in the code of their country as containing the law applicable to the case, the court is at liberty to look at those passages and to consider what is their proper meaning: (*Concha v. Murrieta*, *De Mora v. Concha* (1)). See also the recent decision of the Court of Appeal in *Buerger and another v. New York Life Assurance Co.* (2).

In the present case your Lordships have agreed translations of the Chilean laws applicable to the present circumstances, and we are entitled and indeed bound to construe the relevant provisions and to determine their meaning and effect after consideration of the English version before us. Holding as I do that the lease called for payment of rent by bills drawn in Chile as hereinbefore described, was such payment rendered illegal under the laws of Chile? There are two laws applicable, No. 4973, dated July 30, 1931, and No. 5107, dated April 2, 1932. GREER, L.J., in the Court of Appeal, thought that the first of these laws did not touch the landlord's case at all, but with all deference I am unable to agree with him. He was apparently under a misapprehension as to the effect of art. 1, which he regarded merely as a preamble, and not really as a prohibition. It is not necessary to make a microscopical examination of each one of the sections in question. Dr. Bermudez was clearly of the opinion that the class of bills required by the lease, that is F.C.L. bills, came within the mischief of the first law.

Article 6 brings within its sphere: (i) the getting of a bill, and (ii) the handing over of a bill. Both these are operations connected with bills of exchange and art. 1 places these operations under the control of the new committee. Articles 4 and 5 are mere machinery to carry out the purpose of the legislature. A person would have to go to the committee for leave to purchase a bill, and if he did get such leave, would have to go to the Bank of Chile for the bill. All such operations are under the control, and subject to the decision of, a control committee. It is admitted that the tenants and sub-tenants applied for leave from time to time to the committee and were always unable to obtain it. Without such leave it would have been illegal, and as it appears to me on the evidence impossible, to make payment of the rent in the manner described.

In no other form was rent payable. By English law an act is illegal if it necessitates something which is illegal. Beyond that an English court will have regard not merely to their own views of the foreign law, but to the interpretation put upon it by a competent foreign authority: (see *Paley (Princess Olga) v. Weisz and others* (3)).

In my opinion we ought not to disagree with the conclusion arrived at by the competent authority in Chile, or to differ from their construction of the law.

With regard to the second law, it is not necessary to say anything beyond this—that arts. 1, 2, and 9 clearly make such a transaction as is under discussion in the present case illegal, and on this point the Court of Appeal came to a unanimous decision.

For these reasons, the appeal should be dismissed with costs.

LORD BLANESBURGH, who has had to go to the Privy Council to resume the hearing of a part-heard appeal there, asks me to state that he agrees with the opinion which I have just expressed.

LORD TOMLIN.—I also agree, and I agree with the opinion which has been prepared by my noble and learned friend, **LORD RUSSELL OF KILLOWEN**, which I am about to read.

LORD RUSSELL (read by **LORD TOMLIN**).—I can state briefly the reasons which influence me in reaching the conclusion that this appeal should fail. There is no necessity to recapitulate the facts.

In the first place I have no doubt that the lease of June 18, 1909, and the other leases in the case, impose no obligation on the tenants and sub-tenants to pay rent thereunder in any other way than by delivering each month in Santiago de Chile to the lessor or his representative first-class bills on London at ninety days' sight, for the appropriate sterling sum. Upon the true construction of those documents no other form of rent is, in my opinion, reserved or payable.

In the second place the evidence of Mr. Lewis Holland Keik satisfies me that in these contracts, which relate to premises in Chile and the performance of which must take place in Chile, the words "first-class bills on London" bear a technical and special meaning and signify not any bill on London which could be called first class by reason of the financial repute and solvency of the parties to it, but a bill drawn in Chile by one of a selected list of bankers and mercantile houses in Chile upon one of a selected list of bankers and mercantile houses in London. Thus a bill drawn elsewhere than in Chile on London would not be a "first-class bill on London" within the commercial meaning of those words (or their Spanish equivalents) in Chile; nor would a bill drawn in Chile answer this description, no matter how solvent the parties to it might be, if they were not among the selected bankers and houses. For the purposes of this case, however, the important result of the evidence is that in order to pay the rents under the leases it would be necessary for the tenants and sub-tenants to deliver in Chile bills of exchange drawn on London in Chile.

This evidence of Mr. Keik's was in my opinion admissible as evidence of the peculiar meaning which the words bear in Chilean contracts relating to bills of exchange. The evidence resolves the latent ambiguity which lurks in the words in question; and it must be accepted, for there is no other competent evidence on the point. I say no other competent evidence, for I do not regard the two lawyers as proper witnesses to depose to matters of commercial usage: and Mr. H. G. de Béeche was obviously no expert on the point. **GREER, L.J.**, seems to have thought that Mr. Keik's evidence should be disregarded owing to the state of the pleadings; but the point to which his evidence was directed was plainly raised and argued at the trial without any objection by the landlords, who indeed obtained leave to call, and did call, Mr. H. G. de Béeche as a witness in rebuttal.

In the third place, upon a consideration of the Chilean Laws No. 4973 and No. 5107 and of the relevant evidence given by Mr. Serrano and Dr. Bermudez, I have come to the conclusion that at all material times it would have been illegal according to Chilean law if the lessees had, without the permission of the Control Committee set up under Law No. 4973, or the Exchange Control Commission set up under Law No. 5107, obtained and delivered in Chile bills of exchange drawn in Chile on London for the purpose of

satisfying their obligations under the leases. To do so would have been an operation of International Exchange within the definition contained in art. 6 of Law No. 4973, the control of which is vested in the Control Committee; and it would have been an International Exchange transaction within the definition contained in art. 1 of Law No. 5107, the control of which is vested in the Exchange Control Commission.

Finally, we must, I think, proceed upon the footing that the necessary permission of the committee or commission, as the case may be, was regularly applied for by the tenants and sub-tenants, was refused, and could not be obtained. The applications and refusals are admitted and no suggestion was made impeaching the bona fides of the tenants and sub-tenants in making the applications. They bona fide required and desired permission, but were unable to obtain it.

In these circumstances, it is in my opinion clear that it became impossible for the tenants and sub-tenants to perform their contracts under the leases without committing breaches of the Chilean law and rendering themselves liable to the consequent penalties. This affords a defence to the action.

It was suggested in argument that in some way the tenants and sub-tenants had not established a complete defence because they had not given affirmative evidence to prove that they had not in their possession a supply of "first-class bills on London" already drawn in Chile and acquired by the lessees before the coming into operation of Law No. 4973, which bills, it was said, could have been applied without illegality in satisfying the obligations under the leases. I do not pause to consider whether such bills could without illegality have been so applied, for I consider the suggestion fantastic, and one which it is not open to the landlords to make if they admit, as they do, that the applications of the tenants and sub-tenants to the committee and commission were bona fide applications.

The result is that this appeal must fail as against all the respondent tenants and sub-tenants.

LORD MACMILLAN.—I concur.

Appeal dismissed.

Solicitors: *Smiles & Co.; McKenna & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HAMMOND v. HANLON

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Swift, JJ.), December 18, 1934]

[Reported [1935] 1 K.B. 474; 153 L.T. 13; 104 L.J.K.B. 239; 99 J.P. 134; 51 T.L.R. 195; 33 L.G.R. 12; 30 Cox, C.C. 215]

Licensing—Club—Illegal dealing in intoxicating liquor—Person found on premises—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 82 (1), (3), s. 96 (1).

Section 96 (1) of the Licensing (Consolidation) Act, 1910, which dealt with search warrants authorising the entering of clubs, *held* not by implication to exclude the operation in the case of clubs of the general provisions relating to the issue of search warrants contained in s. 96 (1) of the Act, but s. 96 (1) adds to the provisions of s. 82.

Held, further: it was not a condition precedent of a conviction under s. 82 (3) of a person of being found in the place searched that a search for and seizure and removal of intoxicating liquor, as mentioned in s. 82 (1), should have taken place.

Notes. The Licensing (Consolidation) Act, 1910, has been repealed by the Licensing Act, 1953, s. 96 of the earlier Act being substantially re-enacted in s. 145 of the Act of 1953 and s. 82 by s. 152.

As to the application of the licensing laws to clubs, see 5 HALSBURY'S LAWS (3rd Edn.) 276 et seq., and for cases, see 8 DIGEST (Repl.) 671 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Case Stated by justices for the county of Durham.

At a court of summary jurisdiction sitting at Hebburn-upon-Tyne an information was preferred by Joshua George Hammond (hereinafter called "the appellant") under s. 82 (3) of the Licensing (Consolidation) Act, 1910, against Clara Hanlon (hereinafter called "the respondent") for that she, on Feb. 11, 1934, at the parish of Hebburn, in the county of Durham, unlawfully was found on certain premises—Nos. 41 and 42, Lyon-street, known as the Hebburn Branch Gasworkers and General Labourers Social Club and Institute, Ltd.—for the purpose of illegally dealing in intoxicating liquor, contrary to the above subsection.

Upon the hearing of the information the following facts were proved or admitted: (i) On Feb. 11, 1934, in the execution of a search warrant granted to the appellant in pursuance of s. 82 (1) of the Licensing (Consolidation) Act, 1910, the appellant entered upon the above premises, which were a duly registered club. (ii) The respondent, together with forty-five other persons who were neither members, guests of members, nor affiliated members of the club, was found on the premises, and it was proved that the respondent, together with the forty-five other persons, had been served with and had paid for intoxicating liquor. (iii) The appellant seized five glasses of beer, one of which had been paid for by the respondent, and was being consumed by her. (iv) The appellant took or caused to be taken the names of the respondent and the other forty-five persons. (v) There were upon the premises at the time of the entry by the appellant approximately 150 persons in all. (vi) There was in the bar of the premises a considerable amount of unsold intoxicating liquor. (vii) When the appellant entered there were a large number of glasses of beer on the tables in the premises, but many of them belonged to members, guests of members, or affiliated members of the club.

On the part of the appellant it was contended: (i) That the appellant was entitled to apply for and execute a search warrant under s. 82 (1) of the Licensing (Consolidation) Act, 1910, for the purpose of entering upon the premises, searching for, seizing and removing such intoxicating liquor as he had reasonable grounds to suppose was on the premises for the purpose of unlawful sale. (ii) That any persons found on the premises for the purpose of illegally dealing in intoxicating liquor by a constable who had entered the premises in pursuance of a warrant granted under s. 82 (1) of the Act were guilty of

an offence under s. 82 (3), and that the seizure of intoxicating liquor was not a condition precedent to the commission of an offence under s. 82 (3) by such persons. (iii) That the seizure of five glasses of beer was a sufficient seizure to justify the presumption raised by s. 82 (3) that any person found at the time on the premises must be deemed to have been on the premises for the purpose of illegally dealing in intoxicating liquor. (iv) That under s. 82 (3) the onus of distinguishing whether any person was upon the premises for the purpose of illegally dealing in intoxicating liquor or not rested in the first instance upon the appellant, and that, therefore, he was not bound to lay an information against all persons found upon the premises, but only against such persons as he considered were upon the premises for the purpose of illegally dealing in intoxicating liquor.

On the part of the respondent it was contended that: (i) A search warrant issued under s. 82 of the Licensing (Consolidation) Act, 1910, was not applicable to registered clubs, on the ground that, although a registered club was not authorised to sell intoxicating liquor, it was entitled to have drink upon its premises for the purpose of distribution among its members or affiliated members or guests; that the section contemplated a raid upon premises which were neither authorised to sell nor to have drink for consumption thereon; that by s. 96 of the Act a search warrant authorised to be issued under that section particularly applied to clubs only, which indicated that the Act did not contemplate s. 82 being put into operation against clubs, and that a search warrant could be put into force, so far as licensed clubs were concerned, only under s. 96. (ii) That the appellant had not carried out his duties under s. 82 (1), inasmuch as he only seized five glasses of beer, whereas it was proved that forty-six persons, including the respondent, had been supplied with and had paid for intoxicating liquor, and that seizure of five glasses of beer was not a sufficient seizure under sub-s. (1), which contemplated a search and seizure and a removal of intoxicating liquor which was on the premises, and which there was reasonable ground to suppose was there for the purpose of unlawful sale. (iii) That the words in sub-s. (3), "until the contrary is proved," did not leave the discretion as to proof in the appellant but to a court of summary jurisdiction, and that, therefore, the appellant not having laid an information against all persons present at the time of his entry upon the club under his search warrant, the proceedings against the respondent were void.

The justices were of opinion (i) that the appellant was entitled to apply for and execute a search warrant under s. 82 (1) of the Act, and that the fact that a registered club was entitled to have intoxicating liquor on its premises did not oust the right of the appellant to a search warrant under that section; and that the appellant was entitled under sub-s. (3) to take upon himself the responsibility of distinguishing between the persons who were on the premises legitimately and those who were there for the purpose of illegally dealing in intoxicating liquor, and that the proceedings were not vitiated by the fact that the appellant had taken the names of forty-six persons only. They further held, however, that before the respondent could be convicted under sub-s. (3) a search for, seizure, and removal of intoxicating liquor as set out in sub-s. (1) was a condition precedent and, in view of the fact that it was proved that at least forty-six persons, including the respondent, had been illegally dealing in intoxicating liquor, the seizure of five glasses of beer was not a sufficient seizure to satisfy sub-s. (1). On this last ground they dismissed the information.

The appellant appealed to the Divisional Court.

The Licensing (Consolidation) Act, 1910, provides:

Section 82: "(1) Any justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction, whether a building or not, in which that liquor is not authorised to be sold by retail, may in his discretion grant a warrant under his hand, by virtue whereof it shall be lawful for any constable named in the warrant . . . to enter . . . the place named in the warrant . . . and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in the place for the purpose of unlawful sale at that or any other place, and the vessels containing the liquor. . . (3) When a constable has

entered any premises in pursuance of a warrant under this section, and has seized and removed liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on the premises for the purposes of illegally dealing in intoxicating liquor and be liable in respect of each offence to a fine not exceeding 40s."

[By s. 95 power is given to courts of summary jurisdiction to strike registered clubs off the register on various grounds, one ground being that illegal sales of liquor have taken place upon the premises.]

Section 96: "(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for supposing that any registered club is so managed or carried on as to constitute a ground for striking it off the register, or that any intoxicating liquor is sold or supplied, or kept for sale or supply, on the premises of an unregistered club, he may grant a search warrant to any constable named therein. (2) A search warrant granted under this section shall authorise the constable named therein to enter the club . . . and to inspect the premises of the club, to take the names and addresses of any persons found therein, and to seize any books and papers relating to the business of the club."

D. H. Robson for the appellant.

S. Chapman for the respondent.

LORD HEWART, C.J.—I desire to say that this case has been extremely well argued on both sides, and I should have no doubt at all upon the matter for my own part if it were not for the fact that in the course of the argument my brother AVORY, with his unrivalled knowledge of licensing law, has, at any rate suggested, a possibility of doubt. Nevertheless, looking upon the whole matter, I have come to the conclusion that this appeal ought to be allowed, for the reason that all of the contentions on the part of the appellant were in point of law correct.

The difficulty which is suggested is that in some way or other s. 96 of the Licensing (Consolidation) Act, 1910, which deals expressly with search warrants authorising the entering of clubs, by implication excludes the provisions of s. 82 of that Act in the case of clubs.

As a matter of history, everybody knows that s. 82 of the Act of 1910 goes back at least to the year 1874, before the term "registered club" existed. If it had been intended in the year 1910 in the Consolidation Act to exclude registered clubs from the operation of s. 82, a single phrase, either in s. 82 or in s. 96, would have accomplished that purpose. No such words are to be found in either section, and, therefore, the argument comes to be that, by implication, the particular provisions of s. 96 in the case of registered clubs must be taken to supersede and exclude the general, but in some ways less harsh, provisions of s. 82 relating to any place within the jurisdiction of the justice referred to, whether it be a dwelling or not.

With the greatest respect to those who have raised or developed that crux, it does not appear to me that there is any difficulty in saying that ss. 82 and 96 live side by side in this Act, and that what s. 96 does is in certain respects by no means unimportant—as, for example, the seizure of books and papers relating to the business of a club—to add to the provisions already contained in s. 82. In the absence of clear words or a more clear implication, at any rate, that s. 96 has excluded in the case of clubs the operation of s. 82, I am of the opinion, with diffidence based only upon the ground I have already mentioned, that s. 96 is, within its areas and with its special purposes, superimposed upon s. 82.

I do not intend to repeat the contentions of the appellant which were so clearly laid before the court by his counsel, but they seem to me to be correct. I think that this appeal ought to be allowed, and that the case ought to go back to the justices with an expression of the opinion of this court that the offence which was charged was proved.

AVORY, J.—The only ground upon which the justices have dismissed the information is to the effect that, before the respondent could be convicted under s. 82 (3), a

search for and a seizure and removal of intoxicating liquor as set out in sub-s. (1) was a condition precedent, and, in view of the fact that it was proved that at least forty-six persons, including the respondent, had been illegally dealing in intoxicating liquor, the seizure of five glasses of beer was not a sufficient seizure to satisfy s. 82.

In that view I think the justices were clearly wrong. They seem to have assumed that all the steps to be taken by the police officer are to proceed in a certain order—that, first, he is to examine the premises; that then he is to search for intoxicating liquor; that then he is to seize and to remove any intoxicating liquor found which there is reasonable ground to suppose is in the place for the purpose of unlawful sale; and that it is only after all those events have happened that he is authorised to ascertain what persons are found on the premises and, if necessary, to take their names, and that the persons so found after the other events have happened are to be deemed to have been on the premises for the purposes of illegal dealing.

I think that is quite a wrong construction of the section, and that it contemplates persons who may be on the premises at the time when the officer arrives, and that it is no condition precedent to their being deemed to be there for the purpose of illegal dealing that he should have seized what the justices think is the proper amount of intoxicating liquor. They think in this case that, because there were forty-six persons present, the seizure of five glasses of beer was not a sufficient seizure. Therefore, I agree, assuming s. 82 applies to this case, that the justices ought to have found the offence proved against this particular respondent.

But I wish to express a doubt which has not been completely removed, although it has been modified, by the judgment which LORD HEWART, C.J., has delivered. I express a doubt whether s. 96 was not intended to be in itself a complete code of procedure in the case of a registered club, where it is obvious that intoxicating liquor may be the subject either of a lawful sale or of an unlawful sale. I am influenced in expressing that doubt by the practical difficulty which arises in the case of a registered club when the officer is proceeding under s. 82, which empowers him to remove any intoxicating liquor which there is reasonable ground to suppose is in the place for the purpose of unlawful sale. In the case of a registered club it seems to me impracticable, if not impossible, for the police officer to determine by any inspection which of the liquor on the premises is intended for the purpose of unlawful sale and which is intended for the purpose of lawful sale.

That is the ground upon which I have expressed this doubt, but I cannot abstain from appreciating that it is possible that s. 96 is meant to be supplementary to s. 82, and to give to a police officer in the case of a registered club some additional powers which are not to be found in s. 82.

I agree that the case ought to be sent back to the justices to find that the offence was proved.

SWIFT, J.—I am in entire agreement with the judgment which was delivered by LORD HEWART, C.J.

The only difficulty which I have had during the hearing of the arguments has been the doubt which was suggested by my brother AVORY, but I am quite satisfied that s. 82 is as applicable to registered clubs as it was to unregistered clubs between the years 1874 and 1902, when there were no such things as registered clubs. If there had been an illegal sale, as opposed to a distribution among the members themselves of their own alcoholic liquor, in the premises of a club before 1902, there can be no doubt that an offence giving rise to proceedings under s. 82 would have been committed, and when registered clubs were introduced in 1902 extra provision had to be made for dealing with them.

In addition to regulations for the distribution of intoxicating liquor, certain other obligations were put upon registered clubs, and certain grounds were specified by which they could be removed from the register. They are to be found in s. 95, and in order that s. 95 might be fully operative, s. 96 was added, giving to magistrates and the police powers additional to those given by s. 82 and applicable only to clubs. A magistrate was given the power to issue a warrant if he is satisfied

"that there is reasonable ground for supposing that any registered club is so managed or carried on as to constitute a ground for striking it off the register,"

and the ground may arise from the doing of something quite apart from illegal sale of intoxicating liquor. The next line: "or that any intoxicating liquor is sold or supplied or kept for sale or supply," applies to unregistered clubs, but, quite apart from the illegal sale of intoxicating liquor, there may be grounds for striking a club off the register, and the search warrant which is granted under s. 96 authorises entry, inspection of the premises, the taking of names and addresses, and the seizure of any books and papers relating to the business of the club. If the magistrates and police had to rely only upon s. 82, the seizure of any books or papers would not be permitted. It seems to me that s. 96 was intended to give additional powers and not to detract from the powers of s. 82.

With regard to the difficulty which my brother AVORY has suggested about a police officer not being able to discriminate between that liquor which was intended for legitimate use and that which was intended for illegal sale, it seems to me that it cannot arise. The officer may seize that about which he has no doubt. I do not think he is bound to seize all about which he has no doubt. He may certainly seize that about which he has no doubt, and if there is any about which he is doubtful it seems to me that he solves his difficulty by seizing all that he finds upon the premises.

Having regard to the views which I have expressed, I adopt, if I may respectfully say so, the judgment of LORD HEWART, C.J., for the reasons given by him, and I agree that this case must be sent back for the purpose of conviction.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe, & Co.*, for *Newlands, Newlands, & Patterson*, Jarrow; *King, Wigg, & Brightman*, for *Francis J. Lambert*, Gateshead.

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

DURRANT v. BRITISH FIBROCEMENT WORKS, LTD

[COURT OF APPEAL (Slessor and Romer, L.J.J.), October 26, 1934]

[Reported 104 L.J.K.B. 222; 152 L.T. 205; 27 B.W.C.C. 460]

Workmen's Compensation—Industrial disease—Certificate specifying date of commencement of disablement—Finality—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 43.

On Oct. 21, 1930, the workman was certified to be suffering as from Oct. 9, 1930, the date on which he left the employment of the respondents, from an industrial disease, dermatitis, due to asbestos dust and to the nature of his employment by the respondents. From Dec. 2 to Dec. 29, 1930, and from May 12, 1931, to March 8, 1932, he was employed by other employers on other work at lower wages. On Jan. 6, 1931, he obtained a certificate of disablement as from Dec. 29, 1930, and on March 9, 1932, he obtained a certificate of disablement as from March 8. On a claim by the workman for compensation on the ground that since Oct. 9, 1930, he had been disabled by the disease from earning full wages,

Held: the certificate of Oct. 21, 1930, was final and conclusive that the disablement began on Oct. 9, for the certificates given on Jan. 6, 1931, and March 9, 1932, did not vitiate that certificate and must be treated as nullities so far as the statements in them as to the date of the commencement of the disablement.

Timmins v. Brodsworth Main Colliery Co., Ltd. (1), [1934] 2 K.B. 361, distinguished.

Notes. The Workmen's Compensation Acts were repealed by the National Insurance (Industrial Injuries) Act, 1946, but that Act provides a system of insurance against personal injury caused by accident and s. 55 (1) extends that insurance to industrial diseases.

Considered: *Richards v. Goskar*, [1936] 3 All E.R. 839. Referred to: *Eaton v. Wimpey & Co.*, [1937] 4 All E.R. 583.

As to industrial diseases, see 34 HALSBURY'S LAWS (2nd Edn.) 969 et seq., and for cases, see 34 DIGEST 463 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

- (1) *Timmins v. Brodsworth Main Colliery Co., Ltd.*, [1934] 2 K.B. 361; 103 L.J.K.B. 707; 151 L.T. 231; 50 T.L.R. 458; 78 Sol. Jo. 471; 27 B.W.C.C. 283, C.A.; Digest Supp.
- (2) *M'Dougall v. Summerlee Iron Co., Ltd.* (1927), 20 B.W.C.C. 419; 1927 S.L.T. 364, H.L.; Digest Supp.
- (3) *Meredith v. Ebbw Vale Steel, Iron and Coal Co., Ltd.* (1925), 133 L.T. 641; 18 B.W.C.C. 251, C.A.; 34 Digest 471, 3846.

Appeal by William James Durrant, a workman employed by the respondents, asbestos slate manufacturers, in making asbestos slates, from an award made by Hrs HONOUR JUDGE KONSTAM, K.C., sitting as an arbitrator under the Workmen's Compensation Act, 1925, in the Dartford County Court of Kent.

On March 31, 1933, the workman filed a request for arbitration, claiming that since Aug. 29, 1930, as from which date he had been certified to be suffering from dermatitis produced by dust or liquids, he being thereby disabled from earning full wages at the work at which he was employed, he was totally incapacitated, and, alternatively, that he was partially incapacitated, but was entitled, under s. 9 (4) of the Act of 1925, as amended by the Workmen's Compensation Act, 1931, to be treated as totally incapacitated, the duration of incapacity being uncertain. His average weekly earnings during the twelve months before his disablement, he alleged, were £3 4s. 9d. Liability had been acknowledged, and weekly compensation of 30s. was paid him from the date of disablement to Dec. 2, 1930, when he was employed by the Bexley Heath Urban District Council till Dec. 29, 1930. Thirty shillings a week was again paid to him from Dec. 29, 1930, to May 12, 1931, when he re-entered the employment of the Bexley Heath Council until March 8, 1932. He now claimed 3s. 1d. a week from Dec. 2, 1930, to Dec. 29, 1930, and from May 12, 1931, to March 9, 1932, on the basis of partial incapacity, and thereafter 30s. a week and to continue, and (or) a declaration of liability.

The judgment of SLESSER, L.J., states the various dates on which the workman obtained certificates of disablement from dermatitis, an industrial disease within the Workmen's Compensation Act, 1925. On the hearing of the appeal leave was given to amend the particulars of claim in order that the workman might found his case upon a certificate dated Oct. 21, 1930, which certified that the disablement commenced on Oct. 9, 1930, and the case on appeal was dealt with on that basis.

On June 17, 1933, the employers filed their answer to the workman's claim in the county court, and thereby denied liability on the following grounds: (i) The applicant is not, and has not been since some date before Dec. 2, 1930, incapacitated as a result of the disablement by disease certified on Aug. 29, 1930. (ii) The respondents deny that the applicant is entitled to any compensation in respect of the disease for which he was certified on Aug. 29, 1930, after Oct. 9, 1930; or alternatively Oct. 21, 1930, when he obtained a new certificate of disablement from dermatitis. (iii) Alternatively, the respondents deny that the applicant is entitled to any compensation in respect of the disease so certified after Dec. 29, 1930, or alternatively, Jan. 6, 1931, when he was again certified as suffering from dermatitis. (iv) Alternatively, the respondents deny that the applicant is entitled to any compensation in respect of the disease so certified after March 8, 1932, being the date of disablement certified by a certificate of the certifying surgeon dated March 9, 1932. (v) If the applicant suffered any incapacity between Dec. 2, 1930, and Dec. 29, 1930, which is denied, the same resulted from the disable-

ment from disease certified on Oct. 21, 1930. (vi) If the applicant suffered any incapacity between May 12, 1931, and March 8, 1932, which is denied, the same resulted from the disablement from disease certified on Jan. 6, 1931. (vii) If the applicant suffered or suffers any incapacity after March 8, 1932, which is not admitted, the same resulted, and results, from disablement from disease certified on March 9, 1932. (viii) This application is misconceived. If the applicant is entitled to compensation at all it is in respect of the disablement certified as having commenced on March 8, 1932, while the applicant was in the employment of the Bexley Heath Urban District Council. The applicant at that date had not been employed by the respondents for more than twelve months, and this claim should have been made against the Bexley Heath Council as the last employers within the meaning of s. 43 of the Act. (ix) The respondents do not admit that the weekly payments made by them from time to time and set out in the claim made by the appellant infer any acceptance of liability resulting from the certificate of disablement dated Aug. 29, 1930, except the payments from Aug. 28, 1930, to Sept. 24, 1930, and deny any compensation was paid as alleged between Sept. 24, 1930, and Oct. 9, 1930, and deny that the appellant's pre-accident wages were £3 4s. 9d. a week.

The county court judge made an award in the following terms: Award for respondents with costs, on the ground that the court is bound by s. 43 of the Workmen's Compensation Act, 1925, and by the decision in *Timmins v. Brodsworth Main Colliery Co.* (1).

The workman appealed on the ground that on the facts proved in evidence he was entitled to an award of compensation.

Ronald Smith for the workman.

Edgar T. Dale for the respondent employers.

SLESSER, L.J.—This is a difficult case, as are all these cases which are concerned with the granting of more than one certificate under s. 43 of the Workmen's Compensation Act, 1925. In the present case the man was originally certified to be suffering from dermatitis due to asbestos dust, being one of the diseases to which the Workmen's Compensation Act applies, and thereby disabled from earning full wages.

There is no question with regard to that certificate. The disease had been contracted through long-continued exposure to dust or liquids in the industry, and that certificate has been taken and treated throughout, whatever its legal effect may be, as being a certificate which satisfies all the requirements of para. 2 of the extension of the schedule to s. 43 of the Act dealing with dermatitis.

As a matter of fact, after that certificate of Aug. 29, 1930, certifying that the disablement commenced on Aug. 28, 1930, had been granted, it is common ground that from Sept. 24 to Oct. 9, 1930, the workman returned to his old work with the employers at his full wages, and in accordance with the decision of this court in *Timmins v. Brodsworth Main Colliery Co.* (1) it is unarguable that the disablement had not ceased when he returned to that employment. The workman obtained a second certificate dated Oct. 21, 1930, which certified a disablement commencing on Oct. 9, 1930, and application has been made to us during the hearing of this appeal by counsel for the workman for leave to amend the particulars of claim in order that he may found his case upon the certificate dated Oct. 21, 1930, which, as I have said, certified that the disability started on Oct. 9, 1930. We have given leave for that amendment to be made, and the case has been dealt with on that basis.

The importance of the amendment which was asked for was that after Oct. 9, 1930, the workman did not again return to the work in the process of which he had contracted dermatitis, to which the two certificates which I have mentioned apply. The evidence is that subsequently—the dates are not very material—he did obtain work with a local authority in digging trenches. He says in his evidence that after Dec. 2, 1930, when payment to him of compensation ceased, he went to work as a road-mender under the Bexley Urban District Council, digging 16 in. trenches, and that his dermatitis broke out again. Subsequently he obtained two more certificates, a third certificate dated Jan. 6, 1931, certifying that the disablement commenced on Dec. 29, 1930; and yet another certificate on March 9, 1932, certifying that disablement commenced on March 8, 1932.

The important matter to be considered, to my mind, is that after the certificate of Oct. 21, 1930, on which the workman now relies, he never went back to the work in which he had been engaged at the time when he obtained the certificate.

In my view, the learned judge was wrong in coming to the conclusion that this case was decided by *Timmins v. Brodsworth Main Colliery Co.* (1). *Timmins's Case*, it appears to me, as I understand the decision of the court in that case—though unhappily I was a dissenting member—was based upon the fact that there the workman, after obtaining one certificate that he suffered from nystagmus, returned to work at the coal mine, on his old work, and it was said by the court that in those circumstances he was no longer able to say that he was disabled by reason of his nystagmus from performing his work in the employment in which he had been engaged. LORD HANWORTH ([1934] 2 K.B. at p. 372) quotes the passage from LORD WARRINGTON in *M'Dougall v. Summerlee Iron Co., Ltd.* (2) to this effect:

"The material circumstance is that the disablement, which is essential to the accident, had ceased,"

and my Lord also says (at p. 371):

"That certificate [that is the second certificate] was given after the workman's return to work, which was an overt act indicating that the effects of the first accident had passed away";

ROMER, L.J., in his judgment, bases his judgment, as I read it, upon the same considerations.

If that be so, that case does not seem to me to be at all conclusive of a case where admittedly the workman did not return to his old work at all. The work, the long and continued exposure in which produced the dermatitis, and to which the certificate relates, was the work of making asbestos slabs. The work which he did after the certificate of Oct. 21 may or may not have exposed him to dust or liquids. We are not told; all we know is that he was working in a 16 in. trench for a local authority.

In those circumstances the position, to my mind, is that a certificate that the man has been disabled has been duly given, and there is no evidence before the court that that disablement had ever come to an end. Counsel for the employers raises an argument, not based, I think, upon anything that I find in the case of *Timmins* (1) but which is deserving of consideration.

As I say, I do not think there is any evidence that this workman's disablement had come to an end, and therefore, whether counsel's argument be right or wrong, I think the learned judge was clearly wrong in thinking that this case was determined by *Timmins's Case* (1).

Counsel points out that in the third and fourth certificates it was stated that the workman, who was examined on the dates I have mentioned, was suffering from dermatitis produced by dust or liquids, being one of the diseases to which the Workmen's Compensation Act applies, and was thereby disabled from earning full wages at the work at which he has been employed; and on the certificates the disablement commenced, in the one case on Dec. 29, 1930, and in the other on March 8, 1932. I think it follows from counsel's argument that the later of those certificates must in its turn exclude the earlier. He says that each certificate is final and conclusive; and when the later certificate was given on March 9, 1932, stating that the disablement commenced on March 8, 1932, it was no longer open to the workman, notwithstanding the fact that the employer was unable to prove any cessation of the original disablement, to say that the disablement commenced on Oct. 9, 1930. Counsel argues that such a contention would offend against the conclusiveness of the certificate of March 9, 1932, and that the statutes and all the authorities tell us that these certificates must be regarded as final and conclusive. I think the difficulty in counsel's way is to be found in the very contention on which he relies—that these certificates are final and conclusive.

In my opinion, the certificate of Oct. 21, 1930, is final and conclusive that the disablement commenced on Oct. 9, 1930, and that the workman has since been precluded from earning full wages at the work on which he has been employed. The certificates which

were given subsequently do not vitiate that first certificate. Where the dates of disablement stated in the later certificates are inconsistent with the date stated in the first certificate, to that extent the later certificates must be treated as nullities. The only certificate which is in force is the first one, which is still conclusive.

This point to some extent was dealt with in *Meredith v. Ebbw Vale Steel, Iron and Coal Co., Ltd.* (3) and ATKIN, L.J., says:

"The learned county court judge, I think, has come to the conclusion that where there are two certificates it follows as a matter of law that the second certificate prevails, and, if the second certificate gives the date of the commencement of the disability, that that must necessarily be the date of the accident from which the workman can afterwards claim his compensation and that only. I am not prepared to decide that point. It occurs to me that there may well be cases in which, a certificate having been obtained, the workman may be able to satisfy the county court judge that it was necessary to obtain a second certificate to show that in fact he was suffering from a disability which was the original disability originally certified by a former certificate."

In this case, unfortunately, I think, it becomes necessary to decide this point, and, in my view, the first certificate is still conclusive. The workman is entitled to say that his disability continues, and, therefore, in my opinion, he was entitled to succeed in his application. Owing to the effect of the amendment which we have allowed, the case will have to go back to the learned county court judge for an adjustment on the basis that the workman is certified as from Oct. 9, 1930, but so far as the principle is concerned, I am of opinion that this appeal succeeds and that *Timmins's Case* (1) does not apply.

ROMER, L.J.—I agree. This case was brought before the learned county court judge on the footing that the certificate that governed the matter was that of Aug. 29, 1930. After the date of that certificate the disablement to which the certificate refers came to an end because on Sept. 24 the workman resumed his old work with his employers and continued to do that work until Oct. 9. In those circumstances the learned county court judge held, and, in my opinion, held rightly, that the case as presented to him was covered by the decision of this court in *Timmins v. Brodsworth Main Colliery Co., Ltd.* (1), and he dismissed the workman's application. The workman has now asked for leave to amend and that leave has been given, and by his amendment he now seeks to rely upon the certificate that he obtained on Oct. 21, 1930, in respect of the disablement, the new disablement, that began on Oct. 9, from which date he has been compelled by this disease to abandon his work.

It is said on the part of the employers that the case is still covered by the decision in *Timmins's Case* (1). I do not take that view. What this court had to consider in that case was the position of a workman who recovered from the disablement referred to in the certifying surgeon's certificate, but subsequently became again disabled, and in respect of that second disablement obtained a further certificate. The majority of this court held that when the first disablement ceased, so did the notional accident which was deemed to have happened by virtue of the first certificate, and when the second certificate was given a fresh, independent accident was deemed to have happened as on the date mentioned in that certificate as the commencement of the disablement. This court was not concerned in any way in that case with the position of a workman who had obtained a second or more certificates where the disablement referred to in the first certificate still existed. As regards that case counsel for the employers then argued that every certificate given by a certifying surgeon was conclusive if there was no later certificate. Again I do not take that view. In my opinion, where a certifying surgeon certifies that a workman is suffering from an industrial disease, and is thereby disabled from earning full wages at the work at which he was employed, and specifies in the certificate the date for the commencement of that disablement, the certificate is conclusive that at the date of the beginning of the disablement an accident happened to the workman causing him personal injury for which he is entitled to be compensated under the Act.

That certificate being conclusive that the notional accident happened on a certain day, and that the notional injury, accordingly, was suffered by the workman on that particular day, it is not open to a certifying surgeon while that disablement exists to certify that the disablement was due to an accident happening at another date. The first certificate is conclusive, and, in my opinion, its conclusiveness precludes a certifying surgeon from making such a certificate. If he does, as he has in this case, make another certificate, that certificate is a nullity. That was the view I ventured to express in the course of my judgment in *Timmins's Case* (1) and it is a view which at present I see no reason to depart from. That being so, this certificate of March 9, 1932, which certifies that the disablement—it is the same disablement; it never stopped—commenced on March 8, 1932—one-and-a-half years, be it observed, after the workman had left the employment of the respondents—was a mere nullity. I agree that this case should go back to be tried again in its amended form.

Appeal allowed

Solicitors: *Shaw, Son, & Clark*, for *Baily & Goff*, Dartford, Kent; *Charles St. A. Butcher*.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

Re ALLEN, CRAIG & CO. (LONDON), LTD.

[CHANCERY DIVISION (Bennett, J.), March 7, 8, 9, 12, 13, 14, 15, 1934]

[*Reported* [1934] Ch. 483; 103 L.J.Ch. 193; 151 L.T. 323; 50 T.L.R. 301; 78 Sol. Jo. 223]

Company—Auditors—Duty to report to members on accounts—Report sent to secretary of company only—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 134 (1).

By s. 134 (1) of the Companies Act, 1929, it was provided: "The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office. . . ."

Held: the words "the members" in the subsection meant "the members assembled in general meeting"; the auditors had no power to convene a general meeting; and, therefore, there was no duty on them to make their report personally to the members in general meeting, but their duty under the subsection was performed by their sending the report to the secretary of the company.

Notes. Section 134 (1) of the Companies Act, 1929, has been replaced by s. 162 (1) of the Companies Act, 1948, which includes the provisions of s. 134 (1) of the earlier Act and extends the powers and duties of auditors.

As to the powers and duties of auditors, see 6 HALSBURY'S LAWS (3rd Edn.) 383 et seq.; and for cases, see 9 DIGEST (Repl.) 587 et seq. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

- (1) *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 36 W.R. 322; 3 T.L.R. 841; 9 Digest (Repl.) 588, 3889.
- (2) *Newton v. Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378; 75 L.J.Ch. 627; 95 L.T. 135; 54 W.R. 621; 22 T.L.R. 664; 50 Sol. Jo. 593; 13 Mans. 267; 9 Digest (Repl.) 100, 453.
- (3) *Re London and General Bank, Ltd. (No. 2)* (1894), 72 L.T. 227; 11 T.L.R. 156; 39 Sol. Jo. 180; affirmed, [1895] 2 Ch. 673; 64 L.J.Ch. 866; 73 L.T. 304; 44 W.R. 80; 2 Mans. 555; 12 R. 520, C.A.; 9 Digest (Repl.) 643, 4275.

- (4) *Cuff v. London and County Land and Building Co., Ltd.*, [1912] 1 Ch. 440; 81 L.J.Ch. 426; 106 L.T. 285; 28 T.L.R. 218; 19 Mans. 166, C.A.; 9 Digest (Repl.) 587, 3882.

Summons.

Allen, Craig & Co. (London), Ltd., were registered in July, 1921, as a private company. The company made considerable losses during the time it carried on business. Balance sheets and profit and loss accounts had been prepared annually from the end of the first year of carrying on business, namely, from June 30, 1922, until Dec. 31, 1930, and such balance sheets and profit and loss accounts showed a loss in each year. The balance sheets were signed by two directors and by the auditors. The auditors also signed reports on the balance sheets calling attention to the serious financial position of the company. The auditors sent the balance sheets with their reports to the secretary of the company only. The directors never called a meeting of the company which went into liquidation on Feb. 20, 1933. The liquidator showed in his statement of affairs a deficiency of assets of £4,813. The respondent director had acted as managing director of the company during the whole of the period of the existence of the company and throughout that period he had received a salary of £1,000 a year. During the latter part of the period he was also chairman of the company. The respondent auditors were auditors of the company throughout the period in which it carried on business.

The liquidator took out a summons against the managing director and the auditors claiming (inter alia)

"a declaration that the auditors as auditors of the company were guilty of misfeasance or breach of trust in failing to make a report to the members of the company that the company was insolvent on June 30, 1925, and at all material times thereafter."

Christie, K.C., for the liquidator.—Section 134 (1) of the Companies Act, 1929, requires the auditors to make a report to the members of the company. That means to all the members. The sending of the report merely to the secretary does not comply with the requirements of the section. He referred to *Leeds Estate Building and Investment Co. v. Shepherd* (1).

Alexander Anderson for the respondent director.

Cohen, K.C., and *J. B. Lindon* for the respondent auditors.—The only possible channel through which the auditors can make their report is the executive of the company. Therefore, the sending of the report to the secretary complied with the requirements of the section. He referred to *Newton v. Birmingham Small Arms Co.* (2); *Re London and General Bank* (No. 2) (3), and *Cuff v. London and County Land and Building Co.* (4).

BENNETT, J. [having dealt with other matters raised by the summons].—There remains for consideration the position and the liability of the auditors, and that gives rise to a novel question of considerable importance, not only to those persons who act as auditors to companies registered under the Companies Acts, but also to persons who invest their moneys in limited companies. The case against the auditors is set out in the points of claim in this way:

- "(16) In breach of their duty as auditors of the company the respondent firm failed and neglected either to make any report to the members of the company on the accounts examined by them after the year ending on June 30, 1924, or to take any steps whatever to inform the members of the company that it was insolvent. (17) The liquidator is unable to say when the respondent firm first ascertained that the company was insolvent, but they were aware of this fact in the month of December, 1928, and at all material times thereafter. (18) The respondent firm did not choose to attend or be represented at any general meeting of the company, but they had at all material times access to the minute books of the company, and well knew that the company's accounts were being suppressed and that its insolvency was being concealed from the members, and further that their said reports on the balance sheets of June 30, 1925, and June 30, 1926, were never laid before the company in general meeting or otherwise communicated to the members.

(19) In the circumstances, it was the duty of the respondent firm to take adequate steps by attending a general meeting or otherwise to inform the members of the company of its real position, and this they failed to do. (20) If the members of the company had at any time become aware of its insolvency the company would then have been wound up and all further losses would have been saved."

Before dealing with the legal point, it is desirable to get rid of a suggestion which seems to be made on the pleading of some deliberate misconduct on the part of the auditors, Messrs. Edward Moore & Sons. It was, quite properly, expressly disclaimed at the Bar by counsel for the liquidator that there was any charge of deliberate misconduct being made against the auditors. It is, I think, right that I should say, after having heard the evidence of Mr. Norton, a member of the firm, who was responsible for the audits in question, and of his two assistants, I am quite satisfied that there is not a shadow of ground for suggesting any deliberate misconduct on the part of the respondent firm. I do not think it can ever be a very easy matter to give evidence in a case in which, being a professional man, you are being charged with having been guilty of neglect; I am sure there must always be a tendency to forget that you are a witness and to try to become an advocate. But I think that Mr. Norton was a very frank and very candid witness. I am glad to be able to say that, so far as misconduct is concerned, there is no suggestion of misconduct against him or his firm; and so far as the accounts which he prepared are concerned, they were prepared with all technical skill. If he has been guilty of any breach of duty as the applicant alleges he has, he is guilty merely because he did not know that the law imposed upon him the duty which is in question. That is the ground upon which liability may arise.

Before one can decide whether a man has been guilty of breach of duty you must, as it seems to me, be able to define what his duty is. As I understand it, the auditors' duty in this case is to be found laid down in the Companies Act. There is a slight difference between the provisions of the Companies Act, 1908, and the Act of 1929, immaterial, I think, for this purpose, and I propose, therefore, to refer to the provisions in the Act of 1929, which in material respects are identical with the provisions in the Act of 1908, because the facts in question in this case are in part before Nov. 1, 1929, and in part after Nov. 1, 1929, so that both Acts have been applicable. The material sections in the Act of 1929 are, first of all, s. 129 (1) which provides:

"Every balance sheet of a company shall be signed on behalf of the board by two of the directors of the company, or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, and the report shall be read before the company in general meeting, and shall be open to inspection by any member."

Section 130 provides:

"In the case of a company not being a private company—(a) a copy of every balance sheet, including every document required by law to be annexed thereto, which is to be laid before the company in general meeting, together with a copy of the auditors' report, shall, not less than seven days before the date of the meeting, be sent to all persons entitled to receive notices of general meetings of the company; (b) any member of the company, whether he is or is not entitled to have sent to him copies of the company's balance sheets, and any holder of debentures of the company, shall be entitled to be furnished on demand without charge with a copy of the last balance sheet of the company, including every document required by law to be annexed thereto, together with a copy of the auditors' report on the balance sheet."

Then there is a penalty for default. Subsection (2) provides:

"In the case of a company being a private company, any member shall be entitled to be furnished, within seven days after he has made a request in that behalf to the company, with a copy of the balance sheet and auditors' report at a charge not exceeding 6d. for every hundred words. . . ."

Then there is a penalty for default in supplying that. Section 132 provides for the appointment of auditors, and s. 134 is the important section: A

"(1) The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—(a) whether or not they have obtained all the information and explanations they have required; and (b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. . . . (2) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors." B C

I think the duty of the auditors in this case can be tested by reference to the report and the balance sheets for the year ended June 30, 1925, and the year ended June 30, 1926, both of which were signed by two directors, and reports on both of which were signed by the auditors, and by inquiring what, with respect to those two balance sheets, was the duty of the auditors. All the auditors did was to send them to the secretary of the company, and they never got beyond the secretary of the company. The directors never caused a general meeting of the company to be held for the purpose of considering those two balance sheets and the reports annexed thereto. They were finished, so far as the preparation of them was concerned, in December, 1928. They were not signed until February, 1931. The date at which they came into the hands of the secretary was Feb. 12, 1931. D

Counsel for the liquidator has argued that with respect to those two accounts it was the duty of the auditors imposed upon them by s. 134 (1) of the Companies Act, 1929, to make a report to the members. He says there is the plain wording of the section and the plain admitted fact that the members of the company never have seen a report made by the auditors on those balance sheets and accounts. The first thing to do, is to interpret the section, which lays down the duty. The important words in the section are the words "the members." Does the statute impose upon the auditors the duty of making their report to every member of the company? Of course, if you give the words their plain meaning, it would seem that that obligation is imposed upon the auditors. But when you begin to reflect upon the question, it cannot, I think, have been the intention of the legislature to impose that duty upon the auditors; and it certainly never has been the practice ever since this obligation has been imposed for auditors themselves to send their report to every member of the company. Counsel for the liquidator, in the course of argument when he was pressed to give some definition of the words "the members," shrank from saying that it imposed upon the auditors the duty of sending the report to every member of the company. He said, first of all, that "the members" meant all the members, but those who are present at a general meeting represent them all, so that, if there was a general meeting of the company and a report was presented at that general meeting, those present at the meeting did represent the members and were "the members." If, on the other hand, he says there is no general meeting called by the directors, then "the members" has another meaning and means all the members of the company, because the section does not say the words mean anything else. It seems to me to be a strange way of interpreting an Act of Parliament to say that words are to have two different meanings, one meaning at one time and for one purpose and another meaning at another time and for another purpose. The words must have the same meaning throughout. You cannot, I think, change their meaning according to whether or not the directors of the company choose to call a general meeting of the company. E F G H I

I do not think it would be possible to hold that "the members" in s. 134 (1) means all the members. It cannot be that the auditors are to be at the expense and the trouble, not merely of sending through the post—because I do not suppose that would do if the duty is an absolute duty to send all the members a copy of the report, but of delivering to every member a copy of their report. It seems to me that you are forced

by circumstances to limit the meaning of the words "the members" in the section, and I think the limitation which ought to be put upon those words is that they mean the members assembled in general meeting.

When you have arrived at that conclusion, the next consideration seems to me to be whether it would be right to declare that the auditors are under some duty which it may not be possible for them to perform. I cannot think that it would be right to say that the duty is one which in certain circumstances may be impossible. If the report is to be made to the members in general meeting, then it is not possible, it seems to me, to hold that the duty of the auditors is to make that report themselves to the members in general meeting, unless they can themselves call a general meeting, or compel someone else to call a general meeting; and there are no means by which the auditors can themselves convene a general meeting of the company, nor are there any means by which they can compel other persons to call a general meeting of the company. The only persons who can call a general meeting of the company are either the directors of the company or members who have requisitioned the directors to call a meeting of the company, or, I think, in certain circumstances, the court. But the auditors themselves are powerless. All those considerations inevitably force one to the conclusion that the duty of the auditors, having affixed their signature to the report attached or annexed to the balance sheet, is confined to forwarding or sending that report to the secretary of the company, leaving the secretary of the company, or the directors, to perform the duties which the statute imposes on the directors of convening a general meeting of the company to consider the report at which it is the duty of the directors to see that the auditors' report is read.

I am aware that so to interpret the section may give rise to cases in which matters which the shareholders ought, perhaps, to know are not brought to their attention so soon as they might be. For example, there might be a case in which, on investigating the accounts, auditors find that all the directors have received remuneration to which they were not entitled. The auditors having stated that fact in their report, which they send to the company's office, it may be that the directors obstinately refuse to call a meeting, and if so, the matter is kept from the knowledge of the shareholders. But, after all, shareholders have their rights under the statute. The statute compels directors to convene a meeting once a year, to present reports to a general meeting, and to have auditors' reports read to the meeting; and if shareholders have not the will or the determination to exercise their rights, it does not seem to me that is a ground for enlarging the duties of an auditor.

Having come to that conclusion as to the duty of auditors in regard to the report on the accounts examined by them, and having come to the conclusion that their duty is discharged by sending their report to the secretary of the company, or to the registered office of the company, it is plain that on the facts proved in this case there has been no violation by the auditors of their duty, and that is an answer to the applicant's case so far as the auditors are concerned. Other matters have been discussed and argued, and, in particular, the question, supposing the auditors had violated their duty, whether the losses incurred by the company subsequent to the date when they violated their duty was the measure of the damage which the company had sustained by reason of the breach of their duty. I have been quite unable to see it. It does not seem to me, to take the very simple case by which I tried to test the question, that, if a man is fortunate enough to persuade someone to give him a dinner on credit, that man has lost anything if the debtor does not pay. The only person who has lost anything is the person who has been unwise enough to supply the dinner on credit to a person who was not worthy of being trusted. I am quite unable to see that the damage which the applicant says is the consequence of the misfeasance of the auditors, really has any connection with it at all. So that on that ground, even if on the other ground I had come to the conclusion that the auditors had been guilty of a breach of duty, I should have come to the conclusion that the applicant's case against them failed.

Solicitors: *Wordsworth, Marr Johnson, & Shaw; C. Butcher & Simon Burns; Barlow, Lyde, & Gilbert.*

[*Reported by J. H. G. BULLER, ESQ. Barrister-at-Law.*]

CHOCOLATE EXPRESS OMNIBUS CO., LTD. v. LONDON PASSENGER TRANSPORT BOARD

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.J.J.), June 18, 19, 20, July 2, 1934]

[Reported 152 L.T. 63; 50 T.L.R. 490; 78 Sol. Jo. 518]

Compulsory Purchase—Acquisition of undertaking—Creation by vendor of new burdens after statutory liability of acquiring authority in existence—Transactions not in ordinary course of business—London Passenger Transport Act, 1933 (23 & 24 Geo. 5, c. 14), s. 5 (2) (e) (i), s. 82 (1).

Company—Minutes—Minutes of directors' meeting—Evidence—Contract with person present at meeting.

Once the statutory liability of any company or board to take over a business or property has come into existence, though the actual transfer or conveyance must take place at a later date, it is not open to the vendor, by exceptional transactions not in the ordinary course of business, to create new burdens on his property or his business, and then insist upon the statutory purchasers, who have had in the meantime no control over the business or the property, taking over these burdens.

Mercer v. Liverpool, St. Helen's and South Lancashire Rail. Co. (1), [1904] A.C. 461; *Wilkins v. Mayor of Birmingham* (2) (1883), 25 Ch.D. 78; *Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (3) (1871), L.R. 12 Eq. 389, applied.

By s. 5 of the London Passenger Transport Act, 1933, it was provided that certain transport undertakings, including that of the appellant company, should, on the appointed day, be transferred to the London Passenger Transport Board. By s. 82 (1): "Each of the undertakings . . . which are to be transferred to the Board by this Act shall, until the appointed day, be maintained and carried on as heretofore in the ordinary course of business in as efficient a condition as possible."

The Act came into force on April 13, 1933. On Nov. 29, 1933, by an agreement in writing, the company undertook to hire from one P. space for its omnibuses in a garage of which P. was the owner. On Jan. 8, 1934, by a lease of that date, the company became tenant for twenty-one years of a defined space in the garage.

Held: the company was bound by the Act as from the date of its passing; neither the agreement nor the lease was necessary for the efficient carrying on of the company's undertaking within the meaning of s. 82 (1); and, therefore, neither formed part of the undertaking of the company acquired by the Board, but were invalid as against the Board.

Per MAUGHAM, L.J.: Minutes of a directors' meeting may afford evidence of a contract between the directors and a person present at the meeting.

Notes. As to the effect of a notice to treat or the passing of an Act authorising acquisition, see 10 HALSBURY'S LAWS (3rd Edn.) 63-65, and for cases, see 11 DIGEST (Repl.) 289 et seq. As to company minutes as evidence, see 6 HALSBURY'S LAWS (3rd Edn.) 350, and for cases, see 9 DIGEST (Repl.) 621. For London Passenger Transport Act, 1933, see 24 HALSBURY'S STATUTES (2nd Edn.) 892.

Cases referred to:

- (1) *Mercer v. Liverpool, St. Helen's and South Lancashire Rail. Co.*, [1904] A.C. 461; 173 L.J.K.B. 960; 91 L.T. 605; 68 J.P. 533; 53 W.R. 241; 20 T.L.R. 673, H.L.; 11 Digest (Repl.) 289, 1951.
- (2) *Wilkins v. Mayor of Birmingham* (1883), 25 Ch.D. 78; 53 L.J.Ch. 93; 49 L.T. 468; 48 J.P. 231; 32 W.R. 118; 11 Digest (Repl.) 293, 1989.
- (3) *Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (1871), L.R. 12 Eq. 389; 40 L.J.Ch. 697; 25 L.T. 149; 19 W.R. 1047; 11 Digest 289, 1950.
- (4) *Holmes v. Mitchell* (1859), 7 C.B.N.S. 361; 141 E.R. 856; 12 Digest (Repl.) 145, 910.

Special Case stated by the London Passenger Transport Arbitration Tribunal.

In September, 1927, the Chocolate Express Omnibus Co., Ltd., the plaintiff company, rented part of a garage at 32 and 34, Ethelburga-street, Battersea, which consisted of an office at £28 per annum, with the right, in consideration of a sum calculated weekly, to garage their omnibuses on the premises, the weekly rent varying according to the number of omnibuses garaged. On Sept. 28, 1927, one, Partridge, the chairman of the company, acquired the lease of this garage, and the company thereafter paid the rent for their office and the weekly garage payments to him. The company also purchased about 99 per cent. of their requirements of petrol, oil, grease, and spare parts from Partridge, although until 1929 it did not appear that the company had entered into any agreement to do so. Meetings of the directors of the company were held on Jan. 14 and 17, 1929, and the company alleged that at these meetings an agreement was arrived at, recorded in the minutes, between the company and Partridge that so long as he should be the owner or occupier of the garage, the company should there garage their omnibuses which were used in connection with the provision of services of stage coaches in accordance with the schedules deposited under the London Transport Act, 1924, and should purchase from him at the usual market prices during the said period all petrol, oil, spare parts, and other commodities used by the company in connection with their business. In March, 1929, Partridge purchased the freehold of the garage. The company's payments to him continued as before until July, 1929, when alterations were made at the garage to accommodate a larger type of omnibus, and thereafter the sum of £8 5s. was paid weekly to Partridge for the licence to garage the omnibuses, and the purchases from him continued. In December, 1931, before the London Passenger Transport Act, 1933, had been passed and whilst it was in the form of a Bill, Partridge asked his co-directors to sign an agreement identical with that subsequently signed on Nov. 29, 1933, but they refused to do so. On April 13, 1933, the London Passenger Transport Act, 1933, became law. On Nov. 29, 1933, the company agreed in writing to hire from Partridge space for its omnibuses at the garage and to purchase from him the necessary petrol, oil, and other commodities for its omnibuses. The agreement was to last as long as Partridge was the owner or occupier of the garage. On Jan. 8, 1934, Partridge granted a lease of a defined portion of the garage to the company for twenty-one years on terms which included a covenant to buy from him or his successors in business all petrol, oil, spare parts, and other commodities in connection with the company's business.

By s. 5 of the London Passenger Transport Act, 1933:

"(1) Subject to the provisions of this Act, the undertakings specified in Sched. II to this Act shall on the appointed day, by virtue of this Act, be transferred to and vest in the [London Passenger Transport] Board. (2) The transfer effected by this section shall (subject to the provisions of section eighty-two of this Act) extend—... (e) in the case of each of the undertakings specified in Part IV or Part V of the said Schedule (in this Act referred to as 'the Tilling undertakings' and 'the independent undertakings' respectively)—(i) to such part of the undertaking as consists in the provision of services of stage carriages in respect of which schedules have been deposited with the licensing authority under section six of the London Traffic Act, 1924, consequent upon the grant of a licence under the Metropolitan Public Carriage Act, 1869, subject to the condition of not plying for hire without the consent of the licensing authority except in maintaining regular services on approved routes, including any property of the owners of the undertaking (other than book debts or cash) which was immediately before the appointed day wholly or mainly applied to or used in connection with, the provision of those services, and any unexpired licence or insurance in respect of any such property; . . ."

The Chocolate Express Omnibus Co., Ltd. was included in a list contained in Part V of Sched. II to the Act, headed: "The independent undertakings." By s. 82 (1):

"Each of the undertakings or parts of the undertakings which are to be transferred to the Board by this Act shall, until the appointed day, be maintained and

carried on as heretofore in the ordinary course of business in as efficient a condition as usual."

The Tribunal held (i) that no property acquired by the company after the date of the passing of the Act, passed under s. 5 (2) (e) (i) of the Act to the Board; (ii) that no rights or liabilities under the agreement or lease entered into after the date of the passing of the Act passed to the board under s. 5 (2) (e) (i); and (iii) that the agreement alleged in January, 1929, (a) was not created by the minutes of January, 1929, and (b) that, even if it were, it did not constitute a "part of the undertaking," or any "property of the owners of the undertaking" within the meaning of s. 5 (2) (e) (i) of the Act.

The question for the court was whether the Tribunal came to a right decision in point of law.

Conyns Carr, K.C., and *Astell Burt* for the company.

Craig Henderson, K.C., and *N. R. Fox-Andrews* for the Board.

Cur. adv. vult.

July 2.—The following judgments were read:

SCRUTTON, L.J.—The Court of Appeal is the final court for appeals from the tribunal established under the London Passenger Transport Act, 1933, and the present is the first appeal to come before this court under this Act. It is obvious, however, from what we have seen in this case that it will not be the last. It is, therefore, desirable to confine one's judgment to the points it is really necessary to decide. There are about a dozen cases which may be affected by the present decision, and I think there is one question of principle which may be common to them all, but obviously the facts of these twelve cases are likely to be quite different.

The Act transfers the "undertakings" of certain transport businesses to a central board on an "appointed day," which has not yet arrived in the present case, for a consideration which the tribunal has not yet fixed. The question raised by the present Special Case is whether the tribunal in considering the transfer of the "undertaking," and the consideration therefor, is to take into account: (i) An agreement dated Nov. 29, 1933, by which the Chocolate Express Omnibus Co. agrees to hire from its chairman space for its omnibuses in a garage of which he is the owner, and to purchase from him the necessary petrol, oil, and other commodities for its omnibuses. This agreement is to last so long as the landlord is the owner or occupier of the garage. (ii) A lease dated Jan. 8, 1934, whereby the company agrees to become tenant for twenty-one years of definite space in that garage on certain specified terms, including a covenant to buy from the lessor or his successors in business all petrol, oil, spare parts, and other commodities used in connection with the company's business.

The company contended that the agreement of Nov. 29, 1933, the lease of Jan. 8, 1934, and by amendment of their claim an alleged agreement made with their chairman and landlord, Mr. Partridge, early in 1929, evidenced by the company's minutes of Jan. 14 and 17, 1929, were part of the property of their undertaking, and would pass to and bind the London Passenger Transport Board in the statutory transfer. The Board contended that: (i) as a matter of principle no such agreement or lease made after the passing of the Act, on April 13, 1933, would benefit the company or bind the Board; and that (ii) before the passing of the Act the company had no enforceable agreement which would be property to be transferred.

The tribunal found:

"We award and determine (i) that no property acquired by the company after the date of the passing of the Act passes under s. 5 (2) (e) (i) of the Act to the Board; (ii) that no rights or liabilities under the agreement or lease entered into after the date of the passing of the Act pass to the Board under s. 5 (2) (e) (i); (iii) that an agreement in the terms set out by the company in para. 10 of their amended answer and contended for in their contentions before us, was not created by the minutes of January, 1929, and that even if such an agreement was so created it did not constitute a part of the 'undertaking' or any 'property of the owners of the undertaking' within the meaning of s. 5 (2) (e) (i) of the Act"—

and the Tribunal asks the court if they have come to a right conclusion of law.

The Special Case states a certain number of facts from which we get some idea of the history of the matter in question. The company was incorporated in 1922 to own and run omnibuses. From its incorporation it garaged its omnibuses at 32 and 34, Ethelburga-street, Battersea, which was then on lease to proprietors not named. The lessors carried on their garaging business on the premises. In 1927 Mr. Partridge, the chairman, managing director and secretary of the company, and one of the six shareholders, acquired the leasehold interest in the garage. The company paid a rent to him of £28 a year for the registered office of the company, and some unspecified sum a week for the garaging of the omnibuses. They agreed to purchase all their petrol, oil, grease and spare parts required for their omnibuses at market prices from Mr. Partridge. Nothing appears to have been said as to the duration of this agreement. Mr. Partridge carried on other garaging business on the premises for other people, and no specified area appears to have been let to the company. There was no written agreement, and nothing relevant in the minutes till 1929.

In 1929 the head landlord was thinking of selling the premises, and Mr. Partridge desired the company to purchase it. The other directors refused, and Mr. Partridge determined to purchase it himself. The other two directors, according to the minutes, would have nothing to do with the purchase of the garage, except that they would personally guarantee the first £1,000 of the purchase price of £5,000. This first £1,000 has been paid off, and these directors' guarantee has expired. Mr. Partridge said that he would not purchase unless the other two directors "would agree to the omnibuses of the company being garaged there at the same rate that had always been in operation." The minute concludes:

"The arrangement provisionally discussed to garage the company's buses at the same terms as had always been in operation with previous landlords was ratified, the chairman stating if desired the position could be reviewed when the loan from the bank had been repaid. The meeting then concluded."

There is nothing further in writing; the "previous terms" are not specified. There is nothing said about the duration of the agreement, and the agreement as to petrol is not mentioned.

It is obvious that any attempt to enforce this agreement would meet with serious difficulties under the provisions of the Statute of Frauds, and under s. 4 of the Sale of Goods Act, 1893, on the question of an agreement not to be performed within one year from the making thereof and of the sale being of goods of £10 or upwards. Parol evidence may identify the subject-matter of an agreement coming within the Statute of Frauds, but cannot supply its terms. The vagueness of the agreement as to the space to be occupied, and as to the duration of the agreement, would render it very difficult to enforce except possibly as a revocable licence: see the judgment of BYLES, J., in *Holmes v. Mitchell* (4).

Continuing the history, in July, 1929, the company began to garage larger omnibuses than before, the number of omnibuses being increased from time to time—(see minutes of April 26 and Nov. 29, 1929, and March 7, 1930)—and the payment for the garaging was changed to £8 5s. a week for all the omnibuses. There is nothing in writing about this change, and nothing in the minutes.

In December, 1931, the London Transport Bill had passed through committee. Mr. Partridge, informally and not at a meeting of directors of the company, suggested to the other two directors that the company should execute a document which the Case finds to be in the form afterwards signed in November, 1933, and which Mr. Partridge intended to express the arrangement as to previous terms which the minutes purported in 1929 to ratify. The other directors declined to have anything in writing. The Case states Mr. Partridge's evidence as to their position. However, the Transport Bill did become law, and a statutory obligation to transfer the property of the undertaking became, from the passing of the Act, imposed on the undertakers and the Transport Board. On negotiations ensuing to agree the extent and terms of the transfer it appeared that the company contended and the Board disputed "that the premises constituted property of the owners of the undertaking." Thereupon in November,

1933, the directors, on the advice of their solicitors, executed an agreement. There are two parts, one signed by Mr. Partridge, the owner of the garage, and one with the company's seal signed by the other two directors. The sealed document reads: "Rent for omnibus £8 5s. per week. Petrol, oil, spare parts, other commodities: usual market prices from time to time." The original signed by Mr. Partridge, but which oddly enough has the company's seal on it, reads in the same way as the other original, but has had written into it at some time in Mr. Partridge's writing "Petrol, 1s. 2½d. per gallon; oil, 3s. per gallon (present prices)."

Counsel for the company stated with the utmost frankness that the object of this agreement was to safeguard the position of Mr. Partridge. He is not a claimant before us, and we are not, therefore, deciding anything about any claim he may have. As far as the company are concerned it will be noticed that: (i) The agreement does not specify any particular space that the company have the right to occupy. It is "sufficient space for the garaging of the company's omnibuses." (ii) It does for the first time in writing deal with the supply of petrol, &c. (iii) For the first time in writing a duration is specified: "So long as Mr. Partridge shall be the owner or occupier of the premises," &c. (iv) It is apparently suggested that the agreement gives the company some "property," or, at any rate, that it expresses some property which the company had in 1929. It does not seem to me that the owner of a car with an agreement that he may or shall garage his car in some unspecified part of a garage on paying a weekly sum, and purchasing petrol and oil required for the car at market prices, has property in the garage.

Anyway, the company, or Mr. Partridge, or their solicitors, were not satisfied that this agreement effected what they wanted, either in safeguarding Mr. Partridge or protecting themselves, and on Jan. 8, 1934, they purported to effect a lease which, if valid, certainly would alter the position. It was for a space in the garage specified by measured plan, and purported to lease it for twenty-one years from Jan. 6, 1934, at a rental of £429 per annum to be paid by equal weekly payments. The company was made to covenant:

"Not without the consent in writing of the lessor to assign, underlet or part with the possession of the said premises or any part thereof."

Also:

"That it and its successors in title will for the period of the term purchase from the lessor or his successors in business all petrol," &c.

Whatever might be the relation of the agreement of November to the previous facts, it is quite clear that this lease, if valid, gives rights which did not exist before the passing of the Act, and which could not be justified as enabling the undertakers to carry on the business efficiently, as usual, up to the appointed day. These being the facts found in the Special Case, it is necessary to consider the questions submitted to us by the tribunal.

The first decision of the tribunal is:

"That no property acquired by the company after the date of the passing of the Act passed under s. 5 (2) (e) (i) of the Act to the Board."

The date of the passing of the Act was April 13, 1933—before the agreement of Nov. 29, 1933, and the lease of Jan. 8, 1934. In my opinion, the decision of the tribunal, while very relevant to the facts of this case, is too widely expressed, and, indeed, counsel for the Transport Board did not argue in favour of the language of the finding. While the Act compels a transfer of certain property of the undertaking at a later date—the appointed day (see s. 5 and s. 107)—until that day the owners of the undertaking to be transferred are bound

"to maintain and carry on the undertaking as heretofore in the ordinary course of business in as efficient a condition as usual."

This obligation may easily result in their acquiring fresh property after the passing of the Act. An omnibus essential for the undertaking may be destroyed in an accident, and replaced. Fresh tyres and spare parts may be necessarily bought. The owners, however, must not go beyond what is necessary to maintain the undertaking efficient until the appointed day in the ordinary course of business, as usual. In s. 73 (5) (a)

the Board is expressly protected against the creation of fresh offices, or increase of salary of existing offices, "not reasonably necessary in the ordinary course of business of that undertaking."

But without those words, LORD LINDLEY, in *Mercer v. Liverpool, St. Helen's and South Lancashire Rail. Co.* (1), states a principle which is, in my opinion, applicable to this case. He said ([1904] A.C. at p. 465):

"The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it."

The foundation of this principle as applied to the Lands Clauses Act is to be found in the judgment of STIRLING, L.J., in the same case ([1903] 1 K.B. at p. 660), which the House of Lords adopt. The notice to treat under the Lands Clauses Act creates an equitable right binding the land, and it makes no difference that the compensation is assessed at a later date. After service of a notice to treat, no onerous interest in land taken or injuriously affected can be created by the landowner to the prejudice of the persons taking the land under the notice to treat. The application of this principle is well illustrated under the Land Clauses Act by the case of *Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (3). At the time of the service of notice to treat, the landlord had a weekly tenant of part of the property. After the notice to treat the landlord granted that tenant a three years' lease. It was held that such a transaction entered into after the notice to treat did not give the tenant any right to compensation, nor would it increase the compensation to the landlord.

The principle is not confined to the Lands Clauses Act. In *Wilkins v. Mayor of Birmingham* (2) certain property was to be taken as an unhealthy area under the Artisans' and Labourers' Dwellings Improvement Act, 1875, by virtue of a local Act of 1876 confirming a scheme. There was a provision in that Act enabling the corporation to avoid paying compensation for interests less than a year. In the area affected was a public house, the tenant of which held under a lease expiring at Lady Day, 1880, at a rent of £84 a year. In August, 1879, the corporation gave the tenant notice that they did not propose to take his interest compulsorily. After this, on Oct. 23, 1879, the landlord granted the tenant an eight years' lease beginning on Sept. 22, 1879, at a rent of £120. It was held that the landlord could not grant an effective lease after the requisition under the Artisans' and Labourers' Dwellings Improvement Act, 1875, which bound the land. In my opinion, the same principle applies to the London Passenger Transport Act, which binds the undertaking from its passing, and any change in the property of the undertaking effected by the owner, which goes beyond the duties of the owner of the undertaking in s. 82 to maintain and carry on the undertaking as heretofore in the ordinary course of business in as efficient a condition as usual, is ineffective and invalid against the Transport Board.

The first finding of the tribunal should, therefore, be modified by the insertion, after the words: "passing of the Act," of the words:

"which is not justified by s. 82 of the Act to maintain the undertaking until the appointed day as heretofore in the ordinary course of business in as efficient a condition as usual."

Having laid down in their first finding the principle that no property acquired after the passing of the Act passes to the Board, which we have amended, the tribunal find as follows:

"That no rights or liabilities under the agreement or lease entered into after the date of the passing of the Act passed to the Board under s. 5 (2) (e) (i)."

I am of opinion that the agreement of November, 1933, and the lease of January, 1934, are clearly ineffective and invalid under the principle we have stated. The terms of these documents were not necessary to maintain the undertaking in its usual efficiency until the appointed day.

The tribunal also awards as follows:

"That an agreement in the terms set out by the company in para. 10 of their amended answer and contended for in their contentions before us was not created by the minutes of January, 1929, and that even if such an agreement was so created it did not constitute a 'part of the undertaking' or any 'property of the owners of the undertaking' within the meaning of s. 5 (2) (e) (i) of the Act."

This relates to an amended claim that there was before the passing of the Act an enforceable agreement shown in the minutes of Jan. 14 and 17, 1929. On this point I am of opinion that the tribunal came to a correct conclusion. I do not think the minute creates or is proof of any enforceable agreement to the effect stated in the amended claim, either as to any definite part of the premises, or for the duration alleged and that the alleged agreement is not part of the property of the company within the meaning of s. 5 of the Act. The company had no exclusive possession or indeed any possession of any part of the garage. Neither an obligation to take petrol, nor a right to any petrol at the usual market prices is a subject of tenancy. It would have been impossible, in my opinion, in 1929 to prove in a court of law the agreement alleged in the amended claim. There was no enforceable contract, and, therefore, no property.

The questions asked in the Special Case must be answered to the effect that with the amendment we have specified the tribunal came to a right decision in point of law.

GREER, L.J.—The contentions of the appellants, the Chocolate Express Omnibus Co., Ltd. (hereinafter called "the company"), may be briefly stated as follows:

(i) They contend that the London Passenger Transport Arbitration Tribunal was wrong in law in deciding that no rights or liabilities under an agreement dated Nov. 29, 1933, or a lease dated Jan. 8, 1934, which were entered into after the date of the passing of the London Passenger Transport Act, 1933, passed to the Board under s. 5 (2) (e) (i) of the said Act,

(ii) that the tribunal was wrong in law in holding that certain minutes of the meetings of the directors of the company held on Jan. 14 and 17, 1929, did not "create," that is to say "prove," the contract alleged in para. 10 of the company's amended answer, and

(iii) that the tribunal was wrong in law in holding that such an agreement, if made, did not constitute a part of the undertaking or any property of the owners of the undertaking. They also contended that the first determination of the tribunal stated in the award that no property acquired by the company after the date of the passing of the Act passed to the Board, was wrong in law.

With regard to the determination last mentioned, which was the first one stated in the award, it is enough to say that the facts as stated in the award by way of Special Case did not require a decision by the arbitrators so wide as that which has been just stated. It seems to me sufficient for this court to determine whether the decision of the arbitrators on the first and second contentions above stated was right or wrong in law.

Before considering the meaning of the relevant sections of the Act, it will be convenient to state the various transactions entered into by the company so far as they bear on the company's interest in the garage which, it is contended by the company, was included in the property to be transferred to the Board, and in respect of which the company are to be entitled to compensation.

In March, 1929, Mr. Partridge, the chairman of the company, acquired the freehold interest in a garage situate at 32 and 34, Ethelburga-street, Battersea, by purchase from Lady Cheylesmore. Before that date the company rented part of the premises, which consisted of an office, from the then lessees at £28 per annum, and had the right, in consideration of a sum calculated weekly, to garage their omnibuses on the premises in question, the weekly rent varying according to the number of omnibuses garaged from time to time. On Sept. 28, 1927, Mr. Partridge acquired the lease of the garage, and thereafter the company paid to him the same rent per annum as they had previously paid to the former lessees, and in respect of the garage accommodation a weekly sum calculated as above stated. The company, in addition to paying the weekly sum, purchased about 99 per cent. of their requirements of petrol, oil, grease, and spare parts

from their lessor, Mr. Partridge, but until the year 1929 it does not appear that the company had entered into any agreement with Mr. Partridge that they would do so, though it was an obvious convenience to them, as well as an advantage to their landlord, that they should buy these requirements of their business from him. There is nothing in the statement of facts to show that they were, as regards the garage, other than licensees of the right to use the garage for their omnibuses at an agreed rate per week depending on the number of omnibuses they placed in the garage from time to time, and that as a matter of convenience, but without any contract to that effect, they were in fact buying 99 per cent. of their requirements from their landlord.

Meetings of the directors of the company were held on Jan. 14 and 17, 1929, at which negotiations and discussions took place which the company allege resulted in an agreement, recorded in the minutes, that so long as Mr. Partridge should be the owner or occupier of the said garage the company should garage and continue to garage at the said premises the omnibuses used in connection with the provision of services of stage coaches in accordance with the schedules deposited under the London Transport Act, 1924, and should purchase from Mr. Partridge at usual market prices during the said period all petrol, oil, spare parts, and other commodities used by the company in connection with the said business. After the meeting on March 29, 1929, Mr. Partridge acquired the freehold interest in the premises, and until July of the same year payments in respect of the said licence continued to be at the same rate as before, but in July it was found necessary to alter the garage so that it would take omnibuses which the company had, or intended to acquire, of a larger type than those garaged up to the time when the alterations were made, and thereafter the sum of £8 5s. per week was paid as the weekly rent for the licence, and the practice of purchasing their stores from Mr. Partridge continued. In December, 1931, before the passing of the Act, but during the time when it was a Parliamentary Bill, Mr. Partridge asked his co-directors to sign an agreement identical in terms with the agreement of Nov. 29, 1933, which was afterwards signed, but they refused to sign it because he was unable to convince them that the Transport Bill would ever become law. This seems to me to mean that except for the purpose of affecting the compensation to which they would be entitled if the Bill passed into law, or the burdens that they might impose on the Board for the benefit of their chairman, they were unwilling to bind themselves by any agreement such as that which was afterwards signed. They told him that the arrangement that had existed for so long had satisfied them up to that time, and that he, Mr. Partridge, had managed the company for ten years, and that they did not wish to commit themselves to anything in writing, and they were perfectly satisfied that the present arrangements should continue. On April 13, 1933, the London Passenger Transport Act received the Royal Assent and came into force.

On Nov. 29, 1933, the company entered into an agreement with Mr. Partridge whereby Mr. Partridge undertook to let for garage purposes, and the company undertook to take, sufficient space in the said garage for garaging the company's omnibuses, and Mr. Partridge undertook to supply to the company, and the company to purchase, the necessary petrol, oil, and other commodities upon the terms of paying £8 5s. rent per week for omnibuses, and the prices for petrol, etc., to be current prices, and the parties agreed in the second clause that the agreement should continue in force so long as Mr. Partridge should be the owner or occupier of the garage premises and able to grant such accommodation and supply the said commodities. The document is not an agreement for a lease of land as the space is not defined except as sufficient space for the garaging of the company's omnibuses. Obviously, the company's requirements of space might vary from week to week. It is an agreement to grant a licence to the company to use such space as they might require for their omnibuses in the garage, and to continue to do so so long as Mr. Partridge should continue to be the owner or occupier of the premises and able to grant the accommodation.

On Jan. 8, 1934, Mr. Partridge granted a lease of a defined portion of the premises to the company. It was frankly admitted by counsel who argued the case before us that the object of the agreement and the lease was to bring about the situation that when the company's business was taken over, the Board would have to take over the agreement

and the lease for the benefit of the company's landlord, Mr. Partridge, who was also the company's chairman.

The first question to be determined is whether, having regard to the dates of the agreement and the lease, the tribunal were bound in law to treat the rights created by these documents as included either in the word "undertaking" or the word "property" to be transferred on the appointed day to the Board. The question involved is whether in law the company could by entering into the agreement and lease in question increase the extent of their undertaking or their property to be transferred on the appointed day to the Board.

In my judgment, having regard to the decisions of the courts in analogous cases, the tribunal was right in its decision that it was not open to them to treat either the agreement or the lease as part of the undertaking or property of the company affected by the statutory transfer.

The question that the tribunal had to decide was what was the extent of the company's "undertaking" including any property of the company which was immediately before the appointed day wholly or mainly applied to or used in connection with the provision of services of stage carriages, and any unexpired licence or insurance in respect of such property.

I am disposed to think that if we had to construe s. 5 (2) (e) of the Act by itself, without reference to s. 82, or to the decisions of the courts on questions arising under the Lands Clauses Acts and other similar statutes, it would be right to say that both the agreement of Nov. 29, 1933, and the lease of Jan. 8, 1934, would be included in the undertaking and the property to be transferred on the appointed day. But s. 5 is expressed to be "subject to the provisions of this Act." By s. 82 it is enacted that

"each of the undertakings or parts of the undertakings which are to be transferred to the Board by this Act shall until the appointed day be maintained and carried on as heretofore in the ordinary course of business in as efficient a condition as usual."

This section does not expressly state that the undertakers are not in the course of carrying on their business to acquire property otherwise than in the ordinary course of business, or property which is not required to keep the undertaking in as efficient a condition as usual, but, in my opinion, the section ought to be construed as meaning that the undertaking shall be carried on until the appointed day in the manner stated in the section, and not otherwise. It would be a very extraordinary result of the statute if it was held to authorise, or, what is the same thing, fail to prohibit, undertakers in the position of this company intentionally, by means of transactions out of the usual course of business, to add to the compensation that they would be entitled to receive after the appointed day, or to add to the burdens which would attach to property so acquired between the date of the passing of the Act and the appointed day.

Further, the decisions of the Court of Appeal and of the House of Lords in *Mercer v. Liverpool, St. Helen's and South Lancashire Rail. Co.* (1), and the judgments of MATHEW, J., in *Wilkins v. Mayor of Birmingham* (2) and of LORD ROMILLY, M.R., in *Re Marylebone (Stingo Lane) Improvement Act, Ex parte Edwards* (3) involve the proposition that once the statutory liability of any company or Board to take over a business or property has come into existence, though the actual transfer or conveyance must take place at a later date, it is not open to the vendor, by exceptional transactions not in the ordinary course of business, to create new burdens on his property or his business, and then insist upon the statutory purchaser, who had in the meantime no control over the business or the property, taking over those burdens. On the main question decided by the tribunal, I think they were clearly right.

So far as the tribunal decided that the agreement alleged in para. 10 of the amended answer was not made or created by the minutes of Jan. 14 and 17, 1929, I also think the tribunal was right. There is nothing in the minutes which shows any undertaking by the company that they would continue to garage their omnibuses and buy their stores as long as Mr. Partridge continued to be their landlord. I think the minutes do not afford sufficient evidence of any such agreement. I think they merely mean that Mr. Partridge was willing to buy the property in the well-grounded expectation that the

business would be carried on in the future as it had been in the past, without his obtaining any binding contract by the company. It will be observed that all three directors signed the minutes, and if they were to be treated as a contract Mr. Partridge should not have taken any part on behalf of the company in deciding whether the company would or would not enter into the contract with him. In my judgment, this contention of the company also fails. It is true that in stating their first finding in the award the tribunal stated it too widely, as, of course, the business could not be carried on in the ordinary course or kept efficient unless the company were entitled to make the necessary purchases in order to enable them to carry on the business "as heretofore in the ordinary course of business in as efficient a condition as usual." It was unnecessary for the tribunal to deal with the third contention previously mentioned. The award ought to have been so worded as to have been confined to property acquired otherwise than for the purposes mentioned in s. 82 of the Act.

For these reasons I think we ought to say that subject to the amendment stated in my Lord's judgment, the decision of the tribunal was not wrong in law, and the appeal should be dismissed with costs.

MAUGHAM, L.J.—This award in the form of a Special Case raises some questions of considerable importance under the London Passenger Transport Act, 1933. The Arbitration Tribunal established under the Act has awarded and determined three matters which have been set out in the judgment of SCRUTTON, L.J., and the question for the opinion of this court is whether the tribunal, on these three matters, came to a right determination in point of law. The questions arising on the first two of these matters are questions which depend on the true construction and effect of the Act. The third matter is a question mainly resting upon the true view of certain minutes of board meetings dated January, 1929, with an alternative or subsidiary question whether, if there was such an agreement as therein mentioned, it constituted a part of the undertaking of the Chocolate Express Omnibus Co., Ltd.

It is important to note that we are here concerned with the undertaking of one of the undertakers referred to in Part V of Sched. II to the Act, and such undertakings, described as "independent undertakings," are dealt with by the Act in a manner widely different from that in which the undertakings mentioned in Parts I, II, III, and VI of the same schedule are treated. Section 5 of the Act begins by stating that the undertakings specified in Sched. II shall on the appointed day by virtue of the Act be transferred to and vest in the Board. By sub-s. (2) the transfer, subject to the provisions of s. 82 of the Act, is to extend as regards the undertakings mentioned in Parts I, II, III and VI of Sched. II to the whole of such undertakings (subject to certain special exceptions), and in each case the undertaking includes

"all lands, works, and other property, assets, powers, rights and privileges held or enjoyed in connection therewith or appertaining thereto."

On the other hand, in the case of the undertakings specified in Part IV and Part V of the schedule, the transfer extends only

"to such part of the undertaking as consists in the provision of services of stage carriages in respect of which schedules have been deposited with the licensing authority under s. 6 of the London Traffic Act, 1924."

For the present purpose I will describe these carriages as motor omnibuses. The general word "undertaking"—a noun of multitude with an extensive meaning—is to some extent explained by the further words,

"including any property of the owners of the undertaking (other than book debts or cash) which was immediately before the appointed day wholly or mainly applied to, or used in connection with, the provision of those services, and any unexpired licence or insurance in respect of any such property."

It is important to note here that the transfer as regards the independent undertakings is not expressed to include powers, rights, and privileges as in the case of the other undertakings I have mentioned; nor is there any such provision with regard to the

former as is to be found in sub-s. (4) of s. 5, which gives the Board power to exercise and enforce the rights, powers, and privileges of the undertakings the whole of which have been transferred to the Board, and imposes on the Board

"all liabilities and obligations, whether arising by statute or otherwise howsoever to which the undertakings were subject immediately before the appointed day in respect of the undertaking."

There are certain qualifications on these provisions which are not material to the present purpose. It is clear then that contracts or engagements entered into by the owners of any independent undertakings are not taken over as such by the Board, though they may be included as part of the undertaking transferred to the Board, or they might in some cases be included as "property of the owners of the undertaking" at a relevant date "wholly or mainly applied to or used in connection with the provision of" the motor omnibus services. There are special provisions in s. 73 as to the transfer and rights to compensation of certain of the officers and servants

"solely or mainly occupied in the transferred undertakings or as the case may be the parts of the undertakings transferred to the Board."

These rights to transfer or compensation of officers or servants do not apply to all officers or servants who are as from the appointed day transferred to the Board. I will not stop to consider the provisions of the section in any detail, but I will express the opinion that there is nothing in it which even remotely suggests that the Board, apart from the section, is under any obligation as regards contracts entered into by the owner of an independent undertaking towards an officer or servant. A provision dealing with the effect of severance contained in s. 5 (2) (e) (ii) is not, I think, material for the purpose of the questions submitted in the present case.

I now come to s. 82, which is, for the present purposes, a section of great importance. Subsection (1) provides that each of the undertakings or parts of undertakings which are to be transferred to the Board "shall, until the appointed day, be maintained and carried on as heretofore in the ordinary course of business in as efficient a condition as usual." This is the only part of s. 82 which applies to the independent undertakers. These are special provisions with regard to contracts connected with an undertaking specified in Part I or Part II of Sched. II, undertakings which are in the section described as "transferred undertakings," dealing with contracts which it might be contended were not reasonably necessary in the ordinary course of business; and there is in sub-s. (5) a special provision that until the appointed day a company carrying on a transferred undertaking shall not, so far as concerns that undertaking, without the previous consent in writing of the Minister, sell, dispose of, or let for a longer period than one year any of its land or buildings, or enter into any contract of any kind extending in date beyond a period of one year, or do various other things specified in the subsection. Provisions of this kind were wholly unnecessary in the case of an independent undertaking, if the view I take of s. 5 (1) (e) (i), as above stated is correct, but some such provision was obviously needed if that view is incorrect.

I now turn to the question whether the word "undertaking" in the last-mentioned subsection, or the words "including any property of the owners of the undertaking," &c., include any property or interests created after the Act came into force, namely, April 13, 1933, even though not capable of justification under the provisions of s. 82 (1) above set forth, and even though the acquisition of such property and interests would increase the burdens of the Board.

It was long ago decided in cases arising under the Lands Clauses Consolidation Act, 1845, that the giving of a notice to treat binds the land included in the notice from the time it is given, and that the relation of vendor and purchaser arises as from the date of the giving of the notice. That relation having been created, the company or other body giving the notice became in equity the owners of the property specified, not indeed absolutely, but subject to the performance of their obligations under the Act; and it followed that if the owner of the property created fresh interests of an onerous kind he was not entitled to compensation in respect of them. This doctrine was not in question in *Mercer v. Liverpool, St. Helen's and South Lancashire Rail. Co.* (1), where the question

arose whether a like principle applied, not to the lands the subject of the notice to treat, for that was not in doubt, but to adjoining lands of the same landowner which were injuriously affected by the execution of the works. STIRLING, L.J., in the Court of Appeal ([1903] 1 K.B. at p. 661) explained the effect of a notice to treat as regards the lands proposed to be taken in a passage which was approved by the House of Lords. LORD LINDLEY observed ([1904] A.C. at p. 465):

“The broad principle appears to me to be that it is not competent for an owner of land who has received notice to treat to deal with any of his land, either taken or injuriously affected by the company, so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it.”

The principle is by no means confined to cases where there is a notice to treat, but I think extends (subject to any special provision) to all cases where the relation of vendor and purchaser is established either directly by an Act of Parliament or as the result of a compulsory purchase under the powers conferred by the Act: see *Wilkins v. Mayor of Birmingham* (2). There is, indeed, a qualification to be implied in the present case, since, for the reasons given by my brother SCRUTTON, it is plain that the constituent items of the part of the undertaking transferred may suffer alteration, loss, or addition by the acts of the undertakers in carrying out their duties under s. 82 (1) of the Act; but, subject to the exercise of those powers, I am of opinion that the part of the undertaking transferred by the Chocolate Express Omnibus Co., was, so to speak, defined or crystallised as from the date when the Act came into force, and that the transfer to the Board will not include subsequently acquired property unless the acquisition can be justified under s. 82 (1) of the Act. It follows that the first award and determination of the tribunal, though it requires the limitation mentioned by my brother SCRUTTON as regards powers properly exercised under s. 82 (1), is correct. It necessarily also follows that the second award and determination as regards rights or liabilities under the agreement, and under the lease entered into after the date of the passing of the Act, the making of neither being justified under s. 82 (1), is also a correct determination in point of law.

There remains the question as to the agreement alleged to have been made in the terms set out by the company in para. 10 of their amended answer. Minutes of a directors' meeting may well afford evidence of a contract between the directors and a person present at the meeting, whether a director or not. Curiously enough the relevant minutes in the present case appear to have been signed by all the directors present, so that if they were sufficiently definite and precise there might be no difficulty as to enforcing the contract having regard to the Statute of Frauds and the Law of Property Act, 1925. The minutes, however, are excessively vague, the minute of Jan. 17, 1929, stating that

“the arrangement previously observed to garage the company's buses on the same terms as had always been in operation with the previous landlords was ratified, the chairman stating, if desired, the position could be reviewed when the loan from the bank had been repaid.”

This is not, in my opinion, evidence of a contract for the exclusive possession of any part of the garage, and it is certainly not an obligation to take oil, petrol, or spare parts, or a right to buy oil or petrol or spare parts from Mr. Partridge at the usual market prices. The minute is entirely silent as to the duration of any suggested obligation, except so far as it suggests that the position could be reviewed, and the award shows that later in the year a higher type of omnibus was acquired, and a higher sum was paid per week in respect of the garaging of the company's omnibuses. I, therefore, agree with the view expressed by my brethren that there was not in January, 1929, or at the date of the passing of the Act, any enforceable contract as regards the garaging of the company's omnibuses, or as regards the purchase of petrol and oil and other goods from Mr. Partridge; and in regard to the alleged agreement to purchase such articles from Mr. Partridge, for the reasons above given, I am of opinion that no liability under such a contract would pass to the Board.

I am not, however, quite certain that I understand the phrase in the award
“that even if such an agreement was so created it did not constitute a ‘part of the
undertaking’ or any ‘property of the owners of the undertaking’ within the meaning
of s. 5 (2) (e) (i).”

The word “undertaking” is very well known in connection with companies, and is to be found in various sections of the Companies Act, 1929, and its predecessors. It has been used for well over fifty years in practically every debenture and debenture trust deed. It has always been treated as having the widest meaning, that is, as including all the property real and personal, including, of course, goodwill, licences, and rights of every kind possessed by the company. A transferee of an undertaking would not come under a liability to pay the unsecured debts of the company, or to discharge any obligations of the company as such, but he would, I apprehend, become liable, if bound to take over any specific items of property included in the undertaking, to take the burden attached thereto with the benefit. The most obvious example is that of a lease. Another would be real property subject to a mortgage. A third would be property (such as a motor vehicle) acquired on hire-purchase terms, and not yet fully paid for. Accordingly, it seems to me that, if the alleged agreement had been created, it might if, and so far as, it created a licence not immediately revocable to house the buses in the garage, and, a fortiori, if it created some kind of tenancy, form “part of the undertaking” within the meaning of the section. In these circumstances I think it is safer not to express an opinion on the hypothetical matter involved in the second part of the third determination of the tribunal.

To prevent misconception I may add that nothing in my judgment is intended to indicate that in valuing the part of the undertaking transferred to the Board the arbitration tribunal is not to have regard, among the other circumstances of the case, to the probability of a continuation of a precarious tenure arising out of an understanding between the undertakers and their landlord, or to the benefit, if any, derived by the undertakers from a contract, or course of business in regard to supplies of necessary materials for the purposes of the omnibus undertaking. These matters rest, it is true, on mere probability, but so does any question of the value of a goodwill, and they are among the circumstances of the case which I think the arbitration tribunal is bound to consider under s. 14 (1) of the Act. The determination of the tribunal under the third head is, subject to the above qualification, in my opinion, a right determination in point of law.

Appeal dismissed, subject to amendment of the tribunal's first decision.

Solicitors: *J. R. Cort Bathurst; Bircham & Co.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

Re CHESTERS. WHITTINGHAM v. CHESTERS

[CHANCERY DIVISION (Bennett, J.), July 10, 11, 15, 1934]

[Reported [1935] Ch. 77; 104 L.J.Ch. 65; 152 L.T. 210; 78 Sol. Jo. 634]

Settlement—Mortgage—Payment off by tenant for life in remainder—Mortgage kept alive for his benefit.

A tenant for life in remainder paid off a mortgage on a certain property.

Held: in the absence of evidence of a contrary intention, the mortgage was kept alive for his benefit.*Wigsell v. Wigsell* (1) (1825), 2 Sim. & St. 364, applied.**Notes.** As to discharge of incumbrances by a tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 662 et seq., and for cases, see 40 DIGEST 694–696.

Case referred to:

(1) *Wigsell v. Wigsell* (1825), 2 Sim. & St. 364; 4 L.J.O.S.Ch. 84; 57 E.R. 385; 20 Digest 511, 2397.**Originating Summons**

The following statement of the facts is taken from the judgment of BENNETT, J.:

The testator, Joseph Chesters, by his will devised all his freehold shops and premises situate in Pillory-street, High-street, and Hospital-street, Nantwich—which at the time of his death were charged with payment of moneys due to the Royal Exchange Assurance—to the uses and upon the trusts and subject to the powers and provisions following, that is to say, to the use of his wife, Sarah Ann Chesters, during her life, with remainder to the use of his son, Colin Flint Chesters, during his life upon protective trusts, and from and after the death of his said son to the use of the child or children of his said son, if more than one, in equal shares as tenants in common in fee simple. The testator died on July 11, 1927. The executors of his will were his widow, Sarah Ann Chesters, the plaintiff on this summons, and his son, Colin Flint Chesters, who proved his will on Dec. 9, 1927. At some date or another, not known, there came into the possession of Colin Flint Chesters a document dated Nov. 7, 1927, addressed to the testator, containing a statement of the loan and interest due to the Royal Exchange Assurance. The statement shows “the sum of £513 19s. 6d. as due to Nov. 30, 1927.” On Nov. 29, 1927, Colin Flint Chesters wrote to the secretary of the Royal Exchange Assurance:

“I regret to say that I have mislaid your statement of principal and interest due to be paid on the 30th inst. I am enclosing an open signed cheque—kindly fill in the correct amount and present for payment. Please enclose the statutory receipt and return to me per registered post the deeds and documents—I will see to the stamping of them myself. I believe the amount due to you is in the neighbourhood of £520. Please let me have a copy of your statement which I have mislaid.”

That letter was answered by the secretary of the Royal Exchange Assurance in a letter dated Dec. 1, 1927, in which he says:

“Dear Sir, Re Loan—J. Chesters—I am in receipt of your letter of the 29th ult. enclosing an open signed cheque, which has been completed for the sum of £513 19s. 6d., being the amount required, as set out on the attached copy statement, to fully repay the above loan. I note you wish me to endorse a statutory receipt on the mortgage and return the deeds and documents to you, but, under the Law of Property Act, 1925, the statutory receipt takes the place of a transfer of the property, and it will, therefore, be necessary for the matter to be carried through by the corporation's solicitor. As the costs will have to be borne by you I await hearing further before giving definite instructions.”

The cheque which had been sent by Colin Flint Chesters was his own cheque drawn on his own banking account and was met out of his own money. On receipt of the letter of Dec. 1, Colin Flint Chesters went to his solicitors and saw a managing clerk, Mr. Charles Sutton Latham, who has made an affidavit in which he says:

“On Dec. 2, 1927, Colin Flint Chesters called at this office at 4, Pepper-street,

Nantwich, aforesaid and was attended to by myself personally. He placed before me the letter addressed to him by the Royal Exchange Assurance dated Dec. 1, 1927 . . . with the remark: 'Here, attend to this.' Beyond so placing the said letter before me the said Colin Flint Chesters gave me no further instruction in the matter. I accordingly prepared the statutory receipt in the usual form and forwarded it to the said corporation with the said letter dated Dec. 1, 1927. The form which the receipt should take was given careful consideration by the plaintiff and myself so as to make the title to the said premises satisfactory for an intending purchaser when it should become necessary to sell the premises in accordance with the terms of the testator's will, and, accordingly, the receipt was drawn in the form provided for by s. 115 of the Law of Property Act, 1925. The position as between Colin Flint Chesters and the testator's estate with regard to the payment off of the said mortgage was not taken into consideration either by myself or, to the best of my knowledge from the instructions I received, by the plaintiff. The matter was duly carried through in this way and the deeds were handed over to and retained by the plaintiff as senior trustee of the testator's will."

The solicitors then prepared a statutory receipt to be endorsed on the mortgage, and the statutory receipt as prepared and agreed between the solicitors and as sealed by the Royal Exchange Assurance was in this form:

"We the undersigned Royal Exchange Assurance hereby acknowledge that we have this thirtieth day of December, 1927, received the sum of £500 representing the balance remaining owing in respect of the principal money secured by the within written mortgage dated Oct. 31, 1912, together with all interest and costs the payment having been made by Sarah Ann Chesters of London-road Willeston near Nantwich in the county of Chester widow Joseph Parton Whittingham of Nantwich aforesaid solicitor and Colin Flint Chesters of London-road Willeston aforesaid grocer and provision merchant as executors of the will of Joseph Chesters late of Nantwich aforesaid grocer and provision merchant deceased out of money properly applicable for the discharge of the said mortgage. In witness whereof the Royal Exchange Assurance has hereunto caused its common seal to be affixed the day and year first before written."

On Dec. 30, 1927, Sarah Ann Chesters was alive and was entitled under the testator's will to the freehold shops and premises in Pillory-street, High-street, and Hospital-street aforesaid as tenant for life.

The executor of the will took out a summons for the determination of the question (inter alia) whether the plaintiff ought to pay to the defendant Marion Chester, the legal personal representative of Colin Flint Chesters (who died on June 20, 1933), out of the proceeds of sale of the premises charged by the mortgage, the sum of £500, paid by Colin Flint Chesters in payment off of the mortgage.

Andrew Clarke for the plaintiff, the senior trustee of the testator's will.

Preston, K.C., and *R. O. Wilberforce* for Marion Chesters, the legal personal representative of Colin Flint Chesters.

R. F. Roxburgh, K.C., and *H. Gowan* for a beneficiary. *C. R. R. Romer* and *H. A. Rose* for beneficiaries.

A. Andrewes-Uthwatt for the Attorney-General.

BENNETT, J.—The question on this originating summons is whether the plaintiff ought to pay the defendant, Marion Chesters, out of the proceeds of sale of certain premises comprised in and charged by a mortgage dated Oct. 31, 1912, and made between the testator, of the one part, and the Royal Exchange Assurance, of the other part, the sum of £500, paid by the testator's son, Colin Flint Chesters, who is now dead, in payment off of the mortgage.

The effect of the receipt under s. 115 of the Law of Property Act, 1925, was either—if the mortgage took effect by demise—to merge the term or—if it did not take effect by demise—to re-convey the mortgaged premises to the extent of the interest which was the subject of the mortgage, and in either case to discharge the mortgaged property from

all principal and interest secured by the mortgage. The argument on behalf of the defendant, Marion Chesters, was that, the money in discharge of the mortgage having been paid by the tenant for life in remainder, the presumption arises in law that he intended to keep the charge alive for his benefit, and that there is no distinction to be drawn between the presumption which arises in the case of payment by a tenant for life in remainder and the presumption which it is conceded would have arisen if the payment had been made by him at a time when he was tenant for life in possession. On the other hand, it is said that the presumption which arises in the case of a tenant for life in possession does not arise in the case of a tenant for life in remainder, and that in such a case it must be shown by evidence that when the payment was made there was an intention in the mind of the person making the payment to keep the charge alive.

Apparently there is very little authority as to what the presumption is in the case of a tenant for life in remainder. In the case of a tenant for life in possession it seems to be clearly settled. But I think the matter is concluded so far as I am concerned by the observations of LEACH, V.-C., in *Wigsell v. Wigsell* (1), where the Vice-Chancellor was dealing with the discharge of a mortgage by a tenant in tail in remainder and it was sought to say that a tenant in tail in remainder was in the same position as a tenant in tail in possession. The Vice-Chancellor says on p. 369:

"Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases; because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive."

It seems to me that the case of a tenant for life in remainder is an a fortiori case, and that no distinction is to be drawn between payment off of a mortgage upon the inheritance by a tenant for life in possession and the payment off of a mortgage upon the inheritance by a tenant for life in remainder. The presumption is in both cases that the charge is kept alive. In my judgment, the onus is on those who say that it is not the intention to keep the charge alive to establish it. In the present case there is not sufficient evidence to displace the presumption and to show that there was not that intention. I, therefore, answer the question by saying that the plaintiff ought to pay to the defendant, Marion Chesters, the sum which Colin Flint Chesters paid to discharge the mortgage debt due to the Royal Exchange Assurance.

Solicitors: *Nash, Field, & Co.*, for *J. P. Whittingham*, Nantwich; *Cunliffe, Blake, & Mossman*, for *Martin & Dixon*, Nantwich; *Gibson & Weldon*, for *Whiteley & Bevan*, Nantwich; *Robinson & Bradley* for *A. E. Whittingham & Son*, Nantwich; *Treasury Solicitor*.

[Reported by J. H. G. BULLER, ESQ., Barrister-at-Law.]

STAFFS MOTOR GUARANTEE, LTD. v. BRITISH WAGON CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), April 17, 18, 19, 1934]

[Reported [1934] 2 K.B. 305; 103 L.J.K.B. 613; 151 L.T. 396]

Sale of Goods—Mercantile agent in possession—Seller in possession—Goods sold by owner and re-let by purchaser to him under hire-purchase agreement—Fraudulent "sale" to third party by former owner—Factors Act, 1889 (52 & 53 Vict., c. 45), s. 2 (1)—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 25 (1).

One H. owned a lorry which he sold to the defendants who then let the lorry to him on hire-purchase terms. Subsequently H. fraudulently represented to the plaintiffs that he was still the owner of the lorry, and sold it to them. H. having ceased to pay the instalments under the hire-purchase agreement, the defendants seized the lorry. In an action by the plaintiffs for the return of the lorry or damages,

Held: the lorry had been entrusted by the defendants to H. as a hirer and so as a bailee; consequently, (i) H. was not a mercantile agent within s. 2 (1) of the Factors Act, 1889, who, being in possession of the lorry by consent of the owners, could effect a valid sale of it, and (ii) he was not a person who, having sold goods, had continued in possession of them within s. 25 (1) of the Sale of Goods Act, 1893, and so was able to give a good title to a person to whom he delivered them; and, therefore, the plaintiffs were not entitled to succeed.

Notes. Distinguished: *Union Transport Finance, Ltd. v. Ballardie*, [1937] 1 All E.R. 420; *Polsky v. S. and A. Services*, [1951] 1 All E.R. 185. Followed: *Eastern Distributors Ltd. v. Goldring*, [1957] 2 All E.R. 525.

As to transfer of the title to goods, see 29 HALSBURY'S LAWS (2nd Edn.) 103 et seq., and for cases, see 39 DIGEST 531 et seq. For the Factors Act, 1889, see 1 HALSBURY'S STATUTES (2nd Edn.) 29, and for the Sale of Goods Act, 1893, see 22 *ibid.* 985.

Cases referred to:

- (1) *Yorkshire Railway Wagon Co. v. MacLure* (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 30 W.R. 761, C.A.; 10 Digest (Repl.) 756, 4917.
- (2) *Re Watson, Ex parte Official Receiver* (1890), 25 Q.B.D. 27; 59 L.J.Q.B. 394; 63 L.T. 209; 38 W.R. 567; 6 T.L.R. 332; 7 Morr. 155, C.A.; 7 Digest 17, 74.
- (3) *Oppenheimer v. Frazer and Wyatt*, [1907] 1 K.B. 519; 76 L.J.K.B. 276; 12 Com. Cas. 147; reversed, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 1 Digest 335, 495.
- (4) *Mitchell v. Jones* (1905), 24 N.Z.L.R. 932; 39 Digest 535, a.

Action tried by MACKINNON, J.

One Heap, a dealer in motor cars, owned a Commer lorry, and in April, 1932, entered into an agreement with the defendants under which he agreed to sell the lorry to them for £900 and they agreed to re-let it to him under a hire-purchase agreement. A hire-purchase agreement was executed on May 2, 1932, which provided that the defendants should hire the lorry to Heap for seventeen months; that Heap should make an initial payment of £300 and thereafter monthly payments of £37 6s. 8d.; that, if Heap made default, the defendants might terminate the hiring and re-take possession of the vehicle; that the agreement should not be construed as a purchase by Heap, but that on payment of all the instalments he should have the option of purchasing; that until he exercised such option the vehicle remained the property of the defendants; and that the defendants should have the right to place upon the vehicle their name plate or other distinguishing mark. The defendants thereupon paid Heap £900, and he paid them £300. The defendants never, in fact, affixed any name plate to the lorry. They later gave Heap permission to sub-let it to one Pettitt, who knew nothing of the transactions between Heap and the defendants. Heap and Pettitt visited the plaintiffs, and proposed that the plaintiffs should buy the lorry from Heap and let it on hire-purchase to Pettitt, and eventually this was done. In the beginning of 1933 Heap was in financial difficulties and ceased to pay the monthly instalments of hire due to the defendants.

The defendants, believing that Heap had let the lorry to Pettitt pursuant to the arrangements with them, went to Pettitt's premises and re-took possession of it.

The plaintiffs thereupon brought the present action. They alleged that they had bought the lorry from Heap, who was its owner, or, alternatively, was a mercantile agent in possession with the consent of the owners, and that they had bought in good faith and without knowledge of Heap's want of title, and they relied on s. 2 (1) of the Factors Act, 1889. Alternatively, they said that Heap was a person who had sold goods and remained in possession thereof, and was therefore able to confer a title on a purchaser in good faith, by reason of s. 25 (1) of the Sale of Goods Act, 1893. In the further alternative they said that the transaction between the defendants and Heap was not a hire-purchase agreement, but was a bill of sale, and void for want of registration. The defendants denied all these allegations.

A. A. Pereira for the plaintiffs.

Gordon Alchin for the defendants.

MACKINNON, J.—This is one of those troublesome cases in which one or other of the two litigants must suffer by the fraudulent conduct of a third party, and the question is which of them should bear the loss. There is little dispute, if any, about the main facts, and though there may be some slight uncertainty as to several dates, that is not of any material importance. [His Lordship stated the facts substantially as above set out, and continued as follows:] On these facts arise questions of law which I think are by no means easy.

The plaintiffs put their claim, first, on the ground that the document signed on May 2, 1933, by Heap and the defendants, purporting to be a hire-purchase agreement, ought to be treated, not as a hire-purchase agreement, but as a bill of sale. They say that the transaction in its true nature was a mere loan of £600 by the defendants to Heap to be repaid by certain instalments, and that by virtue of this so-called hire-purchase agreement a security was given on the lorry by Heap to the defendants with power to the defendants to seize it in order to enforce their debt. The question how a transaction of this sort ought to be regarded has been discussed in a number of cases where the facts were somewhat similar to those of the present case, and some of them have been decided one way and some another. The contrast between the two classes of cases is illustrated by *Yorkshire Railway Wagon Co. v. Maclure* (1), on the one hand, where it was held that the transaction was not void, but was genuine, and by *Re Watson, Ex parte Official Receiver* (2), on the other hand, in which it was held that the transaction was a mere loan with a granting as security of a chattel remaining in the possession of the borrower. I have to make up my mind into which of these classes or types of case this one falls, and I come to the conclusion that it falls on the side of the line on which *Yorkshire Railway Wagon Co. v. Maclure* (1) is found. I think that the transaction here in question was a genuine purchase of the lorry by the defendants and a genuine letting of it to Heap. It was done in this way, I think, because a convenient method was thus found by the defendants of making use of their printed agreements, in lieu of the transaction taking the form that Heap had suggested, namely, a hire-purchase agreement to the Thorley Transport Co., and a guarantee of payment by that company from Heap. It seems to me to be highly likely that the defendants adopted this course because they supposed that, if they departed from their printed forms, it might be necessary to employ a solicitor to prepare the proper guarantee, and that from a business point of view the more convenient way of carrying out that transaction would be to make use of their ordinary documents. The transaction was, I think, in its essence a genuine transaction of the kind which is properly carried out by finance companies, namely, the provision to the dealer in such vehicles of the capital sum necessary to supplement the inability of his customer to provide that sum. In my judgment, the transaction between Heap and the defendants is not one to be impugned and set aside under the Bills of Sale Acts.

Assuming that the transaction between Heap and the defendants was valid and that they purchased the lorry from him, the plaintiffs put their claim on one or other of two

alternative grounds. The first of these alternative grounds is that this case falls within the Factors Act, 1889, s. 2 (1):

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

The plaintiffs say that the defendants entrusted the possession of the lorry to Heap, who was a mercantile agent for the sale of second-hand lorries, and that they, the plaintiffs, in good faith and without any notice of his want of authority, entered into a contract with him for the purchase of the lorry, and, therefore, they claim that they have a good title to the lorry as against the defendants pursuant to the provisions of that section. There was no doubt some evidence that Heap did deal in second-hand motor vehicles as an ordinary seller of them. I will suppose that, if the owner of a motor car had brought his car to Heap and asked him to sell it for him and Heap had sold it to someone at a lower price than that authorised by the true owner or otherwise not in accordance with his instructions, the purchaser from Heap would be entitled under the section which I have quoted to claim as against the true owner. I think, however, that it has rightly been pointed out on behalf of the defendants that there would be this difficulty in the way of the plaintiffs' assertion of that claim—that, if the transaction between the defendants and Heap was a genuine transaction—and the plaintiffs' claim in this respect arises on that basis—the lorry had been sold by Heap to the defendants and had been entrusted by the defendants to Heap, not as a mercantile agent dealing in or selling motor vehicles, but as a hirer of the car, and, therefore, as its bailee. In these circumstances I do not think that it is open to the plaintiffs to say that the defendants entrusted the car to Heap as a mercantile agent. In *Oppenheimer v. Frazer and Wyatt* (3) CHANNELL, J., in examining the meaning of the Act of 1889, said ([1907] 1 K.B. at p. 527):

"It seems to me that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled."

I observe that SIR MACKENZIE CHALMERS, the learned draftsman of the Sale of Goods Act, 1893, in his comment on this section, makes the same suggestion and illustrates it by what seems to be a very forcible example:

"Suppose a house were let furnished to a man who happened to be an auctioneer. Could he sell the furniture by auction and give a good title to the buyers? Surely not":

(CHALMERS' SALE OF GOODS ACT, 1893 (11th Edn.) p. 176). That, of course, is an extreme case, but, I think, the same principle applies here. Because one happens to entrust his goods to a man who is in other respects a mercantile agent, but with whom he is dealing, not as a mercantile agent, but in a different capacity, I do not think that it is open to a third party who buys the goods from that man to say that they were in his possession as a mercantile agent and that, therefore, he had power to sell them to a purchaser and so give him a good title to them. The claimant must be able to assert not only that the goods were in the man's possession as a mercantile agent, but also that they were entrusted by the owner to him as a mercantile agent. As CHANNELL, J., said, it is the consent of the owner of the goods to the possession of them by the mercantile agent as a mercantile agent that is the important part of the matter. I, therefore, think that this ground of the plaintiffs' claim fails.

The alternative ground of claim which is relied upon by the plaintiffs also depends upon the possession of the lorry by Heap at the time when the plaintiffs made their

contract with him. That ground is said to be provided by the Sale of Goods Act, 1893, s. 25 (1) which enacts:

"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

It is said that in this case, Heap, having sold the lorry to the defendants, continued and was still in possession of it after the sale, within the wording of that subsection, and, therefore, that the sale of it by him to the plaintiffs enabled them to claim a good title to it. I think this method of putting the plaintiffs' claim is subject to practically the same difficulty as stands in the way of the plaintiffs when they seek to base their claim on the Factors Act, 1889. That difficulty is that Heap's possession of the lorry at the time when the plaintiffs made their bargain with him was not the possession of a seller who had not yet delivered the article sold to the buyer, but was the possession of a bailee under the hire-purchase agreement, held by me to be valid, into which he had entered with the defendants. It is a curious fact that, apparently, no case has arisen in the English courts upon the point taken under this subsection. I have, however, had cited to me a case on the point of *Mitchell v. Jones* (4), which arose in the courts of New Zealand. The facts of that case were that the owner of a horse sold it to a buyer and obtained it back from him on lease, and then, having the horse in the capacity of lessee, sold it to a second buyer, who took it in good faith and without notice of the former sale. The first buyer claimed the horse or its value from the second buyer, who relied upon s. 27 (1) of the New Zealand Sale of Goods Act, 1895, which is identical with s. 25 (1) of the English Act. The case was tried originally in a court of summary jurisdiction, and there was an appeal from that court to a single judge, who thought the point so difficult that he caused it to be re-argued before a court of five judges, who decided in favour of the claimant. The headnote to the report of the case concludes thus:

"Held, that the respondent" (the second buyer) "was not protected by the above subsection, and that the appellant could recover the horse or its value from the respondent."

In the course of the judgment which he delivered in that case, STOUT, C.J., said (24 N.Z.L.R. at p. 935):

"The point turns on how the words 'or is in possession of the goods' in the subsection are to be construed. It is contended by Mr. Levi that these words mean that if the seller of the goods delivers them to a buyer and the buyer accepts them, and afterwards the seller gets them back on a new contract in the nature of a bailment, the seller can sell the goods to a third person and give a good title to them, provided the third person acts bona fide in the transaction. In my opinion, that is not the meaning of the section. The meaning is, first, that if a person sells goods and continues in possession, even though he has made a valid contract of sale, provided that he has not delivered them, he may to a bona fide buyer make a good title; and secondly, the putting-in of the words 'or is in possession of the goods' was meant to apply to a case of this character: If a vendor had not the goods when he sold them, but they came into his possession afterwards, then he would have possession of the goods, and if he sold them to a bona fide purchaser he could make a good title to them. He would be in the same position as if he had continued in possession of the goods when he made his first sale. In such a case as that he could make a good title to a bona fide purchaser. That is not this case. In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship, therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the

buyer, and as the bailee he had no warrant, in my opinion, to sell the goods again, nor could he make a good title to them to even a bona fide purchaser." A

I think that that reasoning is sound, that the same principle ought to apply under the words of the identical provision of the English Act, and that the decision in that case applies to the facts of this case.

The result is, I think, that the claim of the plaintiffs fails. I am sorry for them, as I am for others who have had dealings with Mr. Heap in these transactions, but, unfortunately, one side or other must suffer by reason of his wickedness, and, in my judgment, it is the plaintiffs who have to bear the burden. There must be judgment for the defendants with costs. B

Judgment for defendants.

Solicitors: *Firth & Co.*, for *Hunt & Woolliscroft*, Hanley; *G. H. Drury*, for *Pashley & Hodgkinson*, Rotherham, Yorkshire. C

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

THE ARPAD

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.J.J.), June 1, 5, 6, 29, 1934]

[Reported [1934] P. 189; 103 L.J.P. 129; 152 L.T. 521; 50 T.L.R. 505; 78 Sol. Jo. 534; 40 Com. Cas. 16; 18 Asp. M.L.C. 510]

Carriage of Goods—Short delivery—Damages—Measure—Contracts by consignee for resale—No notice to carrier. F

Whether an action in respect of the non-delivery or short delivery of goods is in tort (for conversion) or in contract (for breach of the contract of carriage) circumstances peculiar to the plaintiff, such as a sub-contract entered into by him and not communicated to the defendant, must be excluded from consideration in assessing damages although in a proper case such a sub-contract might be used as evidence of value. The matter to be ascertained is the value of the goods at the date of the non-delivery or short delivery, and so a sub-contract which the plaintiff has made at a date far removed from that of the non-delivery or short delivery must be ignored in assessing the damages. If there is a market at the time when the goods should be delivered in which goods of a kind fit to implement the contract can be bought and sold, the measure of damages is the value of the goods ascertained by the market price of identically similar goods. Where there is no such market, the value must be otherwise ascertained, and the price at which the plaintiff has sold them a substantial time before the non-delivery or short delivery is not evidence of their value at the time of the breach. G

So held by GREER, L.J., and MAUGHAM, L.J.; SCRUTTON, L.J., dissenting. H

Notes. Applied: *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033. Referred to: *Paul (R. & W.), Ltd. v. National S.S. Co.* (1937), 43 Com. Cas. 68. I

As to damages for loss of goods during carriage, see 4 HALSBURY'S LAWS (3rd Edn.) 151 et seq., and for cases, see 8 DIGEST (Repl.) 17 et seq.

Cases referred to:

- (1) *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp. M.L.C. 100, C.A.; 39 Digest 669, 2570.
- (2) *Williams Bros. v. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 19 Com. Cas. 200; 58 Sol. Jo. 377; 30 T.L.R. 351, H.L.; 2 Digest 475, 1188.

- (3) *Horne v. Midland Rail. Co.* (1873), L.R. 7 C.P. 583; L.R. 8 C.P. 131; 42 L.J.P.C. 59; 28 L.T. 312; 21 W.R. 41, Ex.Ch.; 8 Digest (Repl.) 153, 964.
- (4) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 8 Digest (Repl.) 151, 956.
- (5) *Lyon v. Fuchs* (1920), 2 Ll.L.Rep. 333.
- (6) *Mott v. Muller* (1922), 13 Ll.L.Rep. 492.
- (7) *Patrick & Co. v. Russo-British Grain Export Co.*, [1927] 2 K.B. 535; 137 L.T. 815; 43 T.L.R. 724; 28 Ll.L.Rep. 358; Digest Supp.
- (8) *Braun v. Bergenske Steamship Co.* (1921), 8 Ll.L.Rep. 51.
- (9) *Elder Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp. M.L.C. 351; 29 Com. Cas. 340, H.L.; 41 Digest 478, 3118.
- (10) *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A.C. 515; 74 L.J.P.C. 130; 93 L.T. 562; 21 T.L.R. 718; 10 Asp. M.L.C. 138; 11 Com. Cas. 13, H.L.; 41 Digest 451, 2826.
- (11) *France v. Gaudet* (1871), L.R. 6 Q.B. 199; 40 L.J.Q.B. 121; 19 W.R. 622; 17 Digest (Repl.) 75, 7.
- (12) *The Edison*, [1933] A.C. 449; 102 L.J.P. 73; 77 Sol. Jo. 176; 38 Com. Cas. 267; 18 Asp. M.L.C. 380; 149 L.T. 49; 49 T.L.R. 289, H.L.; Digest Supp.
- (13) *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433, H.L.; 41 Digest 802, 6627.
- (14) *The Harmonides*, [1903] P. 1; 72 L.J.P. 9; 87 L.T. 448; 51 W.R. 303; 19 T.L.R. 37; 9 Asp. M.L.C. 354; 41 Digest 810, 6710.
- (15) *British Columbia Saw Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046; 3 Mar.L.C. 65; 41 Digest 556, 3820.
- (16) *Great Western Rail. Co. v. Redmayne* (1866), L.R. 1 C.P. 329; 12 Jur. N.S. 692; 8 Digest (Repl.) 152, 958.
- (17) *Re Hall & Co. and Pim (Junior) Arbitration* (1928), 139 L.T. 50; 30 Ll.L.Rep. 159; 33 Com. Cas. 324, H.L.
- (18) *Cobb v. Great Western Rail. Co.*, [1893] 1 Q.B. 459; 62 L.J.Q.B. 335; 68 L.T. 483; 57 J.P. 437; 41 W.R. 275; 9 T.L.R. 253; 37 Sol. Jo. 248; 4 R. 283, C.A.; affirmed, [1894] A.C. 419; 6 R. 203; 63 L.J.Q.B. 629; 71 L.T. 161; 58 J.P. 636, H.L.; 36 Digest (Repl.) 35, 169.
- (19) *Borries v. Hutchinson* (1865), 18 C.B.N.S. 445; 5 New Rep. 281; 34 L.J.C.P. 169; 11 L.T. 771; 11 Jur. N.S. 267; 13 W.R. 386; 114 E.R. 518; 39 Digest 673, 2590.
- (20) *Grébert-Borgnis v. Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 17 Digest (Repl.) 132, 390.
- (21) *Fleming v. Manchester and Sheffield Rail. Co.* (1878), 4 Q.B.D. 81; 39 L.T. 555; 27 W.R. 481, C.A.; 42 Digest 970, 19.
- (22) *Gee v. Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 6 Jur. N.S. 1118; 9 W.R. 103; 158 E.R. 87; 17 Digest (Repl.) 117, 292.
- (23) *Hinde v. Liddell and others* (1875), L.R. 10 Q.B. 265; 44 L.J.Q.B. 105; 32 L.T. 449; 23 W.R. 650; 39 Digest 669, 2567.
- (24) *Sheikh Mohammed Habib Ullah v. Bird & Co.* (1921), 37 T.L.R. 405, P.C.
- (25) *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297, P.C.; 17 Digest (Repl.) 81, 36.
- (26) *Stroud v. Austin & Co.* (1833), Cab. & El. 119; 39 Digest 670, 2574.
- (27) *Hollins v. Fowler* (1872), L.R. 7 Q.B. 616; 41 L.J. Q.B. 277; 27 L.T. 168; 20 W.R. 868, Ex.Ch.; affirmed (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 43 Digest 471, 102.
- (28) *Chinery v. Viall* (1860), 5 H. & N. 288; 29 L.J.Ex. 180; 2 L.T. 466; 8 W.R. 629; 39 Digest 680, 2672.
- (29) *Hiort v. London and North-Western Rail. Co.* (1879), 4 Ex.D. 188; 48 L.J.Q.B. 545; 40 L.T. 674; 27 W.R. 778, C.A.; 17 Digest 79, 24.
- (30) *The Parana* (1877), 2 P.D. 118; 36 L.T. 388; 25 W.R. 596; 2 Asp. M.L.C. 399, C.A.; 17 Digest (Repl.) 114, 273.

(31) *The Notting Hill* (1884), 9 P.D. 105; 53 L.J.P. 56; 51 L.T. 66; 32 W.R. 764; 5 Asp. M.L.C. 241, C.A.; 17 Digest (Repl.) 114, 272. A

Appeal by defendants from an order of BATESON, J., affirming a report of the Admiralty registrar.

The plaintiffs, Spear and Thorp, were the consignees of a parcel of Rumanian wheat, shipped in the defendants' steamship *Arpad* for delivery at Hull, and claimed against the defendants damages for breach of contract by short delivery or, alternatively, conversion. LANGTON, J., held that there had been short delivery of forty-seven tons, and referred the assessment of damages to the Admiralty registrar. BATESON, J., confirmed his report, and the defendants appealed. B

A. T. Miller, K.C., Chappell, K.C., and Carpmael for the defendants.
Pilcher and Porges for the plaintiffs. C

Cur. adv. vult.

June 29. The following judgments were read:

SCRUTTON, L.J.—In this claim for damages against a shipowner for non-delivery of cargo, the registrar has assessed damages as £272. The defendants have paid into court £230 as damages for shortage. The amount in dispute is apparently trivial, but becomes important when it is known that the trial judge has made the costs of a five days' trial depend on whether the plaintiffs recover more than the sum paid into court. It is far better in such a case that the judge should adjourn his decision as to costs until he knows the result of the inquiry as to damages. Unfortunately, this course was not pursued, and we have no jurisdiction to alter the judge's order as to costs. Further, the determination of the amount of damages raises questions of principle affecting many cases and of far greater importance than the difference between £230 and £272. D

Fortunately there is no dispute as to the facts necessary to raise the question of principle. On Aug. 11, 1930, the plaintiffs, Messrs. Spear and Thorpe, grain merchants of Hull, bought from Mr. E. Kampffmeyer, of Berlin, 1,000 tons of Rumanian wheat "at time and place of shipment about as per sealed sample marked No. 727 in possession of buyers" at 36s. per quarter of 480 lb., less 2½ per cent. including freight and insurance to Hull. The contract provided for notice of appropriation by seller to buyer with ship's name, date of bill of lading, and quantity shipped, and for provision for the case of re-sales, and disputes between the parties in a chain of re-sales, "last buyer and intermediate buyer." E

There is no dispute that the sample was an exceptionally good sample, and all the witnesses at the reference called by either side admitted this. There is no evidence that the price was further above the market price at the date of the contract of good Rumanian wheat than would be justified by the excellence of the sample. On the conclusion of the contract in August, the buyers re-sold in parcels at the price of 36s. 6d. at once on the excellence of the sample. The Berlin seller at the end of October shipped at Braila and Sulina 1,000 tons on the *Arpad* bound to Hull. There is some evidence that the price of good Rumanian wheat, though not of sample 727 at that date, Oct. 31, was 24s., there having been a heavy fall in the market for wheat generally; but as the buyer had re-sold at 36s. 6d., this fall would not apparently affect him if he could make delivery under his re-sales. F

The shipowners, the present defendants, issued bills of lading to the seller for 1,000,000 kilos of wheat in bulk G

"cargo stored in Nos. 1, 2, 3, and 4 holds, 'tween decks and bunkers as per plan, weight, quality, quantity unknown." H

The plan enables the specific wheat shipped to be identified. It is separated from other parcels. The seller then gave notice to the buyer appropriating the wheat on the *Arpad* under his contract, and the buyer in turn appropriated the proper quantities ex-*Arpad* to his sub-buyers. I

When the *Arpad* arrived at Hull at the end of 1930 there was found considerable mixture of the wheat with barley, and in the result the trial judge found short delivery

to the plaintiff of forty-seven tons of wheat. The question in this case is: What are the damages for that short delivery?

There is no question that if the wheat had been delivered by the ship, the buyers would have tendered it to their sub-buyers and would have received 36s. 6d. per quarter, less an allowance of 6d. per quarter under arbitration for inferiority of sample. They have lost that sum by the short delivery. Can they recover from the shipowners at law their actual loss? It is clear that there was no market at Hull on Jan. 10, the date of the last delivery from the *Arpad* to which they could go and "buy Rumanian wheat as per sample No. 727," still less such wheat ex-*Arpad*. If the wheat had been delivered and the buyers had not already re-sold it, I think it is clear that they could have re-sold it, but at a price considerably below 36s. 6d. owing to the fall of market. Whether the price they would have obtained on this hypothesis would have left them with a loss greater than the sum paid into court is in dispute and is immaterial to the question of principle.

The registrar's report finds that there was no market in which wheat in accordance with sample No. 727 shipment, September-October, could be bought, and that as the buyers had paid for the wheat, they were entitled to recover the amount they had paid, less certain small allowances. He finds that only this rule would place the buyers in the position they would have been in if the wheat had been delivered according to contract. On appeal, BATESON, J., affirmed the result of the registrar's inquiry. He took the view that though, no doubt, the buyers, if they had the wheat and had not re-sold it, could have sold it at some price in Hull, they could not have bought any such wheat, and that to make a "market" you must have power to buy or sell. When the buyer has prepaid, "market price," says the judge, "is no criterion," and he is entitled to the repayment of what the wheat has cost him. That is what is necessary to give him *restitutio in integrum*, and the value of what he has lost, and there being no market, what he paid for the wheat and what he had sold it for are available to fix its value to him.

The shipowners contend that the registrar and the judge were wrong because, as LORD ESHER said in *Rodocanachi v. Milburn* (1):

"But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract for sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods."

This decision was approved by the House of Lords in *Williams v. Agius* (2). The shipowners say that the law between shipowner and goods owner is the same, and that in this case it follows that the re-sales by the receiver of the goods, which the shipowners knew nothing about, are "accidental circumstances" which do not affect them.

On the other hand, in *Rodocanachi v. Milburn* (1) there was a market in which cotton seed could be bought and sold, and the decision of the Court of Appeal giving the goods owner, who had sold the goods, to arrive at a price below the market price at the date when the goods should have arrived, damages based on the market price of the goods, was based on the fact that there was a market in which the price of the goods could have been ascertained, and the fact that the goods owner could not have obtained that market price because he had sold the goods to arrive at a lower price was "accidental" and could not be relied upon by the shipowner. But LORD ESHER, having dealt with the measure of damages when there is a market in which the value of the goods could be fixed, goes on to say:

"If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipowner and adding to that the estimated profit he would make at the port of destination."

In the present case there is, on Jan. 10, no market in which wheat, in agreement with sample No. 727, could be bought; the cost to the shipper, 36s., is known; and there is

no need to estimate the profit, for there has been a contract of re-sale to a solvent buyer at 36s. 6d. If the wheat had arrived the receiver would have put that amount in his pocket; that is what he has in fact lost; he will not get restitutio in integrum unless he receives that amount as damages. A

Where there is no market for the goods in question both the textbooks and the decided cases take the view that the contracts of the owner of the goods may be considered. Thus in *MAYNE ON DAMAGES* (10th Edn. p. 17): B

"But if the goods cannot be replaced for want of a market, their value must be estimated in some other way. If there has been a contract to re-sell them, the contract price will be evidence of their value."

Then in *BENAJAMIN ON SALE* (7th Edn. at p. 1019):

"Where there is no market, where the seller at the time he made the contract knew that the goods would probably be sub-sold, the buyer may recover as special damages the loss of his actual or anticipated profits." C

In *CHALMERS' SALE OF GOODS* (11th Edn. at p. 135), it says: D

"In the case of delivery where there is no market and the sale is for the purposes of re-sale, the measure of damages is the difference between the contract price and the re-sale price."

Where there is no market, s. 51 (2) of the Sale of Goods Act is the applicable provision:

"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract."

This brings in, in claims of contract, the contemplation of the parties, including the knowledge of one contracting party, either from actual communication or from business knowledge, that the goods dealt with may probably be re-sold so that failure to deliver them may probably prevent, if there is no market, the performance of a contract for re-sale and cause probably loss of profit. E

I am, of course, not overlooking the position that the circumstances of the re-sale contracts may be so peculiar or involve such an unusual price that the other party to the contract is not liable for them unless he has such notice of those circumstances that he must be taken to accept liability for them: *Horne v. Midland Rail. Co.* (3). F

It is often said that the measure of damages in contract and tort is the same. I do not think this is strictly accurate. The second branch of the rule in *Hadley v. Baxendale* (4) requires, in the case of breach of contract, where the damages are alleged to flow from the existence of another special contract which is affected by the breach of the first contract, that that consequence may be supposed to be in the contemplation of both parties as the result of the breach, and notice of the special contract or the probability of such a special contract being made is required to affect the defendant with liability for damage flowing from the special contract being affected by the breach of the contract. An instance of the sort of notice required is where the plaintiff is known to be buying for re-sale, though he has not yet re-sold. Thus, in *Lyon v. Fuchs* (5) where the seller knew the buyer was buying for re-sale, though he did not know of the contract of re-sale which the buyer afterwards made, *ROWLATT, J.*, there being no market, gave the plaintiff the profit he lost by being unable to perform the contract of re-sale. *Mott v. Muller* (6) is to the same effect. The matter is fully discussed by *SALTER, J.*, in a careful judgment in *Patrick v. Russo-British Grain Export Co.* (7) to which I refer. In *Braun v. Bergenske Steamship Co.* (8), *BAILHACHE, J.*, heard an action against a carrier by an owner of goods for conversion of his goods, by delivering them to a person who had no title to them. The plaintiff had re-sold the goods for £925. They were bales of dried hides apparently sold by sample, and apparently there was no market in which they could be bought in England, and, therefore, no evidence of market price. The judge gave the plaintiff £925 as the value of the hides, as there was no evidence that the person to whom he had sold had paid more than the market price at the time of the sale. No doubt, if the plaintiff had got the goods, he could have re-sold them at some price. But, in my view, one cannot consider a market price where there is no market in which you can buy to replace. It takes buyers and sellers to make a market. G H I

In the cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby looking man in the street and he may turn out to be a millionaire engaged in very profitable business which the accident disables him from carrying on; or you negligently and ignorantly injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man or his goods at the time of the tort, which is fixed by the circumstances at the time of the demand: (see *BENJAMIN ON SALE*, 7th Edn., p. 1018).

In the peculiar case where goods carried by a carrier under a contract which protects him from liability for a particular damage, the goods owner cannot recover by claiming in tort, for the reasons given in the House of Lords in the well-known case of *Elder Dempster & Co. v. Paterson, Zochonis & Co.* (9). But where, as in this present case, there is an unjustified breach of contract, and the tort of conversion, the goods owner can claim in tort for conversion and bring in the loss on a contract of re-sale without proving notice of it to the carrier, unless there is some very unusual feature in the contract. I am inclined to think that in contracts of carriage from wheat-producing districts, it is always so probable that the shipper is sending for re-sale, or for sale to a person who will re-sell, that the carrier will be liable if there is no market, for the effect on a contract of sale of his conversion or unjustifiable failure to deliver. I observe that *LORD MACNAGHTEN* in *Ströms Bruks Aktie Bolag v. John and Peter Hutchison* (10) says ([1905] A.C. at p. 524):

"Although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen & Co., they must have known, as every business man in their position would know, that in all probability the goods were being dispatched to England in order to fulfil some contract either actually in existence at the time, or in contemplation, so that a breach of their contract with the manufacturer in Sweden might cause a breach of contract with some manufacturer or merchant in England and lead to a claim of damages by him against the shippers of the goods. The respondents, therefore, were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment."

The question of damages for the conversion in such a case was considered in *France v. Gaudet* (11). In that case the plaintiff had bought 100 cases of champagne at 14s. a dozen, laying at the defendant's wharf, and re-sold it to the captain of a ship about to leave England at 24s. a dozen. Champagne of that brand and quality was not procurable in the market. The wharfinger wrongfully refused to deliver until after the ship had sailed, the captain declining to wait for the champagne. It was urged on the authority of *Hadley v. Baxendale* (4) that a wharfinger having no notice of the special value of the champagne was not liable for the loss of profit, but a court comprised of *MELLOR, LUSH and HANNEN, JJ.*, held that, there being no market, the actual value of the champagne, as measured by the price on the sale to a solvent customer, ought to be the measure of damage. In trover, the plaintiff can recover the special value attached by special circumstances to the article converted. The plaintiff was entitled to the immediate delivery of the article, and no notice would affect its actual value, which was the same as the actual present loss to its owner. In other words, there being no market either to fix its value or in which the owner could replace it, the actual value or loss to the owner could be fixed by what the owner could get by a re-sale to a solvent purchaser. Apart from that, there is no doubt that in fact, by the defendant's wrongful conversion, the plaintiff lost 36s., 36s. 6d., the re-sale price, less 6d. a quarter allowance for slight inferiority to sample which, under the re-sale contracts, did not entitle the sub-buyer to reject. There was no market in which the buyer could purchase wheat as per sample No. 727 *ex-Arpad*. In other words, the wheat *ex-Arpad* was a specific wheat re-sold and not capable of replacement.

France v. Gaudet (11) has stood unchallenged for over sixty years; the only comment I can find on it is in *Horne v. Midland Railway* (3), where *MELLOR, J.*, said it turned on there being no market. *MARTIN, B.*, said that it was a case of vendor and purchaser and turned on different considerations. As to this, *BLACKBURN, J.*, said that vendor

and purchaser and carrier and goods owner were in contract the same thing, the carrier agreed to provide conveyance for goods and the vendor the goods themselves. The real distinction is, I think, between a tort, the damages for which do not require notice to the wrongdoer of their probability, and contract, where *Hadley v. Baxendale* (4) requires the consequence to be in the contemplation of the parties. A

The damages for torts to property have been recently considered by the House of Lords in *The Edison* (12). In that case the defendant's ship sank the plaintiff's dredger, which was at the time engaged in a profitable contract of which the defendant had no notice. The House of Lords gave the plaintiff (i) the market price of a comparable dredger; (ii) the cost of its adaption, transport, and insurance to the place of loss; (iii) compensation for disturbance and loss in carrying out the contract up to the time at which the substituted dredger could reasonably have been available at Patras. The decision in *The Argentino* (13) is to the same effect. In *The Edison* (12) I endeavoured to give the defendant the value of the dredger to them as a going concern following the judgment of LORD GORELL in *The Harmonides* (14). I certainly intended to include in that value the dredger's position on a profitable contract, but apparently I did not express myself with sufficient clearness, as LORD WRIGHT, "feeling grave doubt," did not think I intended to include any allowance for the disturbance of the contract. I did, to the best of my recollection, intend to cover that allowance by the words "value as a going concern to the owner." *The Edison* (12) appears to me to be a decision on the same lines as *France v. Gaudet* (11). B C D

In my opinion, the damages in conversion should be the value to the purchaser or goods owner at the time of the conversion. If there is a market in which he can buy, this will fix the value; if there is no market, it may be determined by the goods owner's contract with a solvent purchaser, for that is what he has in fact lost by the conversion. E

It may well be that this rule does not logically fit in with the damages in contract where there is a market, and where, as in *Rodocanachi v. Milburn* (1), the plaintiff may recover more than he has lost, or, as in *Hadley v. Baxendale* (4) and *British Columbia Saw Mill Co. v. Nettleship* (15), less than he has in fact lost. But this depends on the fact that in contract you look at the date of the contract to see what was contemplated or of what there was notice, and in tort you look at the date of the tort when notice is irrelevant. I should, therefore, be of opinion that the result arrived at by the judge below and the registrar is correct, and that the appeal should be dismissed with costs. But, as my brothers are of a different opinion, for reasons expressed in their judgments, the result will be as they direct. A complicated argument of fact was addressed to us to show that, if the above conclusion was incorrect, yet the value of the market without considering the re-sale was sufficient to exceed, though only slightly, the amount paid into court. I do not think the Court of Appeal should be called on to do this calculation of fact, which is a matter for the registrar and merchants. F G

GREER, L.J.—The facts proved in this case so far as they are relevant to the question which arises for determination in this appeal may be briefly stated as follows.

On Aug. 11, 1930, the plaintiffs, who are grain merchants carrying on business at Hull, bought from Mr. E. Kampffmeyer 1,000 tons of Rumanian wheat as per sealed sample No. 727 in possession of buyers at the price of 36s. less 2½ per cent. per 480 lb. shipped, including freight and insurance to Hull, to be shipped from a Black Sea and/or Danubian port or ports, on a bill or bills of lading dated or to be dated during September and/or October, 1930, the bill of lading to be dated when the goods were actually on board. On the same date or the next day, the plaintiffs contracted to sell to eight separate buyers various quantities of wheat amounting in the aggregate to 1,000 tons to be shipped as per bill of lading during September and/or October, 1930, from a Black Sea or Danubian port or ports, quality as per sealed sample in sellers' possession. The sealed sample was in fact the same sample as that on which the plaintiffs had bought. The contracts were not c.i.f. contracts, but were contracts for delivery on arrival at Hull, at 36s. 6d. per quarter of 480 lb. As the sub-contracts did not describe the goods as goods to be shipped on a steamship to be declared, it cannot be said that the sub-sales were specific sales of the agreed numbers of quarters which were shipped on the *Arpad*, H I

A but I think this of no consequence, inasmuch as it was common ground in the case that all the sub-sales were of goods for delivery in Hull shipped in September–October and equal to sample No. 727, and goods answering to that description could not be bought in the grain market in England at the date when the plaintiffs' cause of action arose. In September and October and the first days of November grain was put on board the steamship *Arpad* to the amount of one million kilograms of wheat in bulk and in accordance with the plaintiffs' contract with their seller, the goods so shipped were appropriated to the contract. The goods so shipped were not quite up to the sample, and in accordance with a term in the contract an allowance of 6d. per quarter became deductible from the contract price. The plaintiffs were entitled to this allowance from their seller, and were bound to make a similar allowance to their buyers. Accordingly, if the whole quantity which had been shipped had been delivered to the plaintiffs, they would have been entitled to receive 36s. per quarter in respect of it, but, unfortunately, when the *Arpad* had discharged her cargo it was found that the defendants were unable to comply with their contract to deliver the whole quantity shipped inasmuch as forty-seven tons had been so mixed with barley that a tender of it could not be properly described as a tender of forty-seven tons of the wheat that had been shipped. Therefore, on the facts as proved at the trial of the action, which are not now in dispute, there was a shortage of delivery for which the defendants, the owners of the steamship, were responsible to the amount of forty-seven tons. There were certain other questions disposed of in the course of the action, with which this appeal is not concerned, but LANGTON, J., held the defendants liable in respect of the claim based on the short delivery of forty-seven tons. In the statement of claim this was put as a claim for damages for conversion, the conversion being the failure to deliver or refusal to deliver.

E The action came for trial before LANGTON, J., who decided that the defendants were liable, and gave judgment in favour of the plaintiffs against the defendants for damages in so far as such claim related to the admixture and consequent short delivery of forty-seven tons of the said wheat, and ordered that the costs should depend on whether the plaintiffs recovered more than the amount paid into court. The amount of the difference between the plaintiffs' claim and the sum paid into court is a matter of £40 or £50, but, unfortunately, the costs are very heavy, as the trial before LANGTON, J., lasted for five days, the reference took about the same time, and there was then an appeal to BATESON, J. Now the case has been brought by way of appeal to this court. The amount originally in dispute must be comparatively insignificant compared with the amount of the costs which will have to be met by the defendants if they have underestimated, to however small a degree, the damages to which the plaintiffs are entitled.

G The *Arpad* finished discharging the bill of lading wheat early in January, 1931. There was evidence which entitled the registrar to find that there was at that time no Rumanian grain procurable equal to the sample No. 727. The plaintiffs, therefore, were unable to tender to their buyers forty-seven tons of grain which the latter would have been bound to accept. The buyers were entitled to have September and October shipment of goods which would correspond to the sample, subject to the term of the contract that difference in quality or condition should not entitle them to reject except under the award of the arbitrators, or the committee of appeal of the Corn Trade Association. If the plaintiffs had received the forty-seven tons, they would clearly have been entitled to have received in respect of them from their sub-buyers 36s. 6d., less an allowance of 6d. per quarter for defective quality or condition. It was established to the satisfaction of the registrar and the judge that there was no market in which Rumanian grain could be purchased of the contract description which the plaintiffs could have used for the purpose of implementing their sub-sales. There can be no doubt that in fact they lost 36s. per quarter on the whole of the forty-seven tons by reason of the fact that they had re-sold when the market was high, and were unable to perform their contracts by purchasing in the market goods that would comply with the description contained in their contracts with their buyers, nor were they able to prove that there were any goods available on the market the purchase of which would enable them or their sub-purchasers to fulfil their requirements.

This case falls to be decided in the light of the fact that having regard to the forward

contracts the plaintiffs made with their buyers in August, 1930, they suffered a loss of 36s. per quarter. The registrar and merchants found that their damages must be estimated on this basis, and BATESON, J., confirmed that finding on appeal to him. We have now to determine whether having regard to the law relating to the measure of damages in actions whether of contract or of tort, the decision of the learned judge was right. A

Apart from any difficulty that may be occasioned by decisions of the courts, it seems to me to be unreasonable to hold that a shipowner contracting with the shipper on the terms of a bill of lading should be held liable to pay damages, measured by the loss sustained by reason of the latter's inability to comply with a contract made two months before the shipment by an unknown assignee, the shipowner having no notice of such contract and no opportunity of refusing to carry goods on the terms that he should be so liable. The decisions of the courts do not, in my judgment, involve any such unreasonable measure of the damages payable by a shipowner for failure to deliver the goods shipped. If there is a market at the time when the goods should be delivered in which goods of a kind fit to implement the contract made by the owner of the bill of lading at the time of the breach can be bought or sold, the measure of damages is the value of the goods ascertained by the market price of identically similar goods. When there is no such market, the value must be otherwise ascertained, and the price at which the holder of the bill of lading has in fact sold them five months before is not very satisfactory evidence of their value at the time of the breach. In the case of a claim by a purchaser against a vendor of goods as to which a market price is unascertainable, the price at which the buyer has re-sold the goods may be accepted as evidence of their value. But the court is not bound to accept such evidence as conclusive if the value can be otherwise ascertained. On the facts proved in the present case it is clear that the price fixed by the August contracts cannot be relied on as any evidence of the value of the goods at the date of the breach. B C D E

The judgment of the court in *Hadley v. Baxendale* (4) opened a new chapter in the law of damages. The measure of damages there laid down by the Court of Exchequer has since been invariably applied in cases which involved the consideration of the true measure of damages. I had occasion in the course of my judgment in *The Edison* (12) to state in a summary manner the material facts proved in the case, and the rules for estimating damages as stated in the judgment of the court. I need not repeat my observations here. F

In the present case no notice was or could be given by the plaintiffs to the defendants before the goods were shipped, or at any time, of the price at which they had bought or the prices at which they had sold, or, indeed, that they were buyers or sellers at all. For all the shipowners knew the shippers might have been millers who were shipping the wheat for use at their own mills, or they might have been buying to fulfil contracts made when wheat was higher in price than it was when the goods were shipped, or they might have been bought by the shippers or by the plaintiffs in the expectation that market prices would rise. So far as appears, the plaintiffs had no interest in the goods at the date of shipment. They only became interested when the bills of lading were assigned to them. If they had been able to buy other wheat equal to the sample shipped in September and October they would have been entitled to use the goods for their contracts of sale. There was no evidence showing the date when the bill of lading was assigned to them. The shipowner did not and could not know that the plaintiffs were interested in any way in the goods until the bill of lading was presented to them by the plaintiffs. The point to be decided, so far as the claim is based on contract, is narrowed down to the answer to the question whether damages arising from the fact that the plaintiffs had sold the cargo at the high values prevailing in August, 1930, "may fairly and reasonably be considered as arising naturally according to the usual course of things" from the breach of contract. Another question which has to be determined is whether, assuming that the court is precluded by the rules as to the measure of damage from taking into account the loss occasioned to the respondents by their inability to perform the contracts with their buyers, the same rule is applicable to the alternative claim for damages for conversion. At the time when the appellants G H I

A broke their contract of carriage by short delivery, the value of the forty-seven tons which they failed to deliver, estimated by what it would sell at in the ordinary course of business at the date of the breach, was ascertainable, because it is quite true that though there was no market in which goods similar to the sample No. 727 could be bought, there was a market in which they could have been sold.

B In my opinion, it has been decided both by the Court of Appeal and the House of Lords that in estimating the loss occasioned to a claimant for non-delivery of the goods which he is entitled to have delivered to him, contracts which he has made at a date far removed from the date of the breach of contract have to be neglected in considering what is the measure of damages which has to be applied under the first rule in *Hadley v. Baxendale* (4). In *Rodocanachi v. Milburn* (1) the plaintiffs, before the shipment of a cargo of cotton seed in accordance with the charterparty, had sold the cargo to arrive at a price less than the market price at the port of discharge at the time when the ship in the ordinary course should have arrived there. The cargo never arrived, but was lost by negligence. It is clear that in that case the sale was a sale of the specific cargo, and the plaintiffs were unable to fulfil the sales they had made, because the specific cargo had ceased to exist. They had sold the cargo at a price which was less than the market price at the port of discharge at a time when the ship in the ordinary course should have arrived there. It is plain that there was no market at that time in which the plaintiff could have bought the specific cargo which he sold. He might possibly have bought something as good, but he could not have compelled his buyers to take anything other than the specific cargo which he sold to them. It was held by the Court of Appeal that the court should leave out of consideration the sale made by the plaintiffs, and, as I understand the decision, it was held that the measure of damage was the selling value of the goods at the date when they would in the ordinary course have arrived, and whether this was more or less than the damage which a plaintiff sustained by reason of the fact that he had made a contract of re-sale is irrelevant—the damage is still to be estimated without regard to his contract of re-sale, by finding what the value to him would have been if such sale was left out of consideration. LORD ESHER, M.R., says:

F “The measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. . . . Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in *MAYNE ON DAMAGES*, which gives the market price as the test by which to estimate the value of the goods independently of any circumstance peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods.”

The law is stated to the same effect by LINDLEY, L.J., where he says:

"The rule in an action such as this seems to be well settled, namely, that the damages are the value of the goods at the port of discharge, minus the accruing freight, and that any contract for sale of the goods made by the charterers, whether at a greater or less price than the market value, is not to be taken into account. It is admitted that a contract for sale at a larger price could not have been taken into account, but it contended that nevertheless one made at a less price should be."

LOPES, L.J., says:

"I think the true rule is that the measure of damages in such a case must be the market value at the time when and place where the goods ought to have been delivered independently of any circumstances peculiar to the plaintiff, but deducting therefrom what he would have had to pay to get the goods."

I cannot understand the judgment as meaning other than that what has to be ascertained is the value of the goods at the date of the breach, and that in estimating that value the law does not take into account an intermediate contract entered into with a third party for the purchase or sale of the goods.

That case was expressly approved by the House of Lords in *Williams v. Agius* (2). The House of Lords there held that in a case for non-delivery by a seller to a buyer, the true measure of damages was the difference between the contract price and the market price at the time of the breach, and that the fact that a seller had agreed to sell the goods at a lower price could not be taken into account to diminish the damages. It is true that the sub-sale does not appear to have been a sale of a specific cargo, but only a sale of a cargo of coals of the same amount and description. LORD DUNEDIN points out that claims for damages for delay in delivery are not the same as claims for damages for non-delivery. He there says:

"But when there is no delivery of the goods the position is quite a different one, the buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and, barring special circumstances, the defaulting seller is neither mulcted in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price (*Great Western Railway v. Redmayne* (16)), nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price."

I do not think these observations can be taken to mean that the difference between contract price and market price is recoverable because the buyer can diminish the damages by going into the market and buying. The market price which is treated as the value at which the goods are to be taken for the purpose of estimating the damages means the price at which the goods can be sold on the market. And the noble and learned Lord points out that, even if the sub-sale is of the self-same thing or things, it would be equally right to say that the re-sale price ought not to be taken into account. If the courts are dealing with a case in which the sub-sale is a sale of the self-same thing, that involves the fact that there is no market in which the thing sold can be bought, but only a market in which it can be sold.

Re Hall and Pimm (17) was not a case in which the court had to consider the effect of the first rule in *Hadley v. Baxendale* (4). It was a decision as to damages as between buyer and seller, and the House of Lords held that the sub-sales could be looked at, because by reason of the contract between the plaintiff and the defendant such sub-sales were contemplated, so that the case was brought within the second rule in *Hadley v. Baxendale* (4). In the present case there is nothing in the bill of lading contract to call the attention of the shipowner to any question in any way relating to the sale of the goods by the shipper or his assignee. In my judgment, *Re Hall and Pim Arbitration* (17) has no bearing on the question to be decided in the present case.

There was evidence before the registrar which proved beyond the shadow of a doubt that the selling value of all classes of wheat had greatly diminished between August, 1930, and January, 1931. I think the registrar ought upon the evidence to have made

an estimate as what the value of forty-seven tons of grain of the quality of the goods when they were shipped was at the date of the defendants' breach of their obligation to deliver, and that in making this estimate he ought to have disregarded entirely the contracts made by the plaintiffs in August of the year before—about five months before the date of the breach.

So far I have dealt with the case as if the plaintiffs' claim in the action was merely a claim for damages for breach of contract of carriage. It remains for me to deal with the question what is the measure of damages as applied to the alternative claim for damages for conversion. It has been laid down in judgments of high authority with which I do not find myself able to differ, that the measure of damages in cases of tort are the same as those applied in cases of contract, with the exception that in cases of tort the court has only got to consider the first rule in *Hadley v. Baxendale* (4), whereas in cases of contract there may be, under the second rule in *Hadley v. Baxendale* (4), a larger measure of damages. In my judgment in *The Edison* (12) ([1932] P. at pp. 52, 58, 69), I referred to these authorities and applied them to the case then under consideration. I referred especially to the judgment of BOWEN, L.J., in *Cobb v. Great Western Railway* (18), and the same Lord Justice in *The Argentino* (13), and I acted upon the statement of the law by BOWEN, L.J., and applied it to the case then being considered. What is, perhaps, more important is what SCRUTTON, L.J., said in the course of his judgment in *The Edison* (12) ([1932] P. 61):

"Generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law; and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort."

I do not think there is anything in the decision of the House of Lords in *The Edison Case* (12) which is inconsistent with that proposition of law. Where the House of Lords differed from the Court of Appeal was in regard to the way in which the first proposition in *Hadley v. Baxendale* (4) applied to a case in which the plaintiff had been deprived of an instrument of his trade in circumstances which prevented him from immediately procuring a substitute. It has been frequently decided that if a shipowner is deprived for a short time of the use of a vessel which he uses in his business for the purpose of earning profits, the court can take into account the actual engagements of his ship during the time he is so deprived of the use of it. If, as in the case of *The Edison* (12), he is permanently deprived of his ship, it follows that during the time he is so deprived, that is to say, until he can supply himself with another ship to do the work, he is entitled to the same measure of damages for loss of business between the time when his ship has been destroyed and a reasonable time in which he can obtain a substitute as he would have been entitled to if his claim had been, not for loss, but for being temporarily deprived of the use of his ship. This seems to me, if it is not impertinent to say so, clearly right, but so far as the judgment in the Court of Appeal was concerned, the sum awarded as part of the value of the ship at the time of her loss was intended to include a sufficient sum for loss of the use of the dredger until the plaintiff obtained a substitute. I see nothing in the decision of the House of Lords in *The Edison* (12) which has any bearing on the question what is the measure of damages, whether claimed in contract or tort, for the wrongful deprivation of a marketable article which has been bought for sale and can be sold.

What, then, is to be said about cases like *Borries v. Hutchinson* (19), *Grébert-Borgnis v. Nugent* (20), and *France v. Gaudet* (11). The two former cases were cases of breach of contract, where the buyer had given notice that the goods were bought for re-sale but no notice of the terms of the re-sale. There was no market for the particular goods sold. It was admitted by the seller that the buyer was entitled to his loss of profit on the re-sale. The court, while approving of this admission as right in law, had to deal with further claims depending on the terms of the re-sale, some of which were allowed, and some disallowed. In both these cases there was notice that the goods were bought for the purpose of fulfilling contracts of re-sale, though the exact terms of such re-sale

contracts were not communicated. They were cases which the parties accepted as within the second rule of *Hadley v. Baxendale* (4). LORD ESHER (then SIR WILLIAM BRETT, Master of the Rolls), in giving judgment in the Court of Appeal in *Grébert-Borgnis v. Nugent* (20), used the words which since have been frequently accepted as applying to the measure of damage where there is no notice that the goods are bought for the purpose of fulfilling an existing or contemplated re-sale:

"If such sub-contract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods then the sub-contract by the plaintiff, though not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value."

This statement of the law has been acted upon on frequent occasions. I fully accept it. But I do not read the law so stated as applicable to a case like the present, in which the value fixed by the sub-sale is proved not to be the real value of the undelivered goods at the date of the breach. In my judgment, the damages claimed on the basis of the damages suffered by the respondents by reason of the sale made by them of similar goods to be shipped in September and October are, to quote the words of BLACKBURN, J., in *Horne v. Midland Rail. Co.* (3): "Damages of an exceptional nature, arising from special and peculiar circumstances," of which no notice was given to the defendants when they received the goods for carriage. When there is no evidence of the value other than the price the plaintiff was able to obtain this value may be accepted as evidence of value at the date of the breach of contract. But in this case there was ample evidence that at the date of the breach the value of all wheat had greatly diminished. On the principle laid down in *Rodocanachi v. Milburn* (1), the registrar should have taken into account all the evidence given before him, and found the fair value at the date of the breach, disregarding the fact that the plaintiffs intended to use the cargo for the purpose of implementing the sales they made in August.

With regard to *France v. Gaudet* (11), in so far as the reasons given by the court depend on drawing a distinction between the damages that may be awarded on a claim for non-delivery which may in the alternative be treated as a breach of contract or a tort, I think, though the decision may be supported on other grounds, the reasons stated for the decision of MELLOR, J., cannot be supported. I note in passing that the court adopts as the law applicable to non-delivery as a breach of contract the following sentence from SEDGWICK ON DAMAGES, though they failed to apply the law so stated in the case they were deciding:

"It appears to me that, in principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may thus be said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver or actual conversion, and that the damages should be estimated as at that time."

In my judgment, where the wrong complained of may be stated either in tort or in contract, the same rules as to damages must be applied.

In addition to the decisions already cited, I refer to *Fleming v. Manchester and Sheffield Railway* (21). Adopting the words of LORD BRAMWELL, I say that in the present case under appeal "the real ground of complaint was the breach of contract to deliver." In *Horne v. Midland Rail. Co.* (3), MELLOR, J., explains the decision in *France v. Gaudet* (11) as based on the absence of any evidence of the value of the goods other than the sale to the plaintiff. "There was," he says, "no other test of the value of the goods." *Horne v. Midland Rail. Co.* (3) is an important authority against the plaintiffs' claim in the case under appeal, because (i) the market value taken as the measure of the defendants' liability was not the cost of procuring similar goods in the market, but the price procurable by the plaintiff by sale in the market, (ii) it was a claim against a carrier, and some of the judges who decided the case thought that the measure of damages was not necessarily the same in its application to claims against a carrier as it would be against a seller for late delivery or for non-delivery, and (iii) though the claim

was a claim for late delivery both MARTIN, B., and BLACKBURN, J., treat the principle as similar to that which would have to be applied if the goods had never been delivered at all. MARTIN, B., says:

"Suppose the goods, instead of merely being delayed in delivery, had been burnt while in the defendants' custody. Would the plaintiffs have been entitled to recover from them at the rate of 4s. a pair [of shoes], or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt and not their value calculated according to the price at which they were sold some time before, when the market was higher."

and later,

"If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted that he could only recover £20."

In the judgment of BLACKBURN, J., we find the following statement of the law as that eminent lawyer thought it was:

"If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances, such damages cannot be recovered."

It is worthy of note that in *Horne v. Midland Rail. Co.* (3), there was not, in the proper sense of the word, any market in which goods of the kind which are specially made for the French could be procured. In my judgment, *France v. Gaudet* (11) ought not to be accepted as a decision that in assessing the damage caused to a buyer by non-delivery, the damages are necessarily what he has lost on a contract of re-sale, but merely that in the absence of other evidence, the cost of re-sale may be treated as the value of the goods.

I do not think it is necessary to refer the case back to the registrar for reconsideration. We have the same materials that he had before him for determining what the value of the forty-seven tons was at the material date when the defendants failed to deliver the twenty-seven tons in a condition in which the plaintiff was entitled to receive them. On consideration of the evidence taken before the registrar, I think we ought to decide that the value must be reckoned on the basis of 23s. 6d. per quarter for the forty-seven tons.

I desire to add in order to prevent a misunderstanding of this judgment, that the decision must not be treated as a binding decision with regard to the measure of damages in the case of an action for damages for personal injuries. So far as I am concerned, I desire to reserve the question whether a plaintiff in an action for damages for personal injuries can recover for the loss he has in fact sustained through inability to perform a contract of an unusual and exceptional remunerative character. We are only deciding the measure of damages applicable to damages of which the plaintiff complains of the temporary loss of an article of commerce usually purchased for re-sale.

The appeal will be allowed with costs, the judgment of BATESON, J., will be set aside and judgment entered for the amount so ascertained with the consequences as to costs provided for by the original order of LANGTON, J.

MAUGHAM, L.J.—The question of law that arises on this appeal may be stated very simply. It is this: What is the proper measure of damages when upon a contract of carriage by sea the shipowner fails to deliver the goods at the port of arrival, and it happens that there is at that port no market at which similar goods could be purchased at the date of the breach? There is no dispute as to the main facts which have already been stated in the preceding judgments, and I need not repeat them; but I must make it clear that in the circumstances of this case the shipowners could not, in my view, properly be held to know that the plaintiffs or any other holder of the bill of lading had entered into contracts of sale or was procuring the goods for the purpose of re-sale. I agree with what my brother GREER has said on this point, and need not repeat it. Such

cases as *Patrick v. Russo-British Grain Co.* (7) have, in my judgment, no application, A
and I do not desire to express any opinion with regard to them. The question is in this
court mainly one depending on authority, but I will permit myself two general observa-
tions. The first arises from a consideration of the nature of a market for goods. It
seems to me illogical to apply one rule if the goods shipped have been sold by the plaintiff
ex a particular ship or according to a sealed sample, with the result that generally B
speaking there is no market for those particular goods at the port of destination, and
another measure of damage if the goods are merely goods of a particular description and
quality. A rule which is in effect one of remoteness of damage ought, it seems to me,
to apply in either case. The other observation is that I think it would be very un-
fortunate if shippers or purchasers of goods carried by sea were in a position, during
perhaps a prolonged period, to enter into contracts of sub-sale and to please themselves
whether these were disclosed in the event of a dispute arising such as one based on short C
delivery. Most of such disputes are settled otherwise than in the courts, and even if
the matter comes to be determined by due process of law, I do not think that the right
of the defendant to discovery is a satisfactory safeguard if there has been a considerable
fall in the market since the contract of sale was made.

I will now refer to the leading authorities. It has long been settled as a general rule,
in such a case, whether there is a market or not, that the owner is entitled to the value D
of the goods at the place where they were consigned. It follows, as regards ascertaining
the value, that, if there is a market for such goods at the date when they should have
been delivered, a purchase in the market is taken to put him in the same position as if
the goods had been duly delivered; but it is also well established that in such a case, at
any rate, if the plaintiff is suing in contract, agreements for sale entered into with third
parties by the plaintiff consignee (which may for convenience be called "sub-contracts") E
cannot be looked at either for the purpose of increasing or reducing the damages, unless
sufficient notice of the sub-contracts has been given to the carrier or shipowner. These
rules are clearly similar to those which apply upon failure to deliver under a contract
for the sale of goods, rules now embodied in s. 51 of the Sale of Goods Act, 1893, a section
declaratory of the existing law. The courts have refused to look at the sub-contracts F
entered into by the plaintiff in such a case (in the absence of notice to the defendant at
the date of the contract) on the ground that any sub-contract is an accidental circum-
stance peculiar to the plaintiff; and it is a rule closely analogous to the rule that actual
loss of profits and damages payable to sub-purchasers and other sub-contractors are not
ordinary consequences of delay or failure to deliver. As examples of the many cases
that illustrate the rule, the following may be mentioned: *Hadley v. Baxendale* (4), *Gee v.*
Lancashire and Yorkshire Rail. Co. (22), *Great Western Rail. Co. v. Redmayne* (16), G
Rodocanachi v. Milburn (1). It is manifest, then, that if there is a market the plaintiff
will not be awarded damages on the footing of the actual loss to him occasioned by the
defendant's default, since the sub-contract may have been a sale at a price substantially
higher or lower than the market price at the date when the goods should have been
delivered.

In the present case the first question that arises is whether the measure of damage for H
a breach of a contract of carriage in the case where the goods are not procurable in the
market at the time of breach differed from the rule as above stated so far as regards the
exclusion of the consideration of sub-contracts entered into by the plaintiff. It is not
in dispute that even if there is not a market price the damages are to be taken by
reference to "the value of the goods at the time of the breach," and there may be
different methods of arriving at the value in the particular circumstances. I have, I
however, been unable to find any case which suggests that the law (in the absence of
notice at the date of contract) will take into account in estimating the damages an
intermediate contract with a third party, which is, to use LORD ESHER's words, acci-
dental as between the plaintiff and the defendant. I will refer first to *Borries v.*
Hutchinson (19), in which there was a valuable judgment by SIR JAMES SHAW WILLES.
This was a contract by a defendant to sell caustic soda to the plaintiffs for shipment
from Hull, delivery to be made in June, July and August, and the defendant knew that
the plaintiffs were buying for the purpose of fulfilling a contract with a foreign merchant.

In fact, the plaintiffs had contracted to sell this soda at an advanced price to a merchant in Russia. The plaintiffs delivered a portion in September and October and the rest was never delivered at all. There was no market for caustic soda in June, July and August. The plaintiffs had had to pay damages under their sub-contract; but it was held that they were not entitled to recover such damages, on the ground that they were too remote. The value to the plaintiffs of the goods which were never delivered was taken to be the value of the goods at the time when they ought to have been delivered, which, in the absence of a market price, was held to be the price which they could have got for those goods in Russia less the cost of sending them there.

This case was followed in principle in *Hinde v. Liddell* (23). The defendant had contracted to supply the plaintiff with 2,000 pieces of grey shirting for shipment on Oct. 20. Before that date he informed the plaintiff that he would be unable to complete his contract, and it so happened that grey shirtings of the kind in question could not be procured in the market in England at that time. The plaintiff in fact had entered into a sub-contract to ship the goods in November, and, being unable to find goods of the same quality or to get them manufactured by Oct. 20, he purchased some grey shirtings near the quality contracted for, although of a somewhat superior quality, and for them he had to pay an advanced price. It was held that he was entitled to recover the difference between what he had agreed to pay and what he was compelled to pay for the substituted goods, not, however, because he had entered into a sub-contract, but because the true measure of damage was the value of the goods at the date of the breach, and that was the price of the best substitute procurable. It should be added that the defendants had been told that the shirtings were for immediate shipment, but nothing was decided as to what the effect of a notice of the sub-contract might have been: (per BLACKBURN, J., L.R. 10 Q.B. at p. 270).

The next case I will refer to is *Horne v. Midland Rail. Co.* (3), in which the matter was elaborately discussed by nine judges in the two courts. In that case an action was brought against a railway company for failure to deliver a quantity of shoes in London by Feb. 3, 1871. The plaintiffs had sold these shoes at an unusually high price, and they gave the railway company notice of the contract and stated that the goods would be rejected if not delivered on the fixed date; but they did not inform the railway company that the goods had been sold at an exceptionally high price. The goods were not tendered for delivery until Feb. 4 and were rejected by the buyer on that ground, and the question was whether the damages payable by the defendant company were to be measured by reference to the price at which the plaintiffs would have been paid for them on the sub-contracts if delivered in time, or by reference to the market price. It was held that the latter was the true measure of damages, the loss of the exceptionally high price not being such as might reasonably be considered as arising naturally from the defendants' breach of contract or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract. It is clear from this case that the court rejected the view that the damages ought to be based on the footing of the value of the goods to the plaintiff, having regard to his sub-contracts.

These cases led up to the important decision of *Rodocanachi v. Milburn* (1). In that case the plaintiffs had chartered the defendants' ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom, and the plaintiffs had sold the cargo to arrive at a price less than the market value of the goods at the port of discharge at the same time when the cargo should have arrived. The cargo was lost by the negligence of the master, and it was held that in estimating the damages the market value must be looked to and not the price at which the plaintiffs had in fact sold the cargo. LORD ESHER, after stating that the measure of damages must be the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods were lost, showed clearly that in his view sub-contracts, whether there was or was not a market value at the port of discharge, were not affected by the price obtained on a sub-contract.

"What is to be the rule in getting at the value of the goods? If there is no market for such goods, the result will be arrived at by an estimate by taking the cost of the

goods to the shipper and adding to that the estimated profit he would make at the port of destination."

I pause here to say that he is considering a case where there has been no alteration in the value of the goods between the relevant dates.

"If there is a market there is no occasion to have recourse to such a mode of estimating the value—the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of goods."

LINDLEY, L.J., makes a similar statement:

"The damages [he says] in such an action are the value of the goods at the port of discharge minus the accruing freight, and any contract for sale of the goods made by the charterers whether at a greater or less price than the market value, is not to be taken into account."

This decision has constantly been cited and always approved. It was expressly approved in the House of Lords in *Williams Bros. v. Agius, Ltd.* (2), by LORD HALDANE, L.C., and LORDS DUNEDIN, ATKINSON, MOULTON, and PARKER. It was a case of carriage of coal by sea and failure to deliver, followed by an arbitration, and there had been a sub-contract of sale. LORD HALDANE observed, while referring with approval to *Rodocanachi v. Milburn* (1):

"In that case it was held that in estimating the damages for the non-delivery of goods under a contract, the market value at the date of the breach was the decisive element. In the judgment delivered by LORD ESHER he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, a contract entered into by the plaintiff with a third party,"

and he adds that the law so laid down had not been affected by s. 51 of the Sale of Goods Act, 1893. It is true that in that case there was a market price for the goods, but none of the Lords intimated that the rule of exclusion depended on whether or not there was a market for the particular goods at the port of discharge. The decision of the Privy Council, in *Sheik Mohammed Habib Ullah v. Bird & Co.* (24) supports the view that the exclusion from consideration of sub-contracts does not depend on the existence of a market. In that case there was no market; but LORD DUNEDIN delivered the judgment of the Board and observed:

"The appellants, however, before the Board argued that the damages could not be recovered, because, as a matter of fact, the respondents supplied the sleepers from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood. The answer to this argument is to be found in the well-known case of *Rodocanachi v. Milburn* (1), which was applied by the House of Lords in the recent case of *Williams v. Agius* (2),"

and he cited the passage from the former case which is above set out. In my opinion, it is clear from this that LORD DUNEDIN's view was that the exclusion of intermediate contracts entered into by the plaintiff from a calculation of damages is irrespective of the question whether there is or is not a market for the goods. I should add that the passages cited from *Williams v. Agius* (2) by my brother GREER show that, in my view, LORD DUNEDIN held that opinion when delivering judgment in the House of Lords (see [1914] A.C. at pp. 522 and 523).

It is, I think, plain from the cases I have cited, as well as from a number of other cases which I have referred to, that it is unsound to suggest that the true measure of damages is the amount necessary to indemnify the plaintiff against the loss that he has in fact sustained, or the value of the goods to him if he has entered into a sub-contract,

or, in other words, that he is entitled to damages on the footing of *restitutio in integrum* so far as money will put him in that position. This contention was actually argued in the House of Lords' case, which I have last mentioned, and it was contended that the rule laid down in *Rodocanachi v. Milburn* (1) was not the true rule, but this contention was negatived by the House. I do not think the decision of the Privy Council in *Wertheim v. Chicoutimi Pulp Co.* (25) can be said to be in conflict with the rule as above stated since I find this passage:

"In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him if he had them what they would fetch in the open market, and if he wanted to get others in their stead he could obtain them in that market at that price. In such a case the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter (*Rodocanachi v. Milburn* (1))."

There is, I think, nothing in *Ströms Bruks Aktie Bolag v. Hutchison* (10) which conflicts with the above general rule, for the decision of the House of Lords was based on the view that the proper measure of damages in the circumstances was the cost of replacing at the port of destination the goods which the defendants had neglected to deliver at the time when they should have been delivered, less the value of the goods in Sweden and the amount of the freight and insurance. This amount was greater than the sum paid by the plaintiffs under a sub-contract for sale, and this fact justified a judgment for the sum awarded by the Lord Ordinary as general damages. There is, at any rate, no hint that *Rodocanachi v. Milburn* (1) (relied on there by the respondents) was being in any respect disapproved.

The expression of opinion in the textbooks on this matter, like the oracles of Delphi, are relied on by both sides. As I understand them they are in favour of the view above expressed. For example, the conclusions arrived at by the learned editor of *BENJAMIN ON SALE* (7th Edn. at pp. 1018 to 1029) seem to me to be justified by the authorities as they now stand; and, dealing with the case where there is no market and where the seller at the date of the contract did not know that the goods had been sub-sold or were bought for sub-sale, or would probably be sub-sold, he says that the buyer may buy the best substitute procurable or may charge the seller "the difference between the contract price and the value of the goods as general damages." The passage goes on as follows:

"Some evidence of such value is afforded by the sub-sale price or the price of the goods at the market nearest to the place of delivery or at a distant market added to the expense of transportation to the place of delivery or their price at the market in the place of delivery at a time other than that fixed by the contract for delivery."

The only criticism I have to make with regard to the passage I have quoted is that I doubt whether the words "were bought for sub-sale or would probably be sub-sold" are sufficiently precise. I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or are bought for sub-sale, but the authorities seem to show conclusively that something more than that is necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery.

Grébert-Borgnis v. Nugent (20) may be referred to. The Master of the Rolls there said that if the sub-contract was not made known to the vendor the defendant could not be made liable for what the plaintiff had to pay under it, and he proceeded thus:

"If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value."

He then dealt with the case where the sub-contract was fully made known to the plaintiff, and he said that the cases established that the original vendor was to be liable to so

much of the sub-contract as was made known to him, but only to that extent. It is not in dispute that in some cases a sub-contract may afford evidence of "real value," but, in my opinion, such evidence is of little or no weight if it is proved, as in the present case, that there has been a disastrous drop in the market price of the goods between the date of the sub-contract and the date on which the goods should have been delivered. A

Stroud v. Austin (26) was a case where the sub-contract was accepted as affording evidence of value at the date of the breach. It was an action by a purchaser of English steel rails against the sellers for damages for non-delivery. The contract of sale was dated Nov. 24, 1881, and four days later the plaintiff sold the rails to sub-purchasers in Canada at a price exceeding the contract price by £864. The defendants shipped no rails under the contract, and it was proved that no English steel rails could be obtained at New York in bond or at all at the date when the steel rails should have been delivered in New York. CAVE, J., held that this claim for £864 must succeed, but it is material to note the grounds of the decision. He held that the defendants could not be made liable in respect of the sub-purchaser's claim against the plaintiff as they had no notice of the sub-contract, but that he was entitled to what he called "the market price" of the English rails in bond in New York in February, 1882, and the proof, he said, was that B C

"on Nov. 28, they had been sold at an advance over what the plaintiff had given to the defendants, of £864. There has been no sale at all since then, the plaintiff having purchased and held the whole stock of English rails in bond in New York. Now, it seems to me the price which was given on Nov. 28 is good evidence of the value at that time, and that in the absence of any evidence to show the price of English rails in bond has gone down it is also good evidence of the value in 1882." D

It will be observed that the plaintiff was not given an indemnity, and that the damages were not based on the footing of the value to him of the steel rails since the defendants were not made liable in respect of the sub-purchaser's claim against the plaintiff. The contract of sub-sale was referred to merely as evidence of the value of the rails in the absence of any evidence of a fluctuation in the market. E

It is, however, contended that in the present case the plaintiffs have pleaded in the alternative that the defendants wrongfully converted to their own use the quarters of wheat which were not delivered by the defendants, and it is laid down that whatever may be the rule with regard to damages founded on contract in such a case the plaintiffs are entitled, if the action is regarded as one for a tort, to bring into consideration the loss which they have incurred by reason of the sub-contracts which they have not been able to fulfil. I am not satisfied that there was in this case a right of action founded on tort. It may well be that to allow the wheat to become mixed with the barley at some uncertain date in the course of the voyage was a tortious act and would have justified an action for conversion; but that is not the tort complained of, which is based simply on the non-delivery of a certain number of quarters of wheat, with the result that the plaintiffs, having refused to accept the mixture, treated the defendants as having failed to deliver the forty-seven tons in respect of which the reference took place. An action based simply on non-delivery of goods has been hitherto treated as one founded on contract. The question is whether the defendant's acts amounted to an interference, not capable of justification, with the dominion of the plaintiff as the true owner of the goods (*Hollins v. Fowler* (27)), see the opinion of BLACKBURN, J. The mere omission or negligence of a carrier is not a conversion (BULLEN & LEAKE, 8th Edn., p. 355). An action based simply on non-delivery of goods is one founded on contract: *Fleming v. Manchester and Sheffield Rail. Co.* (21), see HALSBURY'S LAWS OF ENGLAND, vol. 27, p. 892, note n, and HALSBURY'S LAWS (2nd Edn.), vol. 4, p. 95, a title on "Carriers," which has an advantage of being contributed by LORD WRIGHT and MR. MANNINGHAM-BULLER. F G H I

I am, however, reluctant to decide the question involved merely on this technical ground, and I will assume that in the present case we are entitled to assess the damage on the footing of a wrongful conversion by non-feasance or negligence of some kind. But is it true to say that the measure of damage which can be assessed against a carrier in such a case differs from that which would be assessed for breach of contract? I am,

of course, assuming that the defendant has no notice of any sub-contract by the plaintiff. It is no doubt true that in a case of a claim in tort, damages are constantly given for consequences of which the defendant had no notice. In truth, it is immaterial whether or not the damage which flows from his tortious act is such as the wrongdoer might reasonably have anticipated. On the other hand, in tort (as in contract, unless notice to the defendant has affected the matter) the wrongdoer is responsible in damages only for "the natural and direct result of the wrongful act": *The Argentino* (13), per BOWEN, L.J.; *The Edison* (12), per SCRUTTON and GREER, L.J.J.; and see the speech of LORD WRIGHT in the House of Lords, in which all the Lords concurred. These cases, it is true, were cases of damages due to negligence by a wrongdoing vessel, resulting in the destruction of a vessel engaged in a profit-earning enterprise, and to such cases special considerations apply; but the observations to which I am calling attention have a much wider application.

As I have already indicated, the authorities in disregarding sub-contracts entered into by a plaintiff in actions for non-delivery, whether on a sale of goods, or in a case of non-delivery by a carrier, have acted on the ground that sub-contracts are taken to be accidental circumstances peculiar to the plaintiff. A loss on such sub-contracts is not the natural and direct result of the tortious act, any more than a special loss arising from the impecuniosity of the plaintiff (another circumstance regarded as peculiar to him) which is held to be, to use LORD WRIGHT's phrase in *The Edison* (12), "outside the legal purview of the consequences of those acts."

Turning to the earlier authorities on this part of the case, I may observe that, in the scores of cases which are reported as dealing with the measures of damage in an action against a carrier or in an action founded on failure to deliver goods sold to the plaintiff, there is, so far as I have been able to ascertain, no statement in any judgment that the damages might be higher on the allegation of a tort than they would be in contract. On the contrary, as between seller and buyer it has been decided that the buyer cannot recover larger damages in tort than in contract: see *Chinery v. Viall* (28), *Hiort v. London and North-Western Rail. Co.* (29), and see particularly the judgment of THESIGER, L.J.). Section 51 of the Sale of Goods Act, 1893, shows that that view was accepted by the framers of the Act. (See CHALMERS (11th Edn., p. 137; BENJAMIN ON SALE, 11th Edn., p. 984, note x.)

I find in MAYNE ON DAMAGES (10th Edn.), p. 40, the statement that in cases of tort to property, where there are no circumstances of aggravation, the damages are generally the same as in cases of contract. It has been held repeatedly that in trover the measure of damage, generally speaking, is the value of the goods. As an illustration of this it should be observed that in *The Parana* (30) the claim was for damage arising from breach of contract to deliver goods shipped, the default being due to defects in the ship, and it was held that the plaintiffs could not recover damages based on a claim for loss of market.

A few years later a somewhat similar case was brought in connection with *The Notting Hill* (31), but in this case the claim was made in tort and not in contract. The judgments in the Court of Appeal—BRETT, M.R., BOWEN, L.J., and FRY, L.J.—decided that the rule with regard to remoteness of damage was precisely the same whether the damages were claimed in actions of contract or of tort and they followed the decision in *The Parana* (30). The judgments of BOWEN, L.J., in *Cobb v. Great Western Railway* (18) and in *The Argentino* (13), and of SCRUTTON and GREER, L.J.J., in *The Edison* (12) are to the same effect. To avoid misconception, I would add that I am dealing only with the case of an action in trover where there are no circumstances of aggravation and where, though technically the facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver.

France v. Gaudet (11) was, however, relied on by the plaintiffs. That was an action for the wrongful conversion to their own use by the defendants of 100 cases of champagne. This wine had been bought at the price of 14s. per dozen, and had been immediately re-sold by the plaintiff to a Captain Hodder, whose ship was on Aug. 13 in the London Docks and about to sail. The sale was for delivery on the following day, Aug. 14, but when the plaintiff sent to the defendant's wharf, and required the delivery of the wine, the defendants refused to deliver it on an untenable ground, and Captain

Hodder sailed without the wine. It was admitted that champagne of that peculiar brand and quality was not to be bought in the market so as to enable the plaintiff to substitute other cases of champagne for the 100 cases which he had purchased and contracted to sell to Captain Hodder. The defendants, however, had no notice of the contract between the plaintiff and Hodder, and the question for the Court of Appeal was as to the measure of damage. The material part of the decision of the court, delivered by MELLOR, J., was in the following terms:

"We are of opinion that the true rule is to ascertain the actual value of the goods at the time of conversion, and that a bona fide sale having been made to a solvent customer at 24s. per dozen, which would have been realised had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24s. per dozen, and we think that in the present case that ought to be the measure applied, and that a jury would not only have been justified in assuming that to be the value, but ought, where the transaction was bona fide, to have taken that as the measure of damages."

The judgment goes on to state the grounds for the conclusion that notice of a special contract is not necessary in such a case, the defendant being *ex hypothesi* a wrongdoer, and this passage might be thought to have given some ground for the contention that in such a case as we are considering, the measure of damage should be greater if the action can be brought in tort rather than in contract. It is, however, to be noted that MELLOR, J., himself explained the case in *Horne v. Midland Rail. Co.* (3). Counsel for the plaintiffs were arguing that the loss of profit on a contract of sub-sale might be taken into account, and they relied on *France v. Gaudet* (11); but MELLOR, J., remarked:

"That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was therefore no other test of value of the goods."

Having regard to this statement I can see no ground for doubting that the damages recoverable in *France v. Gaudet* (11) were based on the price obtainable on the sub-sale on precisely similar grounds to those which, as I have stated above, were anticipated in *Stroud v. Austin & Co.* (26).

My conclusion is that whether the action is in tort or contract, whether there is or is not a market for the same goods at the port of discharge, circumstances peculiar to the plaintiff, such as a sub-contract by him not communicated to the defendant, must be excluded from consideration, although in a proper case such a sub-contract, like any other contract of sale at a relevant date, might be used as evidence of value. The sub-contracts in the circumstances of the present case are, in my view, valueless as evidence of value.

There remains the question of fact as to the true value on the evidence of the forty-seven tons of Rumanian wheat on or about Jan. 10, 1931. On careful consideration I have come to the same conclusion as GREER, L.J., on this question, namely, that the value has been shown to be 23s. 6d. per quarter. I therefore agree with the order on the appeal which has been proposed by my brother GREER.

Solicitors; *Thomas Cooper & Co.*; *Pritchard, Sons, Partington, & Holland*, for *Andrew M. Jackson & Co.*, Hull.

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

FRENCH v. ARCHIBALD RUSSELL, LTD.

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Thankerton, Lord Russell and Lord Macmillan), April 19, 20, June 11, 1934]

[Reported 1934 S.C. 5; 104 L.J.P.C. 17; 152 L.T. 1; 50 T.L.R. 451; 78 Sol. Jo. 446; 27 B.W.C.C. 338]

Workmen's Compensation—Industrial disease—Total incapacity—"Continuing effects of injury"—Termination of disease—Inability to obtain work owing to inability to make declaration of non-occurrence of disease—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 9 (4) as substituted by Workmen's Compensation Act, 1931 (21 & 22 Geo. 5, c. 18), s. 1.

In cases of industrial disease the "injury by accident" is not the contraction of the disease simpliciter, but the contraction of the disease plus the consequent disablement or suspension, as the case may be, but the words "the continuing effects of the injury" in s. 9 (4) of the Workmen's Compensation Act, 1925, as substituted by s. 1 (1) of the Workmen's Compensation Act, 1931, referred to the physical condition of the workman resulting from the injury. In the present case it was the inability of the workman to sign a declaration required by the colliery owners that he had never suffered from nystagmus and not the continuing effects of the injury which prevented his getting employment in the same grade in the same class of employment as before the accident, and, therefore, the case did not fall within s. 9 (4) (as substituted) and the incapacity of the workman could not be treated as total incapacity.

Notes. The Workmen's Compensation Acts were repealed by the National Insurance (Industrial Injuries) Act, 1946, which, by s. 1 (1), provides for insurance against personal injury caused . . . by accident arising out of and in the course of" employment, and, by s. 55 et seq., extends that insurance to industrial diseases.

Explained: *Andrews v. Denaby and Cadeby Main Collieries, Ltd.*, [1936] 1 K.B. 484. Considered: *Richards v. Goskar*, [1936] 3 All E.R. 389. Followed: *White v. Pickersgill & Sons, Ltd.*, [1941] 2 All E.R. 656. Referred to: *Lloyd v. Conduit Collieries, Ltd.* (1937), 30 B.W.C.C. 293; *Wheatley v. Lambton, Hetton and Joicey Collieries, Ltd.*, [1937] 2 All E.R. 756; *Mayer and Sherratt v. Co-operative Insurance Society, Ltd.*, [1939] 3 All E.R. 158.

As to "incapacity" under the old law, see 34 HALSBURY'S LAWS (2nd Edn.) 917 et seq., and for cases, see 34 DIGEST 393 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.).

Cases referred to:

- (1) *Barstow v. Ingham's Thornhill Collieries, Ltd.*, [1934] A.C. 304; 103 L.J.K.B. 425; 151 L.T. 66; 27 B.W.C.C. 146, H.L.; Digest Supp.
- (2) *Connor v. Cadzow Coal Co., Ltd.*, [1932] A.C. 1; 101 L.J.P.C. 59; 146 L.T. 97; 48 T.L.R. 10; 75 Sol. Jo. 763; 24 B.W.C.C. 396, H.L.; Digest Supp.

Appeal by Thomas French, a miner, from an order of the First Division of the Court of Session on a Case Stated by the sheriff-substitute of Lanarkshire at Hamilton, in an arbitration under the Workmen's Compensation Acts, 1925 to 1931.

The arbitrator found that, in view of all the circumstances, it was probable that the appellant would, but for the continuing effects of miner's nystagmus, have been able to obtain work in the same class of employment as he had before the date of his disablement. Accordingly, he ordered that the workman's incapacity should be treated as total incapacity, and awarded him compensation at the rate of 30s. per week. On appeal, the First Division of the Court of Session (the Lord President (LORD CLYDE) and LORD BLACKBURN, LORD MORISON dissenting) held, that the appellant's failure to obtain employment was not due to the "continuing effects of the injury" within the meaning of s. 9 (4) of the Workmen's Compensation Act, 1925, as amended by s. 1 (1) of the Workmen's Compensation Act, 1931, but was due to the fact that he could not make the declaration required by the colliery owners. The facts as set out in the

stated Case, and the question of law stated by the arbitrator for the opinion of the court, are fully set out in the opinion of LORD TOMLIN. The workman appealed. A

D. P. Blades, K.C., and *James Walker* (both of the Scottish Bar) for the appellant.

T. M. Cooper, K.C., and *A. G. Erskine Hill* (both of the Scottish Bar) for the respondents.

The House took time for consideration :

June 11. The following opinions were read: B

LORD TOMLIN (read by LORD THANKERTON).—This appeal is by a miner under the Workmen's Compensation Act, 1925, against a judgment of the First Division of the Court of Session pronounced upon a stated Case in an arbitration between the appellant and the respondents, who were the appellant's employers, the Case Stated having been prepared upon the requisition of the respondents. C

The appellant, who at the date of the Case Stated was fifty years of age, had been, for thirty-eight years prior to Nov. 2, 1929, employed as a miner by the respondents, who were owners of collieries in Scotland. On Nov. 2, 1929, the appellant was certified by the certifying surgeon for the district to be suffering from miner's nystagmus, and to be thereby disabled from earning full wages at the work at which he had been employed. The respondents admitted liability, and paid the appellant compensation at the rate of 27s. 3d. per week down to March 26, 1930, in respect of total incapacity, and thereafter at the rate of 14s. per week down to June 6, 1930, in respect of partial incapacity. D

On the last-mentioned date the appellant was examined by a medical referee (Dr. H. Wright Thomson), who certified as follows :

"The said Thomas French is recovering from an attack of miner's nystagmus, and his condition is such that he is fit for his usual work as a miner." E

Following upon this certificate the respondents lodged a minute in which they craved the court to end, or alternatively to suspend, the right to compensation. In answer the appellant lodged a minute of process in which he averred, *inter alia*, that since the date of the medical referee's report he had taken all reasonable steps to obtain, and had failed to obtain, employment as a miner, and that such failure had been a consequence wholly or mainly of his disablement from miner's nystagmus. He further averred that he would run a grave risk of recurrence of the said disease and disablement if he were to enter employment underground. He, accordingly, craved the court to award him compensation in respect of total or partial incapacity for work, commencing as from June 6, 1930, until further order of court. F

The respondents then lodged another minute in which they stated that any risk of recurrence was due entirely to the appellant's constitutional tendency to suffer from the disease, and that, therefore, as he had recovered from the disablement, his right to compensation should be ended. Thereafter, on the motion of the parties, procedure in the arbitration was sisted to await the decision in *Connor v. Cadzow Coal Co., Ltd.* (2), in which your Lordships' House subsequently held that s. 9 (4) of the 1925 Act applied to industrial diseases. After that case had been disposed of by your Lordships the sist was recalled. G

At the time when the arbitration began s. 9 (4) of the 1925 Act stood in the following terms: H

"If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act."

By the time that the sist was recalled the 1931 Act, which contained a substitute for s. 9 (4) of the earlier Act, had come into force. I

Section 1 of the 1931 Act provided as follows:

"(1) Section 9 (4) of the Workmen's Compensation Act, 1925, is hereby repealed, and the following subsection shall be substituted therefor:—

'(4) If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the county court judge either (i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident; or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act. Provided that—(i) no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment; and (ii) every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit.'

"(2) As from the passing of this Act the provisions of the subsection so substituted as aforesaid shall apply in any case where the accident happened on or after Jan. 1, 1924, and an application for weekly payments to be reviewed in accordance with those provisions may be made, notwithstanding that there has not been any change in the condition of the workman or any change of circumstances other than the passing of this Act."

As a result of this change in the law the appellant was allowed to amend his minute of process by adding an averment in these terms:

"That having regard to all the circumstances it is probable that the pursuer would, but for the continuing effects of the injury, be able to obtain work of the kind which he was performing prior to his said disablement."

A proof was allowed and was taken before the arbitrator.

It was proved that no coalmaster in Scotland will give employment underground to any workman who is unable to sign a declaration to the effect that he has not previously suffered from miner's nystagmus and that the appellant had made repeated efforts to find work as a miner at the collieries in the district in which he lived, but had failed to obtain it, and that at each of such collieries he had been told that he could not be employed underground in respect that he had previously suffered from nystagmus. The arbitrator held it to be proved that, having regard to all the circumstances, it was probable that, if the appellant had not previously been disabled by miner's nystagmus, he would at the date of the arbitrator's award, namely, May 16, 1932, have been engaged in work in the same grade in the same class of employment as before the date of his disablement.

At the proof an agreed admission as to the appellant's condition was made in the following terms, namely:

"It is admitted that by Feb. 15, 1932, Thomas French had recovered from his attack of miner's nystagmus in the sense that by that date all symptoms of the disease had disappeared."

The parties, however, were not agreed as to whether the appellant had become more susceptible to the disease. Medical evidence was led on this question. After the case had been taken to avizandum, the arbitrator made a remit to Dr. Wright Thomson to report on the question whether after and in consequence of the attack of miner's nystagmus the appellant was more susceptible to the disease than he was before it. On May 10, 1932, Dr. Wright Thomson gave his report as follows:

"I am of opinion that the said Thomas French is, after and in consequence of the attack of miner's nystagmus, more susceptible to the disease than he was before it, in the sense that whereas he worked for thirty-eight years prior to the attack without

being disabled by nystagmus he is now admittedly constitutionally susceptible, and liable to have another attack if he resumes work as a miner." A

The arbitrator held it proved that in consequence of the attack the respondent was more susceptible to the disease than he was before it.

In the result, the arbitrator found that, having regard to all the circumstances, it was probable that the appellant would, but for the continuing effects of the attack of miner's nystagmus, have been able to obtain work in the same grade in the same class of employment as before the date of his disablement. In terms of s. 9 (4) of the 1925 Act, as amended by s. 1 of the 1931 Act, the arbitrator ordered that his incapacity should be treated as total incapacity resulting from the said injury until further order of the court, and, accordingly, awarded him compensation at the rate of 30s. per week from June 6, 1930, until such further order in respect of total incapacity, but subject to the condition that the award should cease to be in force if the respondent should receive unemployment benefit. B C

The questions of law which the arbitrator stated for the determination of the court were as follows:

"(i) In the circumstances above stated was I entitled to hold that the case fell within the terms of s. 9 (4) of the Workmen's Compensation Act, 1925, as amended by s. 1 of the Workmen's Compensation Act, 1931? D

"(ii) In the circumstances above stated was I entitled to make an award of compensation in favour of the respondent as from June 6, 1930?"

The judges of the First Division of the Court of Session (by a majority consisting of the Lord President and LORD BLACKBURN, LORD MORISON dissenting) answered both questions of the Special Case in the negative, holding that the appellant's failure to obtain employment was due to the fact that he could not make the declaration as to his not having suffered from nystagmus required by those from whom he sought employment, and that such failure was not due to the continuing effects of the injury nor was it a consequence, wholly or mainly, of the injury. E

In considering the effect of the section of the Act of 1931 which I have already quoted, it is necessary to bear in mind that the meaning of "injury" must be determined with reference to the provisions of s. 43 of the 1925 Act which applies the Act to certain industrial diseases including nystagmus. F

That section, so far as material, provides as follows:

"43. (1) Where (i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which the workman is employed certifies that the workman is suffering from a disease mentioned in Sched. III to this Act and is thereby disabled from earning full wages at the work at which he was employed; or (ii) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; or (iii) the death of a workman is caused by any such disease; and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications: G H I
(a) The disablement or suspension shall be treated as the happening of the accident;
(b) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable."

From the above I think it follows that in cases of industrial disease the injury by accident is not the contraction of the disease simpliciter, but the contraction of the disease plus the consequent disablement or suspension as the case may be.

Further, in the recent case before your Lordships' House of *Barstow v. Ingham's Thornhill Collieries, Ltd.* (1) it was held that the words "the continuing effects of the

injury" used in s. 9 (4) of the 1925 Act refer to the physical condition of the workman resulting from the injury.

In the present case it is, I think, plain that the failure of the appellant to get employment underground was due to his inability to comply with the colliery owners' rule which requires an applicant for work underground to sign a declaration that he has never suffered from nystagmus. It was his inability to sign the declaration and not the continuing physical effects of the injury which prevented his getting employment in the same grade in the same class of employment as before the accident. For these reasons the case does not, in my opinion, fall within s. 9 (4) (i) as set out in s. 1 of the 1931 Act.

So far as concerns s. 9 (4) (ii) as so set out the appellant never sought to bring himself within it and the arbitrator has not dealt with the case under that head. In this branch of the section the word employment is not confined to the class of employment in which the workman was engaged before the accident. The word is general. In fact the appellant did not seek to prove anything at all with regard to any employment other than employment underground in the collieries, and upon the material before him the arbitrator had no evidence upon which he could have found that the appellant had failed to obtain employment generally as a consequence wholly or mainly of the injury.

In the result, therefore, I think that the decision of the court below was right and that this appeal should be dismissed.

Before parting with the case, however, it is perhaps permissible to express regret that s. 1 of the 1931 Act has not succeeded in introducing into the subject-matter with which it deals a larger measure of clarity in regard to cases of industrial disease.

LORD RUSSELL and **LORD MACMILLAN** ask me to say that they concur in the opinion I have just read, and may I add I also concur.

LORD WARRINGTON.—I also concur in the judgment which I have had the advantage of reading.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*, for *George McLaughlin*, *Hamilton*, and *Allan McDougall & Co.*, S.S.C., *Edinburgh*; *Beveridge & Co.*, for *J. M. Davidson*, *Glasgow*, and *W. & J. Burness*, W.S., *Edinburgh*.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

NORWICH UNION FIRE INSURANCE SOCIETY, LTD. v.
WILLIAM H. PRICE, LTD.

[PRIVY COUNCIL (Lord Sankey, L.C., Lord Blanesburgh, Lord Wright, Sir Lancelot Sanderson, Sir Sidney Rowlatt), April 12, May 8, 1934]

[Reported [1934] A.C. 455; 103 L.J.P.C. 115; 151 L.T. 309; 50 T.L.R. 454; 78 Sol. Jo. 412; 40 Com. Cas. 132, P.C.]

Privy Council—Australia—Marine insurance—Collision—Forced sale of cargo—Cargo not damaged by peril insured against—Payment by insurers as total loss under belief that cargo damaged by insured peril—Transfer to insurers of all rights of insured by letter—Effect of letter—Whether a notice of abandonment—Effect of mistake—Recoverability of insurers' payment—Marine Insurance Act, 1909 (Australia, No. 11 of 1909), s. 68 (6).

Insurance—Marine Insurance—Mistake of fact—Sale of cargo after collision—Payment as for total loss of cargo—Mistaken belief that cargo damaged in collision—Transfer of all insured's rights to insurers by letter—Insurers' right to recover payment back from insured—Whether letter a notice of abandonment—Marine Insurance Act, 1906 (6 Edw. 7, c. 41) s. 62 (2).

Insurance—Marine Insurance—Notice of Abandonment—Letter transferring all insured's rights to insurers on payment as for total loss of cargo—Mistaken belief that cargo damaged by insured peril—Effect of letter—Insurers' right to recover payment back from insured—Marine Insurance Act, 1906 (6 Edw. 7, c. 41) s. 62 (2).

Mistake—Mistake of fact—Money paid under mistake of fact—Insurers' payment as for total loss of cargo in mistaken belief that cargo damaged by insured peril—Recoverability of payment from insured.

Under a policy of marine insurance insurers insured 600 bushels of lemons consigned to the insured on the steamship A. on the voyage from Messina to Sydney, New South Wales, against the usual perils, including sea perils.

En route the A. struck a submerged object, part of the cargo was damaged, the vessel delayed for repairs, and the cargo transhipped. Meanwhile, the lemons ripened and so were sold by the shipowners, who informed the insured. Both insurers and insured concluded from the documents sent by the shipowners that the lemons had been damaged by an insured peril, and accordingly the insurers paid the insured on the policy as for a total loss, and the insured, by letter dated March 25, 1929, in consideration of the payment and at the insurers' request assigned, transferred, and abandoned to the insurers all their rights in the lemons, and subrogated the insurers to all their rights in consequence of the loss. The insurers accepted. Subsequently, it transpired that the lemons had not been damaged, and that consequently no claim under the policy had arisen. On a claim by the insurers for the return of the money they had paid on the policy as money paid under a mistake of fact the insured contended that the letter of March 25, 1929, constituted a notice of abandonment given and accepted within the meaning of s. 68 (6) of the Australian Marine Insurance Act, 1909 (which is identical with s. 62 (6) of the English Marine Insurance Act, 1906), and, therefore, constituted against the insurers a conclusive admission of liability,

Held: the insurers were entitled to recover because

(i) the mistaken belief that the lemons had been damaged, under which the money had been paid, was a mistake of fact in respect of the underlying assumption of the contract [i.e. the contract constituted by the payment and the letter of March 25] and was fundamental and basic: dictum of PARKE, B., in *Kelly v. Solari* (1) (1841), 9 M. & W. at p. 59; *R. E. Jones, Ltd. v. Waring & Gillow* (2), [1926] A.C. 670, and *Cooper v. Phibbs* (3) (1867), L.R. 2

- A H.L. 149, applied; *Bell and another v. Lever Brothers, Ltd.* (4), [1932] A.C. 161, considered;
- (ii) the circumstances of the case and the terms of the letter of March 25 showed that the letter was merely an agreement for immediate settlement on the basis of an actual total loss, together with the consequent abandonment to the insurers of all rights in respect of the loss upon payment;
- B (iii) the words "transfer" and "abandon" in the letter could not be construed as involving notice of a claim to abandon which the insurers were required to accept so that thereby there should be a constructive total loss: dicta of LORD CHELMSFORD in *Rankin and others v. Potter and others* (5) (1873), L.R. 6 H.L. at p. 156, and of BRETT, L.J., in *Kaltenbach v. Mackenzie* (6) (1878), 3 C.P.D. 467 applied.
- C **Semble:** mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in respect to any other contract, and so even if notice of abandonment had been given and accepted, the mistake would have rendered both the notice and the acceptance nullities: dictum of LORD ELLENBOROUGH in *Bainbridge v. Neilson* (7) (1808), 10 East at p. 341, applied.
- D **Notes.** Referred to: *Morgan v. Ashcroft*, [1937] 3 All E.R. 92; *Harrison and Jones, Ltd. v. Burton and Lancaster, Ltd.*, [1953] 1 All E.R. 903.
- As to constructive total loss followed by justifiable sale, see 18 HALSBURY'S LAWS (2nd Edn.) 357-8, para. 515, and for cases on the subject see 29 DIGEST 282, 2292-2296.
- As to notice of abandonment made and accepted under a mutual mistake of fact, see *ibid.* 373, para. 538 text and note (p).
- E As to recovery back by underwriters of losses paid after adjustment, see *ibid.* 382, para. 549 text and note (j), and for cases on the subject, see 29 DIGEST 300, 2464-2468.
- As to the recovery of money paid under a mistake of fact, see 8 HALSBURY'S LAWS (3rd Edn.) 252, para. 436, and for cases on the subject, see 35 DIGEST 147-148, 456-465, and 150-151, 475-485. For the Marine Insurance Act, 1906, s. 62 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 43.
- F Cases referred to:
- (1) *Kelly v. Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 29 Digest 391, 3128.
- G (2) *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 42 T.L.R. 644; 70 Sol. Jo. 756; 32 Com. Cas. 8, H.L.; Digest Supp.
- (3) *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 22 Digest (Repl.) 156, 1411.
- (4) *Bell and another v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; 48 T.L.R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98, H.L.; Digest Supp.
- H (5) *Rankin and others v. Potter and others* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp. M.L.C. 65, H.L.; 29 Digest 278, 2259.
- (6) *Kaltenbach v. Mackenzie* (1878), 3 C.P.D. 467; 48 L.J.Q.B. 9; 39 L.T. 215; 26 W.R. 844; 4 Asp. M.L.C. 39, C.A.; 29 Digest 280, 2273.
- (7) *Bainbridge v. Neilson* (1808), 10 East, 329; 103 E.R. 800; 29 Digest 265, 2140.
- I (8) *Roux v. Salvador* (1836), 3 Bing. N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest 263, 2129.

Appeal from a judgment of the full court of the Supreme Court of New South Wales dismissing a claim by insurers for repayment of monies paid by them under a mistake of fact, being monies paid to the insured as for a total loss of the insured cargo, and in exchange for a letter transferring and abandoning all the insured's rights to the insurers; the payment had been made under the mistaken belief that the cargo had been damaged by an insured peril.

The full court (STREET, C.J., JAMES and DAVIDSON, JJ.) held that the letter con-

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stituted a notice of abandonment which had been accepted, that the abandonment was, under s. 68 (6) of the Australian Marine Insurance Act, 1909, irrevocable and, therefore, that the insurers were not entitled to repayment. The case is reported 33 State Rep. N.S.W., p. 196. The insurers now appealed to His Majesty in Council.

W. L. McNair for the insurers.

Wilfrid A. Barton for the insured.

LORD WRIGHT.—The appellant insurers, an English insurance company with branches in many parts of the world, including Messina and Sydney, New South Wales, brought the action out of which this appeal rises against their insured, who are a company trading as produce brokers in Sydney, New South Wales, for the return, as money paid under a mistake of fact, of £453 11s. 3d., which had been paid to the insured by the insurers on the footing of a loss having occurred under a policy of marine insurance dated Dec. 11, 1928; this policy had been issued by the insurers' branch at Messina to the shippers of 600 bushels of lemons on the steamship *Aagtekerk*, and insured the lemons on the voyage from Messina to Sydney, New South Wales. The insurance was against the usual perils, including sea perils, and was f.p.a., unless in respect of damage caused by fire, sinking, collision or stranding. The lemons were shipped at Messina in December, 1928, and the steamship proceeded on her voyage; at Smyrna, when entering the port, she struck a submerged object; the cargo stowed in No. 1 hold was damaged by sea water, but the lemons being stowed in No. 2 hold were undamaged. The steamship then went on to Gibraltar, where the surveyors ordered her to go to Holland for repairs, the cargo being either transhipped or disposed of at Gibraltar. The lemons were reported to be ripening and fit to be marketed "in about fourteen days (limit)," and were sold for that reason about Feb. 5, 1929, by the shipowners or their agents in Gibraltar at the best price obtainable locally. They were not damaged by any peril insured against; the sale was solely because of their condition.

It is clear on these facts that the insured, who became, in due course, holders of the policy and endorsees of the bill of lading, had no claim on the policy; any claim they might have could only be against the shipowners for failure to deliver in accordance with the bill of lading, or against the shippers for shipping goods inherently unfit for transport on the voyage.

The true state of facts was not, however, known either to the insurers or to the insured in Sydney until some time after March 25, 1929, the date when the payment in question was made in the circumstances now to be stated. The only information in Sydney up to that date was derived from two documents: (1) a cable from the shippers to the insured, produced by the insured to the insurers about Jan. 28, 1929, in the following terms:

"*Aagtekerk* sailed nineteenth December had collision goods trans-shipped steamer *Arendskerk* laying Gibraltar act against Norwich Union Insurance for damage";

(2) a document called a short-landed certificate, dated March 12, 1929, issued by the shipowners' Sydney branch to the insured and produced by the insured to the insurers, which was in the following terms:

"Steamship *Aagtekerk*. We beg to advise that the 600 cases lemons consigned to you from Messina, and which were loaded by the above steamer, have been returned to Rotterdam for disposal. As you are no doubt aware the *Aagtekerk* struck a submerged rock in Smyrna Bay, which necessitated her returning to Rotterdam for repairs, and the delay caused by this forced us to dispose of the lemons at that port.—Yours faithfully, HOLLAND AUSTRALIA LINE."

On the faith of these documents the insurers paid the insured £453 11s. 3d. on March 25, 1929, taking the following letter from the insured:

"Sydney.—To the Norwich Union Fire Insurance Society, Ltd.—In consideration of your agreeing to pay the sum of £453 11s. 3d. under Policy of Insurance No. N602 effected with you on the property mentioned in the

A schedule hereto we hereby agree to assign transfer and abandon to you all right title and interest in and to the said property and the proceeds thereof and all that can or may be made, saved or realised from the damage or loss reported to have occurred to the said property and all rights against the owners of the other cargo on board any vessel or other person whatsoever caused or arising by reason of the said damage or loss and to grant you full power to take and use all lawful ways and means in our or your name or otherwise—at your risk and expense—to save and realise the said property or its proceeds and hereby agree to subrogate you to the same rights as we have in consequence of or arising from the said loss or damage. And we hereby undertake and agree to make and execute at your expense all such further deeds, assignments and documents, and to render such assistance as you may reasonably require for the purpose of carrying out this arrangement.—As witness our hands this 25th day of March, 1929.—Schedule of Property: As per Bill of Lading and Invoice per *Aagtekerk* bound from Messina to Sydney. Witness: JOHN B. FERGUSON. Signature: WM. H. PRICE, LTD., W. H. PRICE, Director."

D Some time afterwards, the insurers were first informed that the lemons had not been damaged by any peril insured against, and discovered for the first time that they had made the payment under a mistake of fact. A claim was made for the return of the money, and when the return was refused this action was brought. It was ordered in the action that there should first be tried the question whether, on the assumption that the payment was made under a mistake of fact, the moneys paid were recoverable. The Chief Justice stated in his judgment that when the insurers made their agreement of March 25, 1929, there is no doubt they believed that the lemons had been damaged by the collision; he added:

E "I have no doubt, too, that the defendant [the insured] was under the same belief."

F It is not necessary here to consider whether in any subsequent proceeding in this case the insured will be able to impugn this position. The present proceeding is based on that assumption. The Chief Justice went on to say:

G "It is clear that the payment of the insurance moneys in consideration of the [insured's] agreement to abandon its right to its property and its subrogation of those rights to the [insurers] was based on an underlying assumption by both parties that the lemons had been damaged by a peril insured against, that is, by collision with some submerged object."

H The Chief Justice accordingly held that at common law the insurers would be entitled to recover as for a payment made under a mistake of fact; but he held that, notwithstanding, the insurers were debarred from recovering, because there had been a notice of abandonment given and accepted within the meaning of s. 68 (6) of the Australian Marine Insurance Act, 1909, so that a conclusive admission of liability for the loss was constituted as against the insurers. JAMES, J., agreed with the Chief Justice; the decision of the trial judge had been to the same effect, and was accordingly affirmed. DAVIDSON, J., in the full court reached the same conclusion as his colleagues, but for other reasons; he did not agree that the claim was barred by the provisions of the Marine Insurance Act, but he held that the mistake was one of law.

I Their Lordships agree with the trial judge and with the majority of the full court that for purposes of this appeal the mistake was one of fact and was fundamental to the transaction. On the assumptions on which this appeal proceeds, the misconception under which the payment was made was that there had been a loss by perils insured against; unless that were so, there was no liability under the policy; save for that misconception no payment could have been claimed and no payment would have been made. The facts which were misconceived were those which were essential to liability and were of such a nature that on well-established principles any agreement concluded under such mistake was void in law, so that

any payment made under such mistake was recoverable. The mistake, being of the character that it was, prevented there being that intention which the common law regards as essential to the making of an agreement or the transfer of money or property. Thus, in *Kelly v. Solari* (1), where money was paid under a mistake of fact, PARKE, B., concludes his well-known statement of the law with these words (9 M. & W. at p. 59):

"If it [the money] is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

The "fact" which PARKE, B., is referring to is one "which would entitle the other to the money" if true. The reference to intention is crucial. In the same sense, in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.* (2) ([1926] A.C. at p. 696), LORD SUMNER says of *Kelly v. Solari* (1):

"The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. If so, there was no real intention on the company's part to enrich her."

LORD SUMNER had just pointed out that passing of property is a question of intention, and just as much so in the case of a payment of money as in the transfer of a chattel. To the same effect, LORD SHAW, in the same case, says in respect of mistakes ([1926] A.C. at p. 690):

"The true facts may not have been known to the grantor, or may have been misrepresented with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction depending on facts different from those which were the true facts."

Thus, in the present case the only transaction with which the mind of the insurers went was payment of a claim on the basis of the truth of facts which constituted a loss by perils insured against; it never intended to pay on the basis of facts inconsistent with any such loss by perils insured against. The mistake was as vital as that in *Cooper v. Phibbs* (3), in respect of which LORD WESTBURY used these words (L.R. 2 H.L. at p. 170):

"If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded on a common mistake."

At common law such a contract—or simulacrum of a contract—is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell and another v. Lever Brothers, Ltd.* (4).

It is true that in general the test of intention in the formation of contracts and the transfer of property is objective, that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty. Applying these principles to the present case, their Lordships find themselves so far in agreement with the opinions of the courts below that the money paid is recoverable at common law. That leaves for consideration the point on which the decision went against the insurers, so that this appeal is brought.

It is first necessary to determine precisely what was the transaction of March 25, 1929, the nature of which must be ascertained from the document of that date. The court below have held that it either constituted or evidenced a notice of abandonment as for a constructive total loss and an acceptance of that notice. It was

A agreed before this Board that the rights between the parties must be ascertained in accordance with the municipal law of Australia, including the provisions of the Marine Insurance Act, 1909. That Act corresponds in substance with the English Marine Insurance Act, 1906; thus s. 4 of the former Act says that the rules of the common law, including the law merchant, save in so far as they are not consistent with the express provisions of the Act, shall apply to contracts of marine insurance;

B this section is identical with s. 91 (2) of the latter Act. Similarly, ss. 62, 63, 66, and 67 of the Australian Act correspond with ss. 56, 57, 60, and 61 of the English Act, and define partial and total loss and actual and constructive total loss in identical terms; s. 68 of the former Act, which deals with notice of abandonment, is identical with s. 62 of the English Act. The policy, which was in Italian, did indeed contain special terms as to abandonment, but they are not material in

C this case.

Their Lordships cannot find in the document of March, 1929, any justification for reading it as a notice of abandonment or as an acceptance of such a notice or as dealing at all with a case of a constructive total loss. In their judgment, the document embodies an agreement for the immediate settlement on the basis of an actual total loss—together with the consequent abandonment to the insurers, upon

D payment of the amount of the total loss, of all rights of property surviving in respect of the loss. That this is its true meaning follows both from the actual language of the document and the circumstances of the case as conceived by the parties. The information on which they acted was that the lemons had been actually sold; the lemons had thus passed from the actual control and possession of the insured, who had lost them irretrievably. There was thus an actual total

E loss within the definition in s. 68 of the Act; no notice of abandonment need in such a case be given; indeed there could not be a notice of abandonment within s. 68 (1) because that section only applies to an election to abandon the subject-matter insured to the insurer, whereas, the lemons having been sold, there was nothing that the insured could abandon. All their right of property in the lemons had gone; it is not even clear that the lemons existed at all, since in all human

F probability they had been already consumed. The lemons had been sold, it seems, by the shipmaster or his agents, acting as agents of necessity; the sale was not the result of any sea damage or peril insured against affecting the lemons, but of their inherent vice or of delay; the sale, unless justifiable in consequence of perils insured against, gave no claim against the insurers; it could not on any view constitute a constructive total loss. The document in question is no doubt a usual form for

G purposes of subrogation, commonly used on payment of an actual total loss. The relevant words are transfer and abandon; they cannot be construed as involving notice of a claim to abandon which the insurers as underwriters were required to accept so that thereby there should be a constructive total loss. In *Rankin and others v. Potter and others* (5), LORD CHELMSFORD points out (L.R. 6 H.L. at p. 156) that "abandonment" and "notice of abandonment" are two separate and

H distinct things, though they are frequently confounded together in expression. The same distinction is developed by BRETT, L.J., in *Kaltenbach v. Mackenzie* (6); he points out that abandonment is part of every contract of indemnity, whereas notice of abandonment is peculiar to marine insurance, just as constructive total loss—as distinguished from actual total loss—is also peculiar. As an instance of abandonment he cites the well-known case of *Roux v. Salvador* (8); that case shows, he

I says, that where goods had been totally lost, but something had been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. BRETT, L.J., adds:

"But that abandonment takes place at the time of the settlement of the claim; it need not take place before."

In their Lordships' judgment, these latter words exactly describe the transaction between these parties which was recorded in the document of March, 1929. The parties having been informed that the lemons had been sold owing to delay, and

coupling that information with the previous cable which they understood to state that the lemons had been damaged as a consequence of the collision, not unnaturally understood the position as being that of a justifiable sale, consequent on damage due to perils insured against, and accordingly settled there and then as for an actual total loss, the insurers being subrogated to the proceeds of the sale. A

On this footing and on the assumption that the parties acted under a mistake of fact, or that the payment was made by the insurers under a mistake of fact, there can, in their Lordships' judgment, be nothing in the Marine Insurance Act which affects the application of the common law rule laid down in *Kelly v. Solari* (1). It therefore becomes unnecessary to consider the question so fully discussed in the judgments below as to the construction and effect of s. 68 (6) of the Act. Their Lordships will only briefly point out with all respect that there may be other matters to be considered than the bare words of the subsection. No doubt it is not generally permissible in construing the words of the Act to read in conditions and qualifications which are not expressed; and s. 4 only permits the application of the rules of the common law and the law merchant so far as not inconsistent with the express provisions of the Act. But the operative effect of mistake or fraud or duress, in cases where it operates, is not inconsistent with the express words—to take the relevant instance—of s. 68 (6) because mistake, if established, raises a preliminary or prior question, namely, whether there is in law a notice of abandonment at all, or an acceptance of such notice; indeed s. 68 (6) presupposes something which is not only in form but in reality a notice of abandonment or an acceptance thereof. Thus, if what appears to be the notice or acceptance is void and a nullity, the express words of s. 68 (6) do not apply at all. Long ago, when communications were slow and difficult, the position of a notice of abandonment based on false intelligence was considered. That admirable writer on insurance law, PHILLIPS, at s. 1665 of his work, states: B C D E

"Although an abandonment may be made on true intelligence of a total loss, yet if the intelligence proves to be false the abandonment will be a nullity."

In *Bainbridge v. Neilson* (7), LORD ELLENBOROUGH said (10 East at p. 341): F

"The effect of an offer to abandon is truly this, that if the offer appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a position to insist on his abandonment; but it is not enough that it was properly made, upon facts which were supposed to exist at the time if it turns out that no such facts existed." G

It would seem that a notice of abandonment, which is itself a nullity, cannot become the basis of rights simply because abandonment has been accepted by the underwriters. It further seems that on general principles mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract.

It is unnecessary to repeat what has been said earlier in this judgment as to the effect of mistake, but it seems to follow that, just as mistake may render a notice of abandonment a nullity, so in the same way it may render an acceptance of the notice a nullity. In other words, though the goods were in fact lost to the insured, such a mistake as is here assumed throughout would prevent not only the notice of abandonment, but also the acceptance of abandonment, from being other than a nullity. No case would then exist for the application of the words of s. 68 (6). I

Their Lordships have felt it desirable to make some observations on the question of construction out of respect to the opinions expressed in the courts below, but it is not necessary in this case to express any final opinion. It is enough for the decision of the appeal that in their Lordships' judgment there was here no case of a notice of abandonment or an acceptance of such notice, but it was simply a case of money paid under a mistake of fact, so that the insurers who have paid are entitled to recover.

It follows that their Lordships' judgment is that the appeal should be allowed

A and the judgment and order appealed from be set aside; the insurers will have the costs of the hearings in the courts below and of this appeal.

They will humbly so advise His Majesty accordingly.

Appeal allowed.

Solicitors: *William A. Crump & Son; Bell, Brodrick, & Gray.*

B [Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister at-Law.]

C

In the Estate of BENJAMIN, Deceased

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), January 24, 1934]

[Reported 150 L.T. 417]

D Will—Attestation—Witness ignorant of nature of document—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 9.

The signature of a testator to his will may be duly attested although an attesting witness does not know that the document in question is the testator's will. The intention of the witness is immaterial so long as his signature complies with the requirements of the Wills Act, 1837, s. 9.

E **Notes.** As to attestation of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 62 et seq.; and for cases see 44 DIGEST 266 et seq. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

- F (1) *Wright v. Sanderson* (1844), 9 P.D. 149; 50 L.T. 769; 48 J.P. 180; 32 W.R. 560; 53 L.J.P. 49, C.A.; 44 Digest 281, 1141.
- (2) *In the Goods of Wilson* (1866), L.R. 1 P. & D. 269; 36 L.J.P. & M. 1; 15 L.T. 191; 15 W.R. 229; 44 Digest 266, 958.
- (3) *In the Goods of Braddock* (1876), 1 P.D. 433; 45 L.J.P. 96; 40 J.P. 792; 24 W.R. 1017; 44 Digest 267, 967.
- G (4) *Pearson v. Pearson* (1871), L.R. 2 P.D. 451; 40 L.J.P. & M. 53; 24 L.T. 917; 19 W.R. 1014; 44 Digest 264, 928.
- (5) *In the Goods of Streatley*, [1891] P. 172; 60 L.J.P. 56; 39 W.R. 432; 44 Digest 267, 961.
- (6) *Neal v. Denston* (1932), 147 L.T. 460; 48 T.L.R. 637; 76 Sol. Jo. 691; Digest Supp.
- H (7) *Hudson v. Parker* (1844), 1 Rob. Eccl. 14; 3 Notes of Cases, 236; 8 Jur. 786; 163 E.R. 948; 44 Digest 258, 850.

Probate Action

I The plaintiffs, the Board of Guardians and Trustees for the Relief of the Jewish Poor, propounded, as one of the residuary legatees, a will of the testatrix, Esther Benjamin, dated June 4, 1929, and claimed a grant of administration with the will annexed. By this will the testatrix, who died on Dec. 25, 1932, after making gifts of money and effects to friends, left the residue of her estate to

"Jewish charity, namely, the Aged and Needy Jewish Board of Guardians, Bread, Meat and Coal, Deaf Dumb and Blind."

The defendants, as next of kin, said that the will was not duly executed; that one of the witnesses, Mary M. Lavery, was not present when the testatrix signed the will; and that the signature of the testatrix was not made or acknowledged by her in the presence of two or more witnesses; and they claimed a grant of administration on intestacy.

The attestation clause in the will, at the side of which the two witnesses' names and addresses appeared, ran as follows: "Signed in the presence of Esther Benjamin." The witnesses were Madame Adlersparre and Mrs. Mary M. Lavery. The Wills Act, 1837, s. 9, provides:

"No will shall be valid unless it shall be . . . signed . . . by the testator . . . ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

T. Bucknill and R. H. Bayford for the plaintiffs.

Frank Powell and Conolly Gage for the defendants.

LANGTON, J., dealt with the facts and the first issue raised on the pleadings, and said that he had come unhesitatingly to the conclusion that the attesting witnesses, Madame Adlersparre and Mrs. Mary Lavery, were right in saying that they both affixed their signatures to the will on the same day, namely, June 4, 1929, and he continued: Having arrived at that determination I have to face this further difficulty—the question of what was Mrs. Lavery's state of mind when she affixed her signature on June 4. Counsel for the defendants says: True, that, finding, as one does, the names of these attesting witnesses in the proper place, in the absence of any evidence from either of those witnesses, the court would infer, as a matter of presumption, that they were witnessing the signature of Mrs. Benjamin opposite to theirs, and would infer, upon the maxim omnia presumuntur rite esse acta, that the signature of the attesting witness, Mrs. Lavery, was sufficient for the purpose; but, even assuming that she is a witness of truth (and I accept her evidence) can it be said that she is a good attesting witness in face of her own testimony that she did not know what she was signing? Mrs. Lavery says she did not know that what she was signing was a will, but so far as acknowledgment of the signature is concerned no controversy arises. Mrs. Benjamin undoubtedly signed the will before either Madame Adlersparre or Mrs. Lavery was called upon to affix an attesting signature, and, in the face of that fact, it is almost impossible to believe that Mrs. Lavery at least did not know that she was witnessing a signature. She may not, perhaps, remember that she was witnessing a signature—I think that that is very possible—but I find it impossible to believe that at the time she did not know she was witnessing a signature. I think that she was willing to be obliging in practically any direction, and that, being in that frame of mind, she did not know and did not inquire whether she was obliging the testatrix by attesting the signature to a will or attesting some other signature of Mrs. Benjamin. I do not think that she actually signed the paper without realising that she was attesting some signature of Mrs. Benjamin's. I am not sure, however, that in the present state of the law on these matters it is necessary to go so far, because the well-known case of *Wright v. Sanderson* (1) seems to me to go as far as saying that it really does not matter, so long as the attestation is made in the proper form, whether or not a witness knows that he is attesting a signature. The case does not say so in so many words, because it did not happen to be a matter that was in dispute; but the case is interesting as showing how far this court has gone (with the approval of the Court of Appeal) in the direction of upholding any testamentary paper which is drawn in proper form in accordance with the Act.

I do not wish it to be thought that I am in any way disassociating myself from a long line of decisions. *Wright v. Sanderson* (1) was a case in which a man of business, not a lawyer, wrote a holograph codicil on the same paper as a will that he had previously made, and called upon the children's nurse and nursery governess to sign this paper. I think that it is a little significant that apparently he did not even ask them to witness a signature, but simply called upon them to sign this paper, and on being asked if they knew whether his signature was there or not, they both said that they did not know. The decision in that case turned on whether the signature was sufficiently acknowledged, and the case has been

A treated (rightly, of course) as a leading authority upon what is necessary by way of acknowledgment of a signature. It is not directly in point in the present case, but it is helpful. It is difficult to believe that a court composed of LORD SELBORNE, L.C., and COTTON and FRY, L.JJ., could possibly have discussed, as they did, the question of acknowledgment of signature, thinking, as they all did, that the case was a borderline case on this matter, if there had been a much more simple and
B much more direct point immediately before them, namely, the fact that the witnesses, or at least one of the witnesses, had not the faintest idea of what she was going to do, and did not know that she was attesting a signature. Although, as I say, the case is not directly in point, I think it affords good warrant for saying that, so long as an attesting signature is in a proper position, and so long as the witness is well aware of the fact that he is signing a paper, especially where, as in
C the present case, it is certain that the witness would have signed and had a consenting mind, even if she had not been informed that it was the signature of a will that she was attesting, in those circumstances the attesting signature is sufficient for the purpose.

In the present case, counsel for the plaintiffs submitted that the essentials of attestation had been complied with, and he quite rightly said that in order to
D discover those essentials you must turn to the Act. The essentials are that a witness shall subscribe and attest in the presence of the testator and after the signature or acknowledgment of the testator. In this case both witnesses did subscribe in the presence of the testator and did subscribe after the signature or acknowledgment of the testator. The Act is quite silent as to any materiality in the intention or mind of the witness. Counsel for the plaintiffs said that the
E witness in question intended to sign the document, whatever it was, and that, having made it clear that she so intended, did, in fact, sign it in the place reserved by Mrs. Benjamin for the signature of her attesting witnesses. I think that that contention is well founded.

Counsel for the defendants, on the other hand, put forward a number of cases as authorities for the proposition that no one can be said to attest a document unless
F he has what for the purposes of this case we have called a consenting mind, that is an intention to attest the actual document that he is signing. That argument has, I think, a good deal to commend it. Now the Act says "attest and subscribe." Mere subscription, therefore, is not enough. One must give a meaning to the word "attest." I agree that if the matter were *res integra* there is a good deal to be said for the argument that you cannot attest a document without being conscious, and fully conscious, of the nature of the document which you are attesting.
G But the matter is not *res integra*, and the decisions which counsel puts forward are, emphatically, none of them decisions which go to anything like the length to which he was bound to go in dealing with this subject. He put forward cases like *In the Goods of Wilson* (2), *In the Goods of Braddock* (3), *Pearson v. Pearson* (4), and *In the Goods of Streatley* (5). He also relied on my decision in *Neal v.*
H *Denston* (6) and the case of *Hudson v. Parker* (7). Apart from my own decision, which was on quite different grounds, those were cases in which the court considered the intention of the attesting witnesses, but the court did not do that because the intention of the attesting witnesses was, of necessity, the ground of the decision, but because it was necessary to consider the intention of the attesting witnesses with a view to curing flaws which were otherwise to be found in the
I testamentary paper. In other words, the courts have said that, in spite of the fact that a testamentary paper is not in the proper form, if the attesting witnesses have certain intentions in their minds, those intentions will cure the defects of form. It seems to me that it is a long step from that to say that, even assuming that the paper is in the proper form, you still have to look at the intention of the attesting witness in order to be satisfied that a will is a good one. The whole trend of the law and of the decisions of this court since the Wills Act was passed has been to uphold testamentary papers which are not in proper form where the defects have been held to be cured by the intention of the attesting witnesses. In

saying this I am not saying that the courts have, as it were, put a premium on the intention of the attesting witnesses and said that in any and every case the intention of the witnesses is an essential to a proper form of will.

For these reasons I reject the contention put forward on behalf of the defendants and I pronounce for the will.

Order accordingly.

Solicitors: *Stephenson, Harwood, & Tatham; Godfrey, Robertson, & Brend.*

[*Reported by W. LATEY, Esq., Barrister-at-Law.*]

GRAVESEND CORPORATION *v.* KENT COUNTY COUNCIL ATTORNEY-GENERAL *v.* GRAVESEND CORPORATION

[KING'S BENCH DIVISION (Lord Wright), October 31, 1934]

[Reported [1935] 1 K.B. 339; 104 L.J.K.B. 169; 152 L.T. 116;
99 J.P. 57; 51 T.L.R. 109; 82 L.G.R. 524]

Education—School—Occupation by education authority of building owned by other authority—Payment of rent.

A building was erected by a borough council as a technical school at a date when the borough council were the authority for the provision of higher education within their area. The cost of building was paid by instalments out of funds provided partly by the borough council and partly by the county council, the contribution of the county council consisting of grants made partly from the county rate and partly from the local taxation exchequer contribution account. Under the Education Act, 1902, the county council became the authority for higher education in place of the borough council, and thereafter occupied the building. They paid a nominal rent and continued their grants towards the cost of construction. When that cost was finally paid off the grants ceased, and the borough council then claimed an economic rent for the occupation of the building.

Held: the borough council were entitled to be paid an economic rent, but, in calculating the amount of it, regard must be had to the equitable interest of the county council in the building, in the proportion which the council's contributions bore to the total cost thereof.

Notes. The Education Act, 1921, was repealed by the Education Act, 1944, but under s. 163 of the Local Government Act, 1933, an education authority has power to appropriate land which it does not require to any purpose approved by the Minister.

As to dealings with land under the Education Acts, see 13 HALSBURY'S LAWS (3rd Edn.) 698 et seq., and as to cases see DIGEST Supps., tit. Education, cases No. 120a et seq. For Local Government Act, 1933, see 14 HALSBURY'S STATUTES (2nd Edn.) 353.

Case referred to:

(1) *The Venture*, [1908] P. 218; 77 L.J.P. 105; 99 L.T. 385; 11 Asp. M.L.C. 93, C.A.; 43 Digest 655, 894.

Actions tried together by LORD WRIGHT, sitting as an additional judge of the King's Bench Division.

In the first action, Gravesend Corporation claimed possession of a building occupied as a technical school by the Kent County Council. In the second, the

A Attorney-General, at the relation of Kent County Council, claimed an injunction to restrain the corporation from ejecting the council from the premises.

B Gravesend Corporation were the owners of the building, which had been erected by them in 1893 as a technical school. The cost of building had been paid by instalments, part of the instalments being found by the corporation and part by the county council. The contributions of the county council had taken the form of grants, partly out of the county rate, and partly out of the local taxation exchequer contribution account. The corporation had undertaken to repay those grants if the building were ever used for other than educational purposes.

C By the Education Act, 1902 (repealed), the county council became the authority for higher education in place of the corporation, and entered into occupation of the building. They continued to make grants towards the initial cost, and paid only a nominal rent of 10s. a year, but when the cost was finally paid off, the grants ceased, and the corporation thereupon claimed that the county council should pay an "economic" rent. As the county council refused to do so the corporation served a notice to quit, which was not complied with, and these proceedings were commenced.

D *Turner, K.C., and S. M. Noakes for Gravesend Corporation.*
Montgomery, K.C., and R. J. Sutcliffe for Kent County Council.

Cur. adv. vult.

Oct. 31. **LORD WRIGHT** read the following judgment. These are two actions which have been tried together. The plaintiffs in the former are the borough council of Gravesend (whom I shall call the Gravesend Council), and the defendants are the Kent County Council (whom I shall call the county council). In the first action Gravesend Council are claiming possession of certain premises, of which they are owners in fee simple, from the county council as tenants, who have been given notice to quit. The county council defend on the ground that the premises are dedicated to higher education in Gravesend, and that they occupy them under the Education Acts as the local authority for higher education in Gravesend. In the second action the plaintiff is the Attorney-General, on the relation of the county council, and the claim is for an injunction to restrain the Gravesend Council from claiming to eject them from the premises. This being, broadly stated, the purport of the pleadings, it appeared as the hearing proceeded that the real dispute between the two public bodies was whether the county council were entitled under the Education Acts to occupy the premises without paying other than a nominal rent, and, if a rent was payable, how it was to be ascertained. At the end of the case I gave leave to the Gravesend Council to embody these issues in an amendment, and a declaration is thus claimed in the first action in the following terms: (i) That the plaintiffs are under no obligation to allow the county council to use the premises for higher education without payment of rent. (ii) That the defendants have no interest in the premises, except an equitable interest, in the proportion that their contributions (other than moneys from the Exchequer contribution account) towards its cost bear to the total cost, including interest on loan.

F The premises in question are the Gravesend Technical School, which was provided by the Gravesend Council about the year 1893. The Gravesend Council were at that date the local authority for technical education in Gravesend, under the Technical Instruction Acts, 1889 and 1891 (both repealed). By s. 1 (1) of the Act of 1889 it was provided as follows:

"A local authority may from time to time out of the local rate supply or aid the supply of technical or manual instruction, to such extent and on such terms as the authority think expedient, subject to the following restrictions,"

and of these restrictions I need refer to only one:

"(g) The amount of the rate to be raised in any one year by a local authority for the purposes of this Act shall not exceed the sum of one penny in the pound."

By s. 4 (1):

A

"For the purposes of this Act the expression 'local authority' shall mean the council of any county or borough, and any urban sanitary authority within the meaning of the Public Health Acts. (2) The local rate for purposes of this Act shall be—(a) In the case of a county council, the county fund; (b) In the case of a borough council, the borough fund or borough rate."

B

Section 4 (2) (c) then goes on to deal with an urban sanitary authority. By s. 4 (3):

"A county council may charge any expenses incurred by them under this Act on any part of their county for the requirements of which such expenses have been incurred";

and by sub-s. (4):

C

"A local authority may borrow for the purposes of this Act. . . . (b) In the case of a borough council, as if the purposes of this Act were purposes for which they are authorised by s. 106 of the Municipal Corporations Act, 1882, to borrow."

Under these provisions the Gravesend Council raised part of the funds to build the technical school by borrowing. They also obtained a grant of £1,000 from the Science and Art Department, now the Board of Education, under a deed dated Jan. 24, 1894, and they also obtained grants from the county council.

D

In 1902 the Education Act of that year was passed. Its main effect with regard to higher education was set out in s. 2, which was in the following terms:

"(1) The local education authority shall consider the educational needs of their area and take such steps as seem to them desirable, after consultation with the Board of Education to supply or aid the supply of education other than elementary, and to promote the general co-ordination of all forms of education, and for that purpose shall apply all or so much as they deem necessary of the residue under s. 1 of the Local Taxation (Customs and Excise) Act, 1890, and shall carry forward for the like purpose any balance thereof which may remain unexpended and may spend such further sums as they think fit: Provided that the amount raised by the council of a county for the purpose in any year out of rates under this Act shall not exceed the amount which would be produced by a rate of 2d. in the pound, or such higher rate as the county council, with the consent of the Local Government Board may fix. (2) A council, in exercising their powers under this Part of this Act, shall have regard to any existing supply of efficient schools or colleges, and to any steps already taken for the purposes of higher education under the Technical Instruction Acts, 1889 and 1891."

E

F

G

But s. 3 also gave a non-county borough power to supply or aid the supply of higher education. That section is as follows:

"The council of any non-county borough or urban district shall have power, as well as the county council, to spend such sums as they think fit for the purpose of supplying or aiding the supply of education other than elementary. Provided that the amount raised by the council of a non-county borough or urban district for the purpose in any year out of rates under this Act shall not exceed the amount which would be produced by a rate of one penny in the pound."

H

I may add a reference to s. 1 (1) of the Local Taxation (Customs and Excise) Act, 1890 (53 & 54 Vict. c. 60), which provides that:

I

"Out of the English share of the local taxation (customs and excise) duties paid to the local taxation account on account of any financial year: (a) The sum of £300,000 shall be applied for such purposes of police superannuation in England as hereinafter mentioned; (b) the residue shall, unless Parliament otherwise determines, be distributed between county and county borough funds, and carried to the Exchequer contribution accounts of those funds respectively, and applied under the Local Government Act, 1888, as if it were

A part of the English share of the local taxation probate duty, and shall be the subject of an adjustment between counties and county boroughs, according to s. 82 of the said Act. . . ."

By sub-s. (2):

B "The council of any such county or county borough may contribute any sum received by such council in respect of the residue under this section, or any part of that sum, for the purposes of technical education within the meaning of the Technical Instruction Act, 1889, and may make that contribution over and above any sum that may be raised by rate under that Act."

C The result of the Act of 1902 was that the supply of higher education was, in Gravesend, taken over from the Gravesend Council and transferred to the county council, who, in accordance with s. 2 (2) of the Act, entered into occupation of the premises in question as being an efficient school. They have so continued, and now occupy under the consolidating Education Act, 1921. In the period before the Act of 1902 the county council made large contributions to the cost of the premises in question, and continued to do so until 1931, when the loan, which had been obtained by the Gravesend Council, was finally discharged. [His Lordship stated D the amounts contributed by the county council, and continued:] In the case of every payment made in this way by the county council to the Gravesend Council a receipt in due form was taken by the former from the latter in the same terms on every occasion. What is relevant in this case is the final paragraph, which was in these terms—it is a covenant by the Gravesend Council:

E "That any building to be erected or acquired or partly erected or acquired by means of the said sum, or by means of any loan in the discharge of the principal and interest of which or any part thereof respectively the said sum of £501 7s. 11d. or any part thereof shall be applied, shall be exclusively used for the purposes of technical education within the true intent and meaning of the said Technical Instruction Acts, 1889 and 1891, and upon any failure in the observance of this restriction the said sum of £501 7s. 11d. shall be repaid by F the said town council to the said Kent County Council upon demand made."

In respect of the grant of £1,000 from the Science and Art Department a deed was executed by the Gravesend Council which contained a similar covenant that

G "if at any time thereafter the said buildings to be used as schools of science and art as aforesaid shall be appropriated to any uses other than those of schools of science and art the said grant of £1,000 which has been made by the department as aforesaid shall be forthwith repaid by the corporation to the Lords of Her Majesty's Treasury."

The fee simple of the premises is in the Gravesend Council. The county council having thus come into occupation of the premises, an agreement was concluded on June 8, 1910, between them and the Gravesend Corporation, whereby the latter H let to the former the premises as on a yearly tenancy from Aug. 1, 1908, at a rent of 10s. a year, subject to three months' notice. The county council were to pay all rates and taxes and repair and insure the premises. They were only to occupy the premises for the purpose of higher education, and to pay teachers' salaries and other expenses. They were also in each year to pay a sum to make up the instalments of principal and interest due under the loan, so far as a rate of 1d. in the I pound, which the Gravesend Council were to raise, was insufficient for that purpose. This agreement was terminated by notice on April 27, 1915, but it was renewed and was continued either as for periods each of three years, or as a yearly tenancy until the final notice to quit was given in June, 1930.

The county council replied to that notice that, the premises being provided for higher education, their occupancy of them could not be terminated except on an order of the Board of Education allowing the Gravesend Council to alienate the property, and that if it were necessary for them to find alternative accommodation the county council would have to consider whether they should recover the cost of

such accommodation by special rate on the locality. Attempts were made to arrive A
at a compromise, but eventually the writs were issued in these actions.

The Gravesend Council relied on the broad case that the premises were their
property, and that there was nothing in the Education Acts which obliged them to
allow the county council to occupy the premises without paying what was called
an economic rent. The county council contended that the premises had been con- B
structed out of moneys provided for technical or higher education, and were
dedicated to that use, and thus could only be occupied by the authority for higher
education, which was the county council, who could thereby fulfil their statutory
duties. They also relied on the provision in s. 115 (2) of the Education Act, 1921
(11 & 12 Geo. 5, c. 51), debarring the Gravesend Council from alienating the
building without the consent of the Board of Education, which in fact had not even
been applied for. They also contended that the Education Acts contained no power C
to the county council to pay a rent, nor to the Gravesend Council to receive rent.
If, however, any rent was payable other than a nominal rent, it could only be on
the special basis applicable to public buildings, and based on so much of the outlays
on the building as remained after deducting the amounts contributed as above
stated by the county council. They further relied on the covenants which the
Gravesend Council had entered into, as stated above, in respect of each payment D
made to them by the county council as a further ground disentitling the Gravesend
Council to divert the premises to any use other than that of higher education.

It is strange that the Education Act, 1902, contained no provision for the financial
adjustments which were inevitable when the supply of higher education was trans-
ferred to the county council from the non-borough councils. Such provision has
been made in other Acts, as, for instance, in s. 151 of the Local Government Act, E
1933. Any such adjustment could deal with the transfer not only of property but
of liabilities, and all other necessary matters. Some provisions of this character
are indeed contained in the Fourth Schedule of the Education Act, 1921 (11 & 12
Geo. 5, c. 51). That schedule was not relied on by either party as being relevant
to the circumstances of the present case, and I do not further consider it herein.
Section 70 (3) of the Act of 1921, which corresponds with s. 2 (2) of the Act of 1902, F
quoted above, and which requires the council to have regard to any existing
efficient schools, clearly contemplates that the county council will, where necessary,
avail itself of schools supplied under the Act of 1889 by a non-county borough, such
as the Gravesend Council. Again, s. 114, which contemplates an appropriation of
the land to purposes other than educational, is thus expressed and qualified :

"The council of any county, borough, or urban district may, with the consent G
of the Board of Education, appropriate any land held by them in their capacity
as local education authority for any of the purposes of the council, otherwise
than in their capacity as local education authority approved by the Minister
of Health."

Section 115 (2) thus deals with alienation :

"A council shall have power, with the consent of and after inquiry by the H
Board of Education, to alienate any land acquired or held by them for the
purposes of higher education under this Act or any enactment repealed by this
Act, and, in the case of the sale of any such land, the proceeds of sale shall be
applied in such manner as the Minister of Health may sanction towards the
discharge of any loan of the council under this Act or any enactment repealed I
by this Act, or otherwise for any purpose for which capital may be applied by
the council under this Act."

Again, s. 113 deals with changes in the appropriation of the land to higher educa-
tional purposes from elementary purposes, or vice versa, or from other purposes to
educational purposes, subject to the consent of the Board of Education, and in the
last class to the consent of the Minister of Health; but in all these cases there is
no transfer from one authority to another.

These sections all seem to show that lands once dedicated to educational purposes

A cannot be diverted to other uses except subject to conditions and to the sanctions of the central authority. They afford, however, no help in ascertaining what is to be the adjustment of rights or liabilities when a local authority is using for higher education a property owned by another local education authority, which that other had acquired for the purposes of higher education at a time when it was the authority for higher education, but which it can no longer use for this purpose, B since its powers in that regard have been transferred to the former authority. The problem can only be solved by the application of general principles of law. I shall assume for the moment that the cost of the Gravesend Technical School was wholly supplied out of the borough rates; that it owns the school in fee simple. It is true that it cannot (without the statutory sanction) use the building for any other purpose than higher education, and in order that it should be so used it must now C be occupied by the county council. All that seems to follow from the Act. But, in my opinion, there is no necessary connection between this state of things and the further position that the Gravesend Council must give the use and occupation to the county council without being paid for it. So to hold would, I think, be to interfere with the Gravesend Council's rights of property without any positive enactment to that effect and without justification in fairness. The Gravesend D Council have, indeed, a limited power to spend money up to a penny rate on higher education, but they are not bound to do so and are not seeking to do so. If they were bound without compensation to supply the use of these premises to the county council, they would to that extent be compelled to aid in the supply of higher education to the extent of the annual value of these premises, which I find contrary to the spirit of the enactment.

E Nor can I see any ground for the contention that it is ultra vires either for the county council to pay a rent or the Gravesend Council to receive rent. The county council clearly are impliedly authorised to pay rent where legally necessary in order to supply higher education, and, if in law they must pay rent to the Gravesend Council for the school, it is no more ultra vires to do so than to pay any other necessary expenses. Equally, if the Gravesend Council are entitled to be paid rent, F they are as much entitled to receive it as to receive any other payment due to them. Whether, when they receive it, they are in law bound to apply it to purposes of education, elementary or higher, or are free to use it otherwise, and in any case whether any sanction of the Board of Education or the Minister of Health to any mode of employing the money is necessary, are not questions relevant between these parties and are not necessary to consider here. I can find no statutory G prohibition in the Acts against the receipt of rent and no requirement of any sanction or approval of the central authority for that purpose. I may add that between 1908 and 1931 the county council were content to accept the position that they were tenants of the Gravesend Council with regard to these buildings, and to pay a rent, nominal it is true, but in all these years the county council were, in addition, paying substantial sums by way of grants in respect of the buildings. In H that state of things a merely nominal rent may well have seemed fair. Thus the actual quantum may be disregarded, but the principle that some rent was payable was admitted throughout these years.

But though, in my judgment, some rent is exigible by the Gravesend Council, I think an important matter arises with regard to the amount. Though the legal estate in the school is vested in the Gravesend Council, the county council have an equitable estate or interest in it in the proportion which the total sums contributed by the county council bear to the total cost, on the principles very simply and clearly stated by the Court of Appeal in the judgment of the court delivered by FARWELL, L.J., in *The Venture* (1). On this basis the full rent must be reduced in favour of the county council to the extent of this equitable interest or resulting trust pro tanto. That this is so was not really disputed by counsel for the Gravesend Council, but he sought to qualify that admission by urging that an inquiry should be held to ascertain how much of these contributions came from the county council's share of the residue of the local taxation exchequer contribution account,

and how much from the county rate or similar sources. His submission was that, as regards the former, the county council could claim no equitable interest resulting from the payments, as they had acted simply as a channel in these matters for the disbursement of Government money. But, in my opinion, no such distinction should be drawn, all the payments made by the county council by way of grants being properly treated as on the same footing, and as equally creating the resulting trust which, in principle, has been admitted. As between these parties these moneys, whatever their origin, must be regarded as moneys of the county council. The earlier grants were made in terms as in exercise of the powers conferred on the county council under the Local Taxation (Customs and Excise) Act, 1890, which I have already read.

The Act of 1902 somewhat altered the county council's discretion in this respect by the words of s. 2 (1),

"and for that purpose" [that is, for the purposes of higher education] "shall apply all or so much as they deem necessary of the residue under s. 1 of the Local Taxation (Customs and Excise) Act, 1890, and shall carry forward for the like purpose any balance thereof which may remain unexpended, and may spend such further sums as they think fit."

It is clear that since 1902 (because the provisions of s. 2 (1) were reproduced in s. 70 (1) of the Act of 1921) the county council's contribution might be either from the Exchequer contribution account or from other funds. I have no evidence from what source they came, but even if all these moneys came from the county council's share in the residue of the Exchequer contribution account, and even if all the contributions before 1902 or 1904 came, in whole, from the Exchequer contribution account, all these moneys were in any case funds which became the funds of the county council, and were entrusted to the county council to distribute in any defined purpose at their discretion. It rested with the county council whether they should devote them to aid the Gravesend Council or to some other object within the ambit of the county council's powers. I see no reason for drawing any such distinction as the Gravesend Council suggests. In my judgment, the resulting trust in favour of the county council arises to the extent of the whole of their grants or contributions.

In my opinion, the declarations asked for in the amended statement of claim should be made, but with the following qualification. It should be declared (i) that the plaintiffs are entitled to be paid a rent by the county council for the use of their premises for higher education; (ii) that the county council have no interest in the premises except an equitable interest in the proportion which their contributions towards its cost bear to the total cost, including interest on loans. The rent payable on this basis will be arrived at by an arbitrator if the parties do not agree, who will proceed in the manner which is recognised as proper in valuing public buildings such as these premises, which are appropriated to particular public use.

I ought to add that two further questions have been raised on either side, which I do not think it necessary to discuss. The county council have urged that if they pay rent to the Gravesend Council the latter, on receiving it, must apply it to the purposes of higher education. The Gravesend Council reply that it is for them to do what is proper with regard to the application of any moneys which they receive, and, if they fail, that is not a matter which concerns the county council, but is for the proper authority. I think that this is a correct answer.

On the other hand, the Gravesend Council seek to secure an undertaking or declaration that, if rent is paid to them, the county council shall not seek to recoup themselves by a special charge on Gravesend under the powers given by s. 122 (1) (a) of the Act of 1921. The county council reply that no such matter is relevant in this action, and that it is for them to determine how they should use their discretion, subject to the terms of the Act, in what is purely a matter of administration. This also appears to me to be a correct answer.

I was referred to the concluding words of s. 171 (2) of the Act of 1921, which are :

A " . . . and the provisions of this Act shall apply with respect to any school, college, or hostel established, and to any obligation incurred, under the Technical Instruction Acts, 1889 and 1891, as if the school, college, or hostel had been established or the obligation incurred under Part VI of this Act."

B But neither of the learned and experienced counsel pretended to be able to explain exactly what these words mean, and I am content to say that, whatever they mean, they do not mean that the county council are to enjoy these premises rent free.

C I have, so far, not referred to the covenants taken by the county council from the Gravesend Council in respect of each contribution, the terms of which have been already set out. These covenants, however, do not help to decide the question whether or not rent is payable as between these parties. No doubt the covenants would be material to consider if the Gravesend Council were diverting the premises to any user contrary to the covenants, and a claim to repayment could, it seems, be enforced, and the court might, in its discretion, grant an injunction in the terms of the covenants if that seemed a proper course in law on all the facts. But I do not believe that the Gravesend Council have any idea or desire to divert the premises, though they have at times expressed that intention. Nor do I believe that they desire to obtain possession of the premises, as claimed in their action, D which is in form based on the ordinary relationship between the parties of landlord and tenant. It is obvious that that is not a true conception of the position as a whole, both in view of the statutory conditions affecting both parties with regard to these premises, and also the covenants entered into by the Gravesend Council.

E I do not feel bound, as I have dealt with the real issue between the parties as defined in the amended statement of claim, to deal in detail with the unsubstantial issues raised in the actions as originally framed. I may simply say that in my discretion I should not, as at present advised, be disposed to make the declarations asked for in the action by the Attorney-General on the relation of the county council, or to grant the injunctions prayed in the action by the Gravesend Council. I do not see how I can make an order for possession on the simple basis of landlord and tenant. In my judgment, the proper course is for the court to make the two F declarations as stated above.

Solicitors: *Watkin, Pulleyn, & Ellison*, for Town Clerk, Gravesend; *Church, Adams, Tatham, & Co.*

[*Reported by V. R. ARONSON, Esq., Barrister-at-Law.*]

HAPGOOD v. J. H. MARTIN & SON, LTD.

[KING'S BENCH DIVISION (Horridge, J.), October 24, 25, 30, 1934]

[Reported 152 L.T. 72; 51 T.L.R. 82]

Easement—Light—Acquisition by deemed inclusion in conveyance—"Contrary intention"—Terms of conveyances—Measure of damages for interference—Whether express terms of two conveyances sufficient to exclude—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 62 (2), (4).

By the Law of Property Act, 1925, s. 62 (2): "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings all . . . lights, . . . easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them." By sub-s. 4: "This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained."

By a conveyance dated Dec. 30, 1907, land was conveyed to the plaintiff's predecessor in title. At that time no house had been erected on the land conveyed. The conveyance was expressed not to include "any easements or implied easements of light and air over any other land now or formerly part of the A. estate." A house was erected on the land conveyed, and by a deed dated Jan. 17, 1934, this was conveyed to the plaintiff "together with such rights easements and appurtenances and subject to such reservations as are set out" in the conveyance of Dec. 30, 1907. The defendants, who had acquired land which was part of the A. estate, erected a wall near a window of the plaintiff's house, which interfered with the light coming thereto. The plaintiff claimed damages on the ground that she had, under s. 3 of the Prescription Act, 1832, acquired an easement of light, with which the defendants had interfered.

Held: the words in the conveyance of Dec. 30, 1907, referred to easements existing at the time of that conveyance, of which there was none, and they did not prevent the plaintiff, at the end of twenty years' enjoyment, by herself or her predecessor, obtaining a right under the Prescription Act, 1832, s. 3: *Mitchell v. Cantrill* (1) (1887), 37 Ch.D. 56, applied; although the easement in question was not mentioned in the conveyance of Dec. 30, 1907, or Jan. 17, 1934, the right claimed by the plaintiff was an existing easement, and the words of the conveyance of Jan. 17, 1934, did not constitute the expression of a "contrary intention" within s. 62 (4) of the Law of Property Act, 1925: *Gregg v. Richards* (2), [1926] 1 Ch. 521, applied; and, therefore, the plaintiff was entitled, in respect of the interference with her right, to damages assessed on the footing of the depreciation in the value of her house due to the interference.

Notes. As to the creation of easements by grant, see 12 HALSBURY'S LAWS (3rd Edn.) 530 et seq., and for cases see 19 DIGEST 22 et seq. For the Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669, and for Law of Property Act, 1925, see 20 *ibid.* 427.

Cases referred to:

- (1) *Mitchell v. Cantrill* (1887), 37 Ch.D. 56; 57 L.J.Ch. 72; 58 L.T. 29; 36 W.R. 229, C.A.; 19 Digest 128, 858.
- (2) *Gregg v. Richards*, [1926] 1 Ch. 521; 95 L.J.Ch. 209; 135 L.T. 75; 70 Sol. Jo. 443, C.A.; Digest Supp.
- (3) *Higgins v. Betts*, [1905] 2 Ch. 210; 74 L.J.Ch. 621; 92 L.T. 850; 53 W.R. 549; 21 T.L.R. 552; 49 Sol. Jo. 535; 19 Digest 123, 829.

(4) *Hansford v. Jago*, [1921] 1 Ch. 322; 90 L.J.Ch. 129; 125 L.T. 663; 65 Sol. Jo. 188; 19 Digest 50, 282.

(5) *Griffith v. Clay (Richard) & Sons, Ltd.*, [1912] Ch. 291; 81 L.J.Ch. 809; 106 L.T. 963, C.A.; 19 Digest 194, 1471.

Action tried by HORRIDGE, J., without a jury.

The plaintiff, as the owner and occupier of a dwelling-house at Croydon claimed from the defendants damages for interference with an alleged prescriptive right to light coming through a window in a room in her house. The defendants, by their defence, admitted that there had been an interference with the light coming through the window, but denied that such interference was sufficient to constitute a cause of action. They further contended that no prescriptive right could accrue to the plaintiff by reason of the terms of two conveyances, the first to the plaintiff's predecessor in title, dated Dec. 30, 1907, and the second to the plaintiff herself, dated Jan. 17, 1934.

By the Prescription Act, 1832, s. 3:

"... When the access and use of light to and for any dwelling-house... shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

N. H. Moller for the plaintiff.

J. W. Morris for the defendants.

Cur. adv. vult.

Oct. 30. **HORRIDGE, J.**, read the following judgment. This action is brought by the plaintiff as the owner and occupier of a dwelling-house, No. 14, Northampton-road, Addiscombe, East Croydon, claiming damages for the interference with an alleged prescriptive right to light coming through a window in a room known as the study in the house.

It was admitted that the plaintiff had acquired under s. 3 of the Prescription Act, 1832, a right to light unless such right was prevented from accruing by the terms of a conveyance dated Dec. 30, 1907, to the plaintiff's predecessor in title or did not pass to the plaintiff under her conveyance dated Jan. 17, 1934. It was admitted that there had been an interference with the light coming to the plaintiff's room, but it was contended that the interference was not sufficient to give the plaintiff a right of action.

I take the law as to the right to complain of interference with light to be as laid down by FARWELL, J., in *Higgins v. Betts* (3). That learned judge states that the question is: Is the light that is left enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind? I have carefully weighed the evidence called before me, and especially the evidence of the plaintiff, who impressed me as a witness of truth, and have come to the conclusion that the interference in this case was such that enough light was not left for such comfortable use and enjoyment.

I must deal now with the two defences raised upon the wording of the two conveyances.

As to the conveyance of Dec. 30, 1907, it was contended that the wording of that deed prevented the plaintiff from acquiring any right to light under the Prescription Act. The words in the deed are as follows:

"... but not including any easements or implied easements of light and air over any other land now or formerly part of the Ashburton Estate."

A somewhat similar question arose in *Mitchell v. Cantrill* (1). The words in that case were

"except rights if any restricting free use of any adjoining land or the conversion or appropriation at any time hereafter of such land for building or other purposes obstructive or otherwise."

The Court of Appeal held that those words were inserted merely to prevent the plaintiff from alleging that the defendant had derogated from his own grant if he erected buildings or interfered with the plaintiff's light, and they did not bring the case within the proviso contained in s. 3 of the Prescription Act

"unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for the purpose by deed or writing."

I think this authority would expressly cover the case in question save for the fact that in that case the house had already been built, whereas in this case no house had been built and therefore there could be no question of derogation of grant as to right of light, but the question arises: Are the words in this case such as to prevent the plaintiff from acquiring a prescriptive right by twenty years' enjoyment? I think the words refer to easements of light existing at the time of the conveyance, of which there was none, and that they do not prevent the operation of the Prescription Act from enabling the plaintiff, at the end of twenty years' enjoyment by herself or her predecessor, obtaining a right under the statute.

The defence under the conveyance of Jan. 17, 1934, was that the conveyance contained these words:

"together with such rights easements and appurtenances and subject to such reservations as are set out in the said indenture,"

and it was said that, as the easement in question was not expressly mentioned, the plaintiff could not take under the conveyance any easement other than those mentioned.

By s. 62 (2) of the Law of Property Act, 1925:

"A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all . . . lights, . . . easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

This right of light was at the time of this conveyance an existing easement, and but for the contention on the wording of the conveyance this right of light would have passed to the purchaser, who is the present plaintiff. Does the fact that the conveyance mentioned the rights set out in the earlier indenture bring the case within s. 62 (4) of the Law of Property Act, 1925? In other words, is the contrary intention expressed in the conveyance? In my opinion, *Gregg v. Richards* (2) is a direct authority that these words do not prevent the right to light passing to the plaintiff under s. 62 (2). In that case the Master of the Rolls said ([1926] 1 Ch. at p. 529):

"RUSSELL, J., in a previous case of *Hansford v. Jago* (4) ([1921] 1 Ch. 322 at p. 332) had to deal with a similar point. He says, dealing with this very point as to sub-s. (4): 'It is a very strong thing to say that, when a section of an Act of Parliament provides that a conveyance of land having houses or other buildings on it is to be deemed to include a large number of different matters unless a contrary intention is expressed in the conveyance, the mere fact that the draftsman has elected to include one or two of these matters expressly in the conveyance should operate as an indication of an intention that the remainder should not be included.' I agree with that statement."

It is true that in that case there were in the conveyance the following words

"to hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed,"

but the Master of the Rolls does not put his judgment upon these words. WARRINGTON, L.J., certainly attaches importance to them, but SARGANT, L.J., says:

A "In this case I think the learned judge attached too much importance to the maxim 'Expressio unius exclusio alterius.' I think here that, even if there had been a mere limited grant of way and nothing else, that would not of itself be sufficient to exclude the larger right of way which is given by the statute. To my mind the view taken by the learned judge of sub-s. (4) in *Hansford v. Jago* (4) is a perfectly sound and proper view to be taken of that subsection."

B He says this, notwithstanding that he goes on to say that the words to which I have referred make it clear that in that case they did not do so. I think there must be judgment for the plaintiff for damages, which I assess on the footing of the depreciation in the value of the house (*Griffith v. Clay (Richard) & Sons, Ltd.* (5)) at the figure of £125, and the defendants must pay the costs.

C *Judgment for plaintiff.*

Solicitors: *Griffinhooft & Brewster; Ward, Bowie, & Co.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

MONK v. WARBEY AND OTHERS

E [COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), October 17, 18, 1934]

[Reported [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; 51 T.L.R. 77; 78 Sol. Jo. 783]

F *Road Traffic—Breach of statutory duty—Uninsured driver permitted to use car by owner—Plaintiff injured by negligence of driver—Right of action against owner—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35 (1).*

Primâ facie, if a person be damaged as the result of the breach of a statute, he has a right to recover damages from the person who has broken the provisions of the statute unless it can be established by looking at the whole of the Act that it was not intended that he should have that right.

G The plaintiff was injured through the negligent driving of a motor car by M. The motor car belonged to W., who had lent it to K., and it was being driven at the time of the accident by M. at K.'s request. Neither K. nor M. was insured against third party risks, as was required by s. 35 (1) of the Road Traffic Act, 1930. W. was insured against such risks while the car was in his own possession, but not while it was in the possession of uninsured persons, and so he was in breach of s. 35 (1) when he permitted K. and M. to use it. M. and K. were without means sufficient to pay the damages sustained by the plaintiff. In an action by the plaintiff against W.,

I **Held:** so far from it being established from the whole purpose of the Act of 1930 that it was not intended that a person in the position of the plaintiff should have a right to recover damages from a person who was in breach of one of the provisions of the statute, it was established that it was intended that he should have such a right because the statute was clearly intended for his protection; the power to prosecute for a penalty was no protection to an injured person; it was not necessary to indicate an individual or class of persons, other than the public, using the roads for whose benefit the statute was intended before it could be said that an action lay; the damages claimed were not too remote; the cause of action was complete when a provision of the statute was broken and damage occasioned to the plaintiff; and, therefore, the plaintiff was entitled to succeed.

Groves v. Lord Wimborne (1), [1898] 2 Q.B. 402, and observations of

ATKIN, L.J., in *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2), [1923] 2 K.B. 882, at p. 841, applied. A

Notes. Explained: *Richards v. Port of Manchester Insurance Co.*, post, p. 458. Distinguished: *Daniels v. Vaux*, [1938] 2 All E.R. 271. Applied: *Corfield v. Groves*, [1950] 1 All E.R. 488.

As to remedies for breach of statutory duty, see 81 HALSBURY'S LAWS (2nd Edn.) 532, and as to offences under the Road Traffic Acts, see *ibid.* 666 et seq., and for cases see 42 DIGEST 758-760 and DIGEST SUPPS., tit., Street and Aerial Traffic. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569. B

Cases referred to:

- (1) *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633, C.A.; 34 Digest 218, 1815.
- (2) *Phillips v. Britannia Hygienic Laundry Co., Ltd.* [1923] 2 K.B. 882; 93 L.J.K.B. 5; 129 L.T. 777; 39 T.L.R. 530; 68 Sol. Jo. 102; 21 L.G.R. 709, C.A.; 26 Digest 433, 1514.
- (3) *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 26 T.L.R. 164; 54 Sol. Jo. 151; 34 Digest 219, 1816.
- (4) *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 25 W.R. 794, C.A.; 33 Digest 23, 99.
- (5) *Gorris v. Scott* (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp. M.L.C. 282; 2 Digest 277, 526.

Appeal from an order of CHARLES, J., reported 151 L.T. 100, in an action in which the plaintiff claimed damages for personal injuries sustained in a street accident against three defendants. The first defendant, Warbey, was the owner of a motor car, through the negligent driving of which the accident was caused. He had lent the car to the second defendant, Knowles, and it was being driven at the time of the accident by the third defendant, May. It was admitted that the accident had been caused by the negligence of Knowles and May, and interlocutory judgment had been signed against them, but they had no means of satisfying it. Warbey had insured against third party risks whilst the car was in his possession, but not whilst it was in the possession of uninsured persons, and neither Knowles nor May was an insured person. E

The plaintiff contended that Warbey was liable to him because he had permitted the use of the car without there being in force a policy against third party risks, contrary to s. 35 of the Road Traffic Act, 1930. Warbey said that the damage, if any, accruing from that breach of statutory duty was too remote to be recovered. He also said that the statute imposed a penalty for breach of the duty to insure, and that that excluded the bringing of an action against him. F

The Road Traffic Act, 1930, s. 35 (1), provides as follows:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance . . . in respect of third party risks as complies with the requirements of this Part of this Act." H

Subsection (2) renders a person who contravenes sub-s. (1) liable to a fine or imprisonment or both.

CHARLES, J., held that Warbey was liable to the plaintiff, on the ground (i) that he had committed a breach of a statutory duty in permitting the car to be used in circumstances in which there was no sufficient policy of insurance within the meaning of s. 35 of the Road Traffic Act, 1930, and (ii) that the damage to the plaintiff resulted from the breach of duty and was not too remote. The defendant Warbey appealed. I

R. T. Monier-Williams (L. B. Schapiro with him) for the defendant.
Comyns Carr, K.C., and G. H. Oliver for the plaintiff.

GREER, L.J.—This appeal raises one question of considerable public importance, and though I might in other respects have been content with saying that I have read CHARLES, J.'s very careful judgment and that I agree with every word of it, having regard to the fact that other cases may be affected by our judgment, I think it necessary to add some few words.

The facts can be stated quite shortly. Warbey, the defendant to the action in the court below and the appellant in this court, was the owner of a motor car which he had insured under a Lloyd's policy in which the liability was described under the head of "Liability to the public" as "liability at law for compensation for death or bodily injury caused by the use of the car." The question whether or not the events which happened in this case were within the terms of the policy has not been presented for argument either in the court below or in this court. It was conceded by the parties when this came before the court that the policy did not cover the events that happened, and the action which was brought by the plaintiff was an action on the ground that there had been a breach of the statutory duty imposed by s. 35 of the Road Traffic Act, 1930, and the damages which he sought to recover were alleged to be the result of that breach of the statute.

In his clear-cut argument counsel for the defendant takes three points. First, he submits to this court that the learned judge was wrong in deciding that a breach of s. 35 was available for the benefit of the plaintiff, who alleged that he had been injured by the negligent driving of the motor car by the servant of an uninsured person, and his contention is—and the matter is capable of considerable argument—that, having regard to the fact that a very serious penalty is imposed by the statute for the breach of s. 35, it cannot be concluded that that section was intended to create any right on the part of a member of the public who was injured by reason of the breach. Numbers of cases have been cited. In my judgment, this is a stronger case in favour of the plaintiff than *Groves v. Lord Wimborne* (1) and the cases which relate to breaches of statutory duties towards minors, such as *Britannic Merthyr Coal Co. v. David* (3).

The Road Traffic Act, 1930, was passed in these circumstances. It had become apparent that people who were injured by the negligence of drivers of motor cars on the roads were in a parlous situation if they happened to be injured by somebody who was unable to pay damages for the injuries which they had suffered, and, accordingly, two Acts were passed. One was for the purpose of enabling persons who were so injured to recover, in the case of the bankruptcy of the insured person, the money which would be payable to him by the insurance company—that is the Third Party (Rights against Insurers) Act, 1930. It was thought right by Parliament that in such a case the insurers' money should not go to the general creditors of the bankrupt, but should be available for the purpose of compensating the injured person, and it was provided that in the case of bankruptcy proceedings being taken against a defendant who could not pay the amount of the damage, but was insured, then in the course of the bankruptcy the person injured could make the insurance company liable for the damage caused to him although he was not a party to the contract of insurance. But that did not meet the whole difficulty because the owners of motor cars sometimes lent their motor cars to uninsured persons, and if the person causing the injury was an uninsured person then the remedy provided by that Act to which I have just referred was unavailable for the injured person. Provision, therefore, was made in the Road Traffic Act, 1930, for the protection of third persons against the risks arising out of the negligent driving of a motor vehicle by an uninsured person to whom an insured owner had lent his car and, in connection with such protection, to amend the Assurance Companies Act, 1909. How could Parliament make provision for the protection of third parties against such risks if it did not enable an injured third person to recover for a breach of s. 35 of the Road Traffic Act, 1930? That section is to be found in Part II of the Act, which is headed "Provision against third party risks arising out of the use of motor vehicles." It would be a very poor protection of the person injured by the negligence of an uninsured person to whom a car had been lent by an insured

person if the person injured had no civil remedy for a breach of the section. The Act provides that every person who owns a car shall take out an insurance of that car in respect of third party risks, and shall provide himself with a certificate of insurance containing particulars of the terms of insurance. Subsection 1 of s. 35 provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act."

It is not in dispute that there was a breach by the defendant of s. 35 (1); but it is argued that it was not intended to give a right to the injured person to claim damages for a breach of the statute. It seems to me that the situation falls exactly within the judgment of A. L. SMITH, L.J., in *Groves v. Lord Wimborne* (1), where he says ([1898] 2 Q.B. at p. 406):

"The Act in question" [the Factory and Workshop Act, 1878] "which followed numerous other Acts in *pari materia*, is not in the nature of a private legislative bargain between employers and workmen, as the learned judge seemed to think, but is a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

Later, the learned lord justice uses these words:

"Could it be doubted that if s. 5 stood alone, and no fine was provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole 'purview' of the Act, the language of LORD CAIRNS in the case of *Atkinson v. Newcastle and Gateshead Waterworks Co.* (4), that it was the intention of the legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine imposed by s. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established."

The effect of those observations is that *prima facie*, if a person be damaged by the breach of a statute he has a right to recover damages from the person who has broken the provisions of the statute, unless it can be established by looking at the whole of the Act that it was not intended that he should have such a right. I think that so far from it being established in the present case from the whole purpose of the Road Traffic Act, 1930, that it was not intended that a person in the position of the plaintiff should have such a right, it is, on the contrary, established that it was intended that he should have this right, because it is clear that the statute was intended for his protection. The power to prosecute for a penalty is no protection whatever to the injured person except in the sense that it affords a strong incentive for people not to break the provisions of the statute. But the power to prosecute is a poor consolation to the man who has been damaged by reason of a breach of the provisions of s. 35.

The only other case I wish to refer to is *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2) It is always a little dangerous to pick out one or two observations out of a long judgment and treat them as if they necessarily afforded the ratio decidendi of the case. I do not consider that it is at all logical to say that, unless you can indicate an individual or a class of persons other than the public using the roads as the individual or class for whose benefit the statute was intended, then no action lies. I prefer the view expressed by ATKIN, L.J., in *Phillips' Case* (2). He said ([1923] 2 K.B. at p. 841):

"One question to be considered is, Does the Act contain any reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy. But

that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves v. Lord Wimborne* (1) and *Britannic Merthyr Coal Co. v. David* (3). To my mind, and in this respect I differ from McCARDIE, J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public."

What you have to consider is whether, taking the whole Act together, it shows that the injured person was outside its purview. I am myself satisfied that, as the law stands at the present day, a cause of action does exist in the case of persons who have suffered damage by reason of a breach of s. 35 (1) of the Road Traffic Act, 1930.

Counsel took two other points in support of his appeal, one of which he said in the court below he did not think very much of, but he urged it here, and it has to be considered, namely, that the damages were too remote. It seems to me, assuming that the section gives a right of action to the person injured, that the damages in this case are the very thing by which it was intended to protect the injured person, because the damage which he suffered by reason of the non-compliance with s. 35 (1) is that he has got as a defendant a person who cannot pay, who is uninsured, and as against whom he has not got the right given by the earlier statute of 1930. That is the very thing in respect of which, if he is protected by the section, it is intended that he should be protected. Therefore, I think that point fails.

The third point taken was that, in any event, the action was premature. That involved the consideration whether quantification of the damage is an essential part of the cause of action. I think it is not. The cause of action is complete if a provision of the statute has been broken and damage occasioned to the plaintiff, and that can be proved in any way in which courts of law are accustomed to have questions of damage proved. All that is required is that it should be proved that the man who was primarily liable is in such a financial position that nothing can be obtained from him by execution or by bankruptcy proceedings, because he is not an insured person, and, therefore, there is no recourse to an insurance company in his case. Here the damage had accrued at the date of the writ: neither the defendant to whom the car had been lent nor the defendant who was driving the car, had any money with which to pay damages: proceedings in bankruptcy would have been useless. The action might have been brought without joining these two as defendants at all, and it would have been successful if the plaintiff had been able to prove the facts as I have stated them, namely, that before the issue of the writ his only claim was against a man who could not pay and was not insured.

For these reasons I think that the decision of the learned judge was quite right and the appeal will be dismissed with the usual consequences of costs here and below.

MAUGHAM, L.J.—On one of the points raised in this appeal I confess I think there is a great deal to be said, and it is only after some hesitation that I have arrived at the same conclusion as my brother GREER. That point is in reference to the question whether the Road Traffic Act, 1930, upon its true construction, gives rise to an action by a third party for damages for breach of the statutory obligation imposed on the owner of a motor car by s. 35 of the Act. It is on that point that I propose to add some observations of my own.

The facts here, having regard to the admissions, are of the simplest possible character. A Mr. Albert Warbey was the owner of a Morris car. He was properly insured with an insurance company who had complied with the provisions of the Road Traffic Act, 1930, against a number of risks including third party risks, if he himself, or members of his family, were driving the car. It is, however, admitted

that he was not insured against third party risks if some person, other than the limited class I have mentioned, were permitted by him to drive the car. He lent the car out of the kindness of his heart to one Knowles, one of the defendants. Knowles told him that the other defendant, Frank May, would actually drive the car, and Mr. Warbey had no objection to that. He was probably unaware whether they were insured against third party risks or not, and it does not appear whether he made any inquiries. There was, unfortunately, an accident, and in order to save costs it has been admitted on behalf of the defendant Warbey that the accident was due to the negligence of Frank May in driving the car. The action is then brought in the circumstances my Lord has stated by the person injured, one Monk, against not only Knowles and May, but also against Albert Warbey.

Section 35 of the Road Traffic Act, 1930, provides, stating it shortly, that it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance as is proper in respect of third party risks. There was here a policy of insurance, but, as I have said, it did not cover third parties when the car was being driven by a person to whom the car had been lent, such as Knowles or such as May. This is, therefore, a case where there has been a breach of the provisions of the statute and the plaintiff sues in respect of a breach of duty so created by the statute which he says resulted in damage to him.

I think, on the authorities which have been called to our attention in the able argument on behalf of the defendant, that there can be no doubt that, *prima facie*, the rule is that a breach of a duty created by the statute if it results in damage to an individual is a tort for which an action in damages will lie. There is, however, a line of authorities which show that the *prima facie* rule is subject to a number of exceptions and, in particular, there is a rule that where the statute gives a special remedy for breach of the duty, it may be that the intention of the statute is merely to provide the special remedy, without intending to confer on the person injured by the breach of the statutory obligation any personal right of action for damages. In the present case s. 35 (2) of the Act provides not only for a fine for acting in contravention of the section, but for the possibility of imprisonment. It provides also that which I think to most motor car drivers is an even greater penalty, the possibility of a disqualification by virtue of a conviction under the section, or of an order thereunder, for holding or obtaining a licence as mentioned in the subsection.

The cases show that at various times there has been some doubt as to the circumstances which will enable the court to determine whether or not there is to be a personal remedy in addition to the special remedy provided by the Act. There can now, I think, be no doubt that the question is one of intention to be gathered from the construction of the Act, and I doubt whether anything more lucid can be found than the language of LORD CAIRNS in *Atkinson v. Newcastle and Gateshead Waterworks Co.* (4), in the passage which my Lord has already read. I think, however, one may say this, that if the Act is an Act which provides a special remedy for the contravention of the provisions of a section the *prima facie* rule which I have mentioned has no weight, and the question then, in effect, is purely one dependent on what LORD CAIRNS calls "the purview of the legislature and the language which they have there employed."

There are a number of cases which show that the courts have resolved that question sometimes in one way and sometimes in another. The decision in *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2) is a comparatively recent decision of this court, in which it was held that it was not intended by the Act that everyone injured through a breach of the Order there in question should have a right of action for damages. Like my brother GREER I have come to the conclusion that the view of ATKIN, L.J. ([1928] 2 K.B. at p. 841) is, if I may say so with great respect, a correct view:

"The question" [whether the intention of the Act is to give a private remedy

A or to exclude it], "is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual." [He adds:] "The duty may be of such paramount importance that it is owed to all the public."

The best case, probably, on the other side is *Groves v. Lord Wimborne* (1).

B I think further that the cases show that there are two considerations which are, I will not say the only considerations, but the most weighty considerations in determining whether the intention of the statute precludes a private remedy. The first point is that you have to make up your mind whether the harm which has been sought to be remedied by the statutory provision which is alleged to have been broken is one of the kind which the statute was intended to prevent. In other words, it is not sufficient to say that harm has been caused to an individual merely because there has been a breach of the provision of the statute which has resulted in injury. A good instance of that is to be found in *Gorris v. Scott* (5), where cattle were washed overboard for want of appliances prescribed by the Act of Parliament. The court took the view that the object of the Act of Parliament was not to protect the owner of the cattle, but rather of a sanitary nature for the benefit of those travelling in the ship.

D The other circumstance which I think strongly tends to support the view that the statute was not intended to preclude a personal action is that the action is brought by a person who is pointed at on the fair construction of the statute as being a person whom the legislature desired to protect. That, of course, is the sort of consideration which very powerfully affected this court in the decision of *Groves v. Lord Wimborne* (1).

E On the whole, though, as I have already said, I think the question is an arguable one, but not very difficult. I have come to the conclusion, like my brethren, that this case is one where there is nothing in the Act to show that a personal action is precluded by reason of the special remedy, and, further, that upon the true construction of the Act there is sufficient ground for coming to the conclusion that the section was passed for the purpose of giving a remedy to those third party users of the road who might otherwise suffer injury by the negligence of drivers without having any pecuniary remedy which was of any avail. It is true to say that it is only if there is negligence in the driving of a car that the third party user of the road who has been injured has any right of relief; but I cannot help thinking that when the Road Traffic Act, 1930, was passed it was within the knowledge of the legislature that negligence in the driving of cars was so common an occurrence, and likely to happen to so many people with the result of injury to others, that it was necessary in the public interest to provide a way whereby those third parties might recover damages for the injuries they sustained, although the driver of the car might be a person of no means.

F I will add this, which has already been adverted to by my brother GREER, that sub-s. (4) of s. 35 seems to me to tend strongly in favour of the view that civil remedies were being considered by the legislature. The subsection indicates that a person who has deposited the sum of £15,000 under certain circumstances is no longer bound to enter into any policy of insurance which will protect third parties. That is a circumstance which seems to me to show that the legislature was concerned with protecting only those third parties who on suffering damages by the negligence of a driver were unable to recover their damages owing, as I have already pointed out, to the impecuniosity of the driver.

I On the whole, then, I come to the conclusion that this personal right of action for breach of s. 35 of the Act does lie, on the assumption that the policy of insurance which was the requirement of the Act was one which would give the third party a sufficient, or some measure of, indemnity in the event of the person using the car being guilty of negligence. It is in no other case that the policy would be of any advantage to him at all. Inferentially, or rather incidentally, that disposes, in my opinion, of the point made on remoteness of damages.

With regard to the other point raised on behalf of the appellant, I have nothing

to add. Upon those grounds I agree that the judgment of CHARLES, J., should be affirmed and this appeal dismissed. A

ROCHE, L.J.—Notwithstanding the able and exhaustive argument of counsel, I am clearly of opinion that the judgment under appeal should be affirmed. I have only one observation to make. I should be content to rely on the very clear and closely reasoned judgment of CHARLES, J., and the reasons in support of that judgment assigned by the lords justices, but I desire to add, as did GREER, L.J., and MAUGHAM, L.J., in their judgments, that I am not uninfluenced by the existence of sub-s. (4) of s. 35 of this statute. That, among other things, seems to me to point clearly to the conclusion that it was within the purview of this statute to render effective civil remedies for the mischief dealt with in the statute, and that the last thing that was within the purview of the statute was to limit in any way those civil remedies, and to protect one who suffered damage by reason of a breach of the statute, merely because penalties were provided for in the statute of a criminal nature. Accordingly I am of opinion that this appeal should be dismissed. B C

Appeal dismissed.

Solicitors: *Clifford-Turner, Hopton, & Lawrence; Pattinson & Brewer.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*] D

ELIAS AND OTHERS v. PASMORE AND OTHERS

[KING'S BENCH DIVISION (Horridge, J.), January 16, 23, 1934]

[Reported [1934] 2 K.B. 164; 103 L.J.K.B. 223; 150 L.T. 438; 98 J.P. 92; 50 T.L.R. 196; 78 Sol. Jo. 104; 32 L.G.R. 23] E F

Arrest—Search—Search of person arrested—Seizure of property in possession of person arrested—Evidence of crime—Retention by police.

The plaintiffs were officials of the National Unemployed Workers' Movement, and the first three were tenants of premises occupied by the Movement. These premises were entered by two of the defendants, who were inspectors of the Metropolitan Police, the fourth plaintiff was arrested on a charge of attempting to cause disaffection among the police, and a number of books and documents were seized. These were returned to the plaintiffs, with the exception of some which were ultimately used on the trial of the first plaintiff on a charge of incitement to sedition. After that trial had resulted in the conviction of the plaintiff the documents seized were still retained by the police. G H

Held: (i) the police had the right to search an arrested person: *Bessell v. Wilson* (1) (1853), 1 E. & B. 492, applied; (ii) on a lawful arrest the police were entitled to take and detain property in the possession of the arrested person which formed material evidence on the prosecution of any criminal charge: *Dillon v. O'Brien and Davis* (2) (1887), 20 L.R.Ir. 300 applied; (iii) where a seizure of documents would be otherwise unlawful the interests of the State would excuse it if the documents ultimately proved to be evidence of a crime committed by anyone: *Crozier v. Cundey* (3) (1827), 6 B. & C. 232 applied; (iv) where the taking of property was excused, the police might retain it until the conclusion of any charge on which the articles were material: *R. v. Lushington, Ex parte Otto* (4), [1894] 1 Q.B. 420. I

In the present case, however, the defendants had retained the documents after demand subsequent to the conclusion of the trial of the first plaintiff for incitement to mutiny, which they had no right to do, and the plaintiffs were

entitled to damages for the detention of the documents, and to their return, and also to damages for seizure of those documents which had been returned.

Notes. As to the powers and duties of police officers, see 25 HALSBURY'S LAWS (2nd Edn.) 320 et seq., and for cases see 37 DIGEST 187, 188.

Cases referred to:

- (1) *Bessell v. Wilson* (1853), 1 E. & B. 492, n.; 22 L.J.M.C. 94, 95, n.; 20 L.T.O.S. 233, n.; 17 J.P.Jo. 52; 118 E.R. 518; 14 Digest (Repl.) 192, 1566.
- (2) *Dillon v. O'Brien and Davis* (1887), 20 L.R.Ir. 300; 16 Cox, C.C. 245; 14 Digest (Repl.) 193, *972.
- (3) *Crozier v. Cundey* (1827), 6 B. & C. 232; 9 Dow. & Ry. K.B. 224; 49 Dow. & Ry. M.C. 303; 5 L.J.O.S.M.C. 50; 108 E.R. 439; 14 Digest (Repl.) 212, 1773.
- (4) *R. v. Lushington, Ex parte Otto*, [1894] 1 Q.B. 420; 70 L.T. 412; 58 J.P. 282; 42 W.R. 411; 17 Cox, C.C. 754; 10 R. 418; 10 T.L.R. 57, D.C.; 22 Digest (Repl.) 422, 4567.
- (5) *Six Carpenters' Case* (1610), 8 Co. Rep. 146, a.; 77 E.R. 695; 18 Digest 324, 587.
- (6) *Harvey v. Pocock* (1843), 11 M. & W. 740; 12 L.J.Ex. 434; 1 L.T.O.S. 290; 152 E.R. 1003; 18 Digest 368, 1090.
- (7) *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 37 T.L.R. 944, P.C.; 43 Digest 395, 176.
- (8) *Pringle v. Bremner and Stirling*, 5 Macpherson's H. of L. Cas. 55.
- (9) *Entick v. Carrington* (1765), 19 State Tr. 1029; 2 Wils. 275; 95 E.R. 807; 14 Digest (Repl.) 211, 1767.

Action tried by HORRIDGE, J., without a jury.

The plaintiffs, Elias, Llewellyn, James, and Hannington, were officials of the National Unemployed Workers' Movement, and the first three named were tenants of premises occupied by the Movement. The defendants, Pasmore and Kitchener, were inspectors of the Metropolitan Police; and the other defendants were Lord Trenchard, the Commissioner of the Metropolitan Police; and the Receiver for the Metropolitan Police District. On Nov. 1, 1932, the plaintiff Hannington was arrested by the defendants Pasmore and Kitchener at these premises on warrant on a charge of having attempted to cause disaffection among the police. At the time of that arrest the police searched Hannington, and seized a number of documents and books which were on the premises. These were removed to Scotland Yard, but some were returned to the plaintiffs on that day and others on Nov. 8, 10 and 18, while documents contained in a bundle marked "2A" were retained. Hannington was convicted at Bow-street police court on Nov. 8, 1932, of the offence with which he was charged, and sentenced to three months' imprisonment. No document was produced in evidence against him at his trial. In December, 1932, Elias was convicted at the Central Criminal Court of incitement to sedition, and was sentenced to two years' imprisonment. The documents in the bundle marked "2A" were used in evidence by the prosecution at his trial, and were retained by the police after the conclusion of that trial.

The plaintiffs' contention was that the documents had been wrongfully seized and that some were unlawfully detained in that they were Hannington's property and were not used as evidence on the charge against him, but were used as evidence on the charge against the plaintiff Elias. The defendants contended that the books and documents in question were lawfully taken by the police for examination and investigation in connection with the arrest of Hannington, and that some of them were still lawfully detained as being evidence in criminal proceedings against the plaintiff Elias.

Sir Stafford Cripps, K.C., D. N. Pritt, K.C., and G. R. Mitchison for the plaintiffs.

The Attorney-General (Sir Thomas Inskip, K.C.), Wilfrid Lewis, and G. K. Rose for the defendants.

Jan. 23. **HORRIDGE, J.**, read the following judgment. The plaintiffs' claim is for damages for trespass on certain premises, 35, Great Russell Street, which were occupied by the National Unemployed Workers' Movement, and of which premises the plaintiffs Elias, Llewellyn, and James were tenants, and for the return of certain documents, and £10 damages for their detention. It was not contended that the plaintiffs were not the proper persons to bring the action. As regards the defendant, Lord Trenchard, the Attorney-General did not wish to raise the point that he was not responsible for anything done by the defendants Pasmore and Kitchener, and no case was pressed as against the Receiver for the Metropolitan Police District.

On Nov. 1, 1932, the defendants Pasmore and Kitchener, under the authority of a warrant for the arrest of Hannington, entered on the premises, and, in addition to arresting Hannington, seized a number of documents and other things which were on the premises and removed them to Scotland Yard. Subsequently, on the same day, and on Nov. 8, 10, and 18, all the things which had been removed were returned with the exception of those contained in the bundle marked "2A." The plaintiffs claim that they are entitled to damages for trespass to the premises and to all the goods removed, and also claim delivery of the documents contained in the bundle "2A," with £10 damages for their detention.

As regards the damages for trespass to the premises, the plaintiffs rely on the *Six Carpenters' Case* (5) as showing that, if there was any illegality subsequent to entry, the entry became a trespass ab initio, but I think that *Harvey v. Pockock* (6) and *Canadian Pacific Wine Co. v. Tuley* (7) show that the defendants were only trespassers ab initio as to the documents and goods that were seized, and that they were not liable for any damages in respect of the entry on the premises for the purpose of the lawful arrest of Hannington. I have, therefore, to consider how far the defendants were justified in seizing and removing the documents and goods which were in fact seized and removed.

It was not contended that there was any general right of search or seizure, but it was submitted that, in certain circumstances, there was a right to seize and detain documents, but that contention, if correct, did not in any way justify the seizure and removal of the documents and goods which have already been returned, and I will deal later on in my judgment with the remedy which the plaintiffs have in respect of such seizure and removal.

The propositions put forward with regard to the removal of the remaining documents in bundle "2A" were that: (i) there was a right to search the person arrested; (ii) the police may take all articles which are in the possession or under the control of the person arrested, and which may be, or are, material on a charge against him or any other person; (iii) the police, having lawfully entered, are protected if they take documents which subsequently turn out to be relevant on a charge of a criminal nature against any person whatever; and (iv) the police are entitled to retain property taken until the conclusion of any charge on which the articles are material.

In dealing with these different propositions, I only propose to deal with the authorities which seem to me to be the most relevant to this inquiry. First, as to the right to search on arrest. This right seems to be clearly established by the footnote to *Bessell v. Wilson* (1), where LORD CAMPBELL clearly laid down that this right exists, but this right does not seem to me to authorise what was done in this case, namely, to seize and take away large quantities of documents and other property found on premises occupied by persons other than the person of whom the arrest was made.

As to the second contention, *Dillon v. O'Brien and Davis* (2) clearly lays down that constables are entitled on a lawful arrest by them of a person charged to take and detain property found in his possession which will form material evidence on his prosecution for that crime, and I think, for the reasons hereinafter stated with regard to the third contention, that that would include property which would form

a material evidence on the prosecution of any criminal charge. This, however, would not justify the seizure of the documents in this case with the exception of one letter, signed "P.C.," a copy of which was found on Hannington, and which is contained in bundle "2A."

In support of the third contention, the Attorney-General relied on *Pringle v. Bremner and Stirling* (8). In that case an action was brought at the instance of one Pringle for damages in respect of the illegal search of his house and repositories. The defenders in that case pleaded that a warrant had been obtained to search the business premises for pieces of wood and a fusee, and that in searching the pursuer's house for the articles mentioned in the warrant they discovered papers which seemed to them to throw light on the sending of a threatening letter and to implicate the pursuer therein, and that they thought it their clear duty to take possession of the documents. It is to be observed in that case that the defenders entered only under a warrant to search for the wood and fusee, which it was alleged were used in causing the explosion of the bush of a cartwheel near the dining-room window of the manse of Mr. Edgar, but the charge in respect of which the pursuer was arrested and the papers taken was a charge of sending a threatening letter. LORD CHELMSFORD, in giving the judgment of the House of Lords, said (5 Macpherson's H.L.Cas. at p. 60):

"But supposing that in a search which might have been improper originally there were matters discovered which showed the complicity of the pursuer in a crime, then I think the officers, I can hardly say would have been justified, but would have been excused by the result of their search. Then again with regard to the arrest and imprisonment of the pursuer, as to that it is not alleged that there was any warrant at all; but then, it is said, the constable having discovered matters which in his judgment brought home to the pursuer complicity in the alleged crime, he was justified in exercising his discretion upon the subject and in apprehending the pursuer and lodging him in prison. Again I say, answering in the same way as I answered with regard to the searching for papers, the result will either justify him, or will not justify him; if the papers he seized really proved or gave a fair and reasonable ground to believe that the pursuer was implicated in the grave crime which was charged, then although the officer might have had no warrant for his apprehension (and he had no warrant upon this occasion), yet the event would justify him, and he would protect himself by the circumstances afterwards discovered."

LORD COLONSAY says (at p. 61):

"Now the case being one of excess of authority by reason of having done things which the warrant did not authorise to be done, though the parties were lawfully in the house and lawfully searching, the question comes to be, what was it that the constable ought to have been held justified in doing? If the constable is to be held under such circumstances as justified in taking possession of papers which he finds implying complicity in the offence which is under investigation, then I think that the constables here would have a good defence in stating and in proving at the trial that they had taken possession of papers which gave them reasonable ground to suppose that this party were implicated in the offence."

He further says (at p. 62):

"I have been of opinion, and I cannot say that I am entirely shaken in that opinion, that the statements of the pursuer were evasive and avoided that which was the main point in the case—the reasonableness or non-reasonableness of the conduct of the constables. However (as I have said) that is a very narrow question of pleading; and as it is held that nothing that is done in this case interferes with the proposition which was contested in the court below—that a constable in executing a search warrant for certain articles and finding other articles that tend to implicate the party and taking those articles and the party himself into custody is only acting in the performance of what may

be his duty—I think there is the less reason to regret that there should be any difference of opinion in regard to this case.” A

This case seems to me to show that, in the opinion of the Lord Chancellor and LORD COLONSAY, if the seizure of documents was originally wrongful, but if it in fact turned out that the documents seized were documents which might be properly used in a prosecution against anyone, the seizure would become excused. That, however, was a Scottish case, and must not be taken to have been decided on the law of England, and it becomes necessary therefore to consider whether in principle the same doctrine can be applied to a seizure of documents in England. There was no direct authority cited to me in support of the proposition in English law. B

In examining *Dillon v. O'Brien and Davis* (2), and the judgment of PALLES, C.B., it seems to me that the principle on which he held that there was a right to detain property in the possession of the person arrested is that the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. In dealing at p. 318, 20 L.R.Ir., with *Entick v. Carrington* (9), he says : C

“The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable and probable cause for believing him to be guilty, nor that a crime had in fact been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing there might be evidence of) a crime committed by him or anyone else.” D E

In *Crozier v. Cundey* (3), where a constable having a warrant to search for certain specified goods alleged to have been stolen found and took away those goods and certain others also supposed to have been stolen but which were not mentioned in the warrant and which were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant, it was held that the constable was liable to an action of trespass. ABBOTT, C.J., said (6 B. & C. at p. 233) : F

“If those others had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, there might have been reasonable ground for seizing them, although not specified in the warrant.”

He also said :

“I have expressed myself in this manner in order to prevent the supposition that a constable seizing articles not mentioned in the warrant under which he acts is necessarily a trespasser.” G

It, therefore, seems to me that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents are evidence of a crime committed by anyone, and that, so far as the documents in the present case fall into that category, the seizure of them is excused. The documents coming within that description were all the documents contained in bundle “2A” and were used at the trial of Elias. It was admitted by counsel for the plaintiffs that these documents were capable of being evidence in the case against Elias, who was convicted of unlawfully soliciting and inciting Emrys Llewellyn and Walter Hannington to commit the crime of sedition. In my opinion, the seizure of these documents was justified because they were capable of being and were used as evidence in that trial. If I am right in that view, the original seizure of these documents, though improper at the time, would, therefore, be excused. H I

As to the fourth proposition, that the police are entitled to retain property the taking of which is excused until the conclusion of any charge on which the articles are material, in *R. v. Lushington, Ex parte Otto* (4), WRIGHT, J., said :

“In this country I take it that it is the undoubted law that it is within the

power of and is the duty of constables to retain for use in court things which may be evidence of crime and which have come into the possession of the constables without wrong-doing on their part. I think it is also undoubted law that, when articles have once been brought into court by witnesses, it is right and necessary for the court or the constable in whose charge they are placed (as is generally the case) to preserve and retain them so that they may be always available for the purposes of justice until the trial is concluded."

In this case, however, both the trials of Hannington and Elias have been concluded, and I think that there is no answer now to the claim for the detention of the documents after demand, or for the £10 claimed as damages for their detention. The Attorney-General stated that for the purposes of this case only he did not intend to contend that the plaintiffs could have no property in the documents which have been used on the charge against Elias because these documents were of a seditious character. As regards the claim for damages for trespass to documents and goods I have held, with regard to the letter signed "P.C.," and also the documents used on the trial of Elias, that they were properly seized. The police in seizing the other documents were not actuated by any improper motives, and there was no evidence that the plaintiffs have sustained in any way any special damage, and I think in respect of that matter that the sum of £20 should be awarded. There will, therefore, be judgment for the plaintiffs for £20 damages for trespass, an order for the return of the documents comprised in "2A," £10 damages for detention of those documents, and the first three defendants must pay the costs of the action. There will be judgment, without costs, for the Receiver for the Metropolitan Police District.

Judgment accordingly.

Solicitors: *W. H. Thompson; Treasury Solicitor.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

ELLEN STREET ESTATES, LTD. v. MINISTER OF HEALTH

[COURT OF APPEAL (Scrutton and Maugham, L.JJ., and Talbot, J.), January 25, 1934]

[Reported [1934] 1 K.B. 590; 103 L.J.K.B. 364; 150 L.T. 468;
98 J.P. 157; 32 L.G.R. 233]

Housing—Clearance order—Lapse—Power to make second order affecting same property—Compensation—Effect on Housing Acts of Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 7 (1)—Housing Act, 1925 (15 & 16 Geo. 5, c. 14), s. 46 (1)—Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 64 (1).

In 1923 a scheme (which incorporated the Lands Clauses Consolidation Act, 1845) made by a local authority to deal with property in a clearance area was confirmed by the Minister of Health, but a period of more than three years passed with the result that the power compulsorily to acquire the property lapsed. The local authority then made a new clearance order which, after a public inquiry, was confirmed by the Minister. Owners of property within the area affected by the order having objected,

Held: there was nothing in s. 64 (1) of the Housing Act, 1930, to prevent the making of a fresh order after the time for serving notice to treat under the previous order had expired, and, therefore, the second order confirmed by the Minister was valid.

Section 7 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, which provides that the provisions of any Act or Order under which land is authorised to be acquired shall, so far as they are inconsistent with the Act of 1919, "cease to have or shall not have effect," cannot render nugatory inconsistent legislation passed after the Act of 1919, for Parliament cannot bind itself as to the form of subsequent legislation. Therefore, the force and effect of s. 46 (1) of the Housing Act, 1925, which contained provisions for compensation inconsistent with those of the Act of 1919, was *held* not to be affected by s. 7 (1) of the Act of 1919.

Notes. The Housing Act, 1925, was repealed by the Housing Act, 1936, which in turn was repealed by the Housing Act, 1957, but s. 46 (1) of the earlier Act is reproduced in s. 59 (2) of the Act of 1957. The Minister concerned is now the Minister of Housing and Local Government.

As to the compulsory purchase of land for housing purposes and compensation, see 26 HALSBURY'S LAWS (2nd Edn.) 571 et seq., and for cases see DIGEST SUPPS., tit. Public Health, case No. 502g et seq. For Acquisition of Land (Assessment of Compensation) Act, 1919, see 3 HALSBURY'S STATUTES (2nd Edn.) 975, and for Housing Act, 1936, see 11 *ibid.* 444.

Case referred to :

- (1) *Vauxhall Estates, Ltd. v. Liverpool Corpn.*, [1932] 1 K.B. 733; 101 L.J.K.B. 779; 95 J.P. 224; 48 T.L.R. 100; 146 L.T. 167; 30 L.G.R. 22; 75 Sol. Jo. 886; Digest Supp.

Appeal from an order of SWIFT, J.

Prior to June 18, 1920, one Nathan Lithman acquired the sub-lease of certain property in Ellen Street and Berners Street, Stepney, for £5,500. The lease of the property was for sixty years from Michaelmas, 1919. When he made that purchase he did not know that the London County Council had, on July 15, 1919, made an order dealing with an area which included the property by means of an improvement scheme under the Housing Acts. Notice of the scheme was served upon him on June 18, 1920, and in October the local inquiry was held. Mr. Lithman appeared by his son at the local inquiry, but no objection was raised to the order because he was under the impression that, if the London County Council were going to acquire his property compulsorily, they would pay the owner the value of it. The order was duly confirmed by the Minister of Health on Nov. 8, 1923. In December, 1928, an arbitration was held to determine the amount of compensation to be paid to Mr. Lithman, but the arbitrator held that Mr. Lithman was entitled to nothing. As the powers of compulsory purchase could no longer be enforced, the London County Council made a fresh order under Part I of the Housing Act, 1930, in relation to Mr. Lithman's property, and a second inquiry was held at which the objection was taken on behalf of Ellen Street Estates, Ltd., the assignees of Mr. Lithman, that the Minister had no jurisdiction to hold a second inquiry on the ground (i) that if his confirmation order of Nov. 8, 1923, was right, it would be legally impossible for him to give a different decision on the second inquiry; (ii) that it was contrary to principles of justice that a person should have his case tried by a judge who had already decided the same point against him; and (iii) that by s. 64 of the Housing Act, 1930, the earlier improvement scheme was preserved. Notwithstanding these objections the Minister confirmed the order declaring the property to be a clearance area and made a compulsory purchase order which contained the following clause :

"3. Subject to any necessary adaptations the provisions of (a) the Lands Clauses Acts, except ss. 127 to 132 of the Lands Clauses Consolidation Act, 1845; (b) the Acquisition of Land (Assessment of Compensation) Act, 1919 . . . as modified by Part I of Sched. II to the Housing Act, 1930, in the case of compulsory purchase orders made for the purposes of the Housing Act, 1930, are hereby incorporated in this order and the provisions of those Acts shall apply accordingly."

A Section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, provides:

"In assessing compensation an official arbitrator shall act in accordance with the following rules . . . (2) The value of land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. . . ."

B Section 7 (1):

"The provisions of the Act or Order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act these provisions shall cease to have or shall not have effect. . . ."

C Section 46 (1) of the Housing Act, 1925, provides:

D "Where land included in any improvement or reconstruction scheme made under this Part of this Act . . . is acquired compulsorily, the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building by-laws for the time being in force in the district: Provided that, if in the opinion of the Minister it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, or that the land or a part thereof when cleared should be laid out as an open space, the compensation payable to all persons interested in any land included in the scheme . . . for their respective interests therein shall be reduced by an amount ascertained as follows. . . ."

E Subsection (2):

"Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919."

F By s. 64 (1) of the Housing Act, 1930:

" . . . where before the commencement of this Act . . . any scheme or order has been confirmed . . . by the Minister or any order has been submitted to him for confirmation . . . the like proceedings . . . may be taken thereon and the like consequences shall ensue as might have been taken or would have ensued if this Act had not been passed."

G Ellen Street Estates, Ltd., appealed on the ground that the London County Council had no jurisdiction to make, and the Minister of Health no jurisdiction to confirm, the orders.

SWIFT, J., refused the application.

Ellen Street Estates, Ltd., appealed to the Court of Appeal.

H H. A. Hill (A. W. Nicholls with him) for the appellants.

The Attorney-General (Sir Thomas Inskip, K.C.) and W. Bowstead for the Minister of Health and H. G. Robertson for the London County Council were not called upon to argue.

I **SCRUTTON, L.J.**—This is an appeal from an order of SWIFT, J., to whom are assigned cases under the Housing Acts. It arises in this way. A person, not knowing of the fact that the district was being dealt with by a clearance order, bought certain houses in Stepney which were included in the order as being

"by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area."

The first proceedings were taken in 1920, and shortly after there was a public inquiry, at which the then owner, who has now assigned to the Ellen Street Estates Co., Ltd., appeared by his son, but, being under the impression that he was going to obtain compensation, raised no objections to the order. The proceedings in

carrying out the order drifted along, partly owing to the difficulty in re-planning, and partly owing to the fact that certain other cases were on their way to the House of Lords, where one of them ultimately arrived, and it was not until some five or six years afterwards that the appellants proceeded to have the amount assessed to which they were entitled for compensation, when, no doubt extremely to their disgust, the arbitrator held that the compensation they were entitled to was nothing. The appellants' solicitors then discovered what, apparently, they had not noticed before, namely, that there was a provision in the Lands Clauses Consolidation Act, 1845, s. 123, which is incorporated in the Housing Acts, that compulsory purchase under the scheme could not be enforced later than three years after the date of the order, and that period had elapsed. Negotiations in Stepney still proceeded, and ultimately the local authority determined that the best course to pursue was to make another application for a clearance and demolition order under the Housing Act, 1930, and an order was made and was approved by the Minister after a public inquiry, at which the owners of the land were heard. Thereupon the appellants' assignees, the Ellen Estates, Ltd., objected to the proceedings on three grounds, and the matter came before SWIFT, J. One ground was at once disposed of. That ground was that in the evidence taken at the public inquiry there was no evidence upon which the Minister could make the order. SWIFT, J., read some of the evidence, pointed out to counsel for the appellants his difficulty, and counsel, according to the learned judge, gracefully retired on that particular point. However, he insists on the other two points which we now have to deal with.

The first point with which we have to deal is this. Counsel contends that it is impossible now to make any order about these houses because an order was made under the previous Act on the first inquiry, and, that order having been made, but not enforced, no subsequent order in respect of those houses can be made, and he bases that argument, as I understand, upon s. 64 of the Housing Act, 1930, which provides that,

"... where before the commencement of this Act ... any closing order ... has been made, or any scheme or order has been confirmed or approved by the Minister ... the like proceedings (... and, in the case of London, proceedings for the acquisition of additional land ... may be taken thereon) and the like consequences shall ensue as might have been taken or would have ensued if this Act had not been passed."

If the Act had not been passed in the circumstances that I have stated, compulsory purchase could not have gone on, because proceedings had not been taken within three years of the date of the order, and nothing could be done apart from purchase by agreement, under the previous order; but counsel argues that in some way, though these houses are in an unhealthy or dangerous condition, they must remain in that condition for the rest of the lease, unless the local authority will pay the appellants what they ask for them in spite of the fact that the arbitrator has held that they are entitled to nothing. The only thing I can say about that point is that I cannot understand how it can intelligently and reasonably be argued. I have endeavoured to understand how counsel can say that a plan sanctioned for one area which cannot be carried out owing to the lapse of time prevents for the rest of all time any proceedings being taken in respect of those houses which are to be taken to be by their situation in a dangerous condition to health. The result seems absurd. I have not been able to see any intelligible reason why that point should be taken. That point, therefore, in my opinion, fails.

The second point is, I think, still more impossible. It is this. The Acquisition of Land (Assessment of Compensation) Act, 1919, lays down certain principles on which compensation for land taken is to be assessed, and it provides by s. 7 (1):

"The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters

- A dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect."
- Counsel says that is to be read in such a way that, if you find in a later Act provisions as to compensation for land inconsistent with the Act of 1919, those provisions are to have no effect. I pointed out to him that that means that no subsequent Parliament by passing a provision inconsistent in terms with the Act of 1919 can give any effect to the words that it uses. Section 46 (1) of the Housing Act, 1925, in codifying all the Housing Acts, inserted this provision:
- "Where land included in any improvement or reconstruction scheme . . . is acquired compulsorily"
- certain provisions as to compensation shall apply. Those provisions are inconsistent with the provisions in the Act of 1919. Having laid that down, the Act continues in s. 46 (2):
- "Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919."
- D I asked counsel what meaning he attached to those words, and he said they meant nothing, because the Act of 1919 had said that nothing inconsistent with it shall have any effect. That appears to me absolutely contrary to the constitutional provision that Parliament can alter an Act which it has previously passed. It can do so by repealing the previous Act, and I gather counsel admits that, if it does that, it does not matter that the Act of 1919 has said that that shall have no effect.
- E But it can also do it in another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it.
- In those circumstances it seems to me impossible to say that these words:
- F Compensation shall be assessed in a particular way and subject as aforesaid, shall be assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919, have no effect. A Divisional Court in *Vauxhall Estates, Ltd. v. Liverpool Corpn.* (1) has held that counsel's argument on that point was not a good one, and that the provisions of the Act of 1925, so far as they were inconsistent, must prevail over the provisions of the Act of 1919. One cannot
- G help thinking that the matter is carried a step further in this case, because s. 12 of the Act of 1930 says again that compensation shall be assessed in accordance with the provisions of the Act, except as altered in a series of matters which the Act proceeds to prescribe. I think that the decision in *Vauxhall Estates, Ltd. v. Liverpool Corpn.* (1) is a correct decision, and I think that this point put forward by counsel is no better than his first point, as to which I have expressed my opinion.
- H For these reasons, in my view, the appeal must be dismissed.

I MAUGHAM, L.J.—I agree, and will add very few words. The first point is as to the true construction of s. 64 of the Housing Act, 1930. It is contended that as the result of that section, which is a repealing section in a form which is very familiar, a scheme or order confirmed or approved by the Minister under one of the repealed Acts precludes the possibility of any fresh scheme relating to the same area or part of it being made under the Housing Act, 1930. It is to be observed that the end of the proviso to the section is purely permissive; it merely says where before the commencement of the Act certain proceedings have been, stating it shortly, begun under the repealed Act, the like proceedings may be taken thereon and the like consequences shall ensue as might have been taken or would have ensued if the Act of 1930 had not been passed. In the present case, the argument was presented upon the footing that the previous scheme had become abortive, owing to the lapse of time in acquiring certain lands. The facts are peculiar in that the arbitrator, who was appointed to determine the compensation payable to

the appellants, came to the conclusion that the sum payable was nothing, a conclusion which I cannot help thinking might have caused some difficulty if the county council had thereupon desired a conveyance, because it is more difficult to put the machinery of conveyance in force if you cannot pay or tender a sum to the person who ought to convey, but, however that may be, the appellants submitted that three years having elapsed after the time when compulsory powers were given, the procedure to obtain a conveyance could not be carried out, and, accordingly, the scheme was pro tanto abortive. I see not the smallest reason for coming to the conclusion that in such a case as that there is anything in s. 64 which prevents a fresh scheme under the new Act being prepared by virtue of a resolution under s. 1 and the consequent proceedings as regards a closing order. Accordingly, I cannot accede to the first point that has been made by counsel for the appellants.

The second point must depend upon a view of constitutional law, based upon the terms of s. 7 of the Acquisition of Land (Assessment of Compensation) Act, 1919. That section is, it must be admitted, in one respect in a somewhat peculiar form. It begins thus:

"The provisions of the Act or Order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and in so far as inconsistent with this Act, those provisions shall cease to have or shall not have any effect."

Counsel for the appellants contends that as regards any subsequent Act, in the absence of an express repeal of this provision of the Acquisition of Land (Assessment of Compensation) Act, 1919, the provisions of that Act must apply, however clearly it may be that the intention of Parliament, as expressed in the subsequent Act, was to modify the provisions of the Act of 1919.

For the reasons given by SCRUTTON, L.J., I am quite unable to accept that view. It seems to me that there are several ways of dealing with it. It seems to me, in the first instance, plain that the legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject-matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it perfectly plain that the previous one is being to some extent repealed or abrogated, that must have effect, because it is the will of the legislature. It may be possible to say that the provisions of s. 7 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, are intended, so far as regards the words "or of any Act incorporated therewith," to say that, if any subsequent Act shall incorporate the provisions of the Act of 1919 and make no provision with regard to the way in which compensation is to be assessed, *prima facie* the provisions of the Act of 1919 would apply; in other words, it might be establishing as regards future Acts a *prima facie* rule as to the principles for the assessment of compensation which should apply. That question does not arise here because, as pointed out by my Lord, it is beyond question that the Act of 1925 and the subsequent Housing Act of 1930 declared in the plainest and most unambiguous terms the provisions for assessing compensation which were to apply.

For those reasons it seems to me that the second point must also fail, like the first.

TALBOT, J.—I agree. I only wish to add one word with regard to the question of the meaning of the words "or of any Act incorporated therewith." I should have thought the obvious meaning—the meaning which, at any rate, at first sight seems to be the right one—is that it was intended to cover the case which would include, at any rate, the vast majority of Acts authorising the acquisition of land, of which the Lands Clauses Act is the most typical example, and that these words are simply meant to treat the Act itself which authorises the acquisition of land as if an Act of that kind were incorporated with it. I observe that in *Vauxhall Estates, Ltd. v. Liverpool Corpn.* (1) the court, or, at any rate, one of the judges, was inclined to favour the position that s. 7 did not apply to anything except Acts

A existing, but abstained from expressing a final opinion on that point. I should have thought, to say the least of it, there was a great deal to be said for the view that the marginal note, which, of course, is no part of the Statute, correctly stated the effect of the section, and that it does not apply to future enactments at all; but I agree entirely with the judgments which have been given by the other members of the court as to the reason for rejecting the second point which counsel put forward.

Appeal dismissed.

Solicitors: Knapp-Fisher & Wartnaby; Solicitor to Ministry of Health; Solicitor to London County Council.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

ELLIOTT v. ALBERT

[COURT OF APPEAL (Scrutton and Maugham, L.JJ.), February 27, 1934]

[Reported [1934] 1 K.B. 650; 103 L.J.K.B. 305; 151 L.T. 13; 78 Sol. Jo. 206]

Discovery—Interrogatory—Imputation of adultery—Objection to answer on ground that answer might tend to prove adultery and to expose to risk of ecclesiastical censure—Action by wife for enticement of husband—Admissibility.

The plaintiff, a wife, brought an action against the defendant, a married woman, claiming damages for (i) enticing away from the plaintiff her husband, (ii) trespass, and (iii) eviction from a house. In her statement of claim the plaintiff alleged adultery on the part of the defendant with her husband. The plaintiff applied for leave to administer the following interrogatory to the defendant: "Did you not from Jan. 10, 1928, until some other and what date, live at the same address with the plaintiff's said husband?" It was objected that the interrogatory was inadmissible as the answer might convict the defendant of adultery and so expose her to ecclesiastical censure and punishment.

Held: the interrogatory was admissible because the causes of action were not based on adultery as the proof of adultery was not essential to any of them, but was merely relevant in assisting proof of interference with the right of consortium between the plaintiff and her husband.

Redfern v. Redfern (1), [1891] P. 139 considered and distinguished.

Evans v. Evans and Blyth (No. 2) (2), [1904] P. 378 followed.

Notes. Delivery of interrogatories is now regulated by R.S.C., Ord. 31, rns 1, 2, and by r. 23 of the Matrimonial Causes Rules, 1957 (S.I. 1957, No. 619). The statutory bar to questions tending to prove adultery in divorce cases is now contained in s. 32 of the Matrimonial Causes Act, 1950.

Referred to: *Blunt v. Park Lane Hotel, Ltd.*, [1942] 2 All E.R. 187.

As to discovery in enticement cases, see 12 HALSBURY'S LAWS (3rd Edn.) 70, para. 96; as to the difference between discovery in matrimonial causes and in other cases, see *ibid.* 7, para. 7; and as to interrogatories in matrimonial causes, see *ibid.* 361, para. 776, and for cases on the subject see 18 DIGEST 52-53, 181, 98-104, 1326-1327.

Cases referred to :

- (1) *Redfern v. Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 39 W.R. 212; 7 T.L.R. 157, C.A.; 27 Digest (Repl.) 267, 2147.
- (2) *Evans v. Evans and Blyth* (No. 2), [1904] P. 378; 73 L.J.P. 114; 91 L.T. 600; 20 T.L.R. 612; 27 Digest (Repl.) 519, 4620.
- (3) *R. v. Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur. N.S. 1158; 9 W.R. 690; 9 Cox, C.C. 32; 121 E.R. 730; 22 Digest (Repl.) 391, 4191.
- (4) *Spokes v. Grosvenor and West End Rail. Terminus Hotel Co.* (No. 1), [1897] 2 Q.B. 124; 66 L.J.Q.B. 572; 76 L.T. 679; 45 W.R. 546; 13 T.L.R. 431, C.A.; 9 Digest (Repl.) 715, 4736.

Interlocutory Appeal from a decision of CHARLES, J., in chambers.

The plaintiff, Mrs. Isobel Kathleen Elliott, brought an action against Mrs. Sybil Albert, a married woman, claiming damages against her for (i) wrongfully enticing away the plaintiff's husband, and depriving her of his consortium; (ii) trespass; and (iii) causing the plaintiff to be evicted from a house, "The Whins." By her statement of claim the plaintiff alleged that from the end of 1927 the defendant solicited the affections of the plaintiff's husband by providing him with large sums of money; that in January, 1928, in consequence of the enticement of the defendant, the plaintiff's husband deserted her; that from that date to the present the defendant had supported the plaintiff's husband, and that for the greater part of that time the defendant and the plaintiff's husband had lived together as man and wife; that in February, 1928, the plaintiff obtained a maintenance order of 15s. a week against her husband; that in April, 1930, "The Whins" was purchased by the plaintiff's husband; that in June, 1931, the plaintiff's husband agreed with her verbally that in consideration of her abandoning her claim to maintenance under the said order he would hand over to her "The Whins," and that, accordingly, she entered into possession of that house; that in August, 1932, she was evicted from "The Whins" by the defendant.

By her defence the defendant denied the enticement, and the desertion. She alleged that "The Whins" was bought by the plaintiff's husband with money provided by her, and that by a judgment of the court in the Chancery Division it had been declared that "The Whins" was vested in the plaintiff's husband as trustee for the defendant, and that thereupon the plaintiff's husband had conveyed that house to the defendant. She further alleged that she had obtained in the King's Bench Division an order for possession of that house, which the sheriff had delivered to her.

By her affidavit of documents the defendant said that she had in her possession certain documents set out in Sched. I, Part III, to the affidavit relating to certain loans and gifts of money which she admitted that she had made to the plaintiff's husband. If it should be held that such documents were relevant, she objected to produce them, on the ground that to the best of her knowledge, information and belief, "they may tend to expose me to ecclesiastical censure and punishment." On Nov. 2, 1933, the plaintiff applied to a master for a further affidavit of documents relating to entries of cheques in the defendant's pass-books drawn in favour of the plaintiff's husband, and also for an order that the defendant should produce the documents above referred to in Sched. I, Part III, of the defendant's affidavit. On this application the master accepted the defendant's contention and made no order.

On Nov. 16, 1933, the plaintiff applied to the master for leave to amend her statement of claim by striking out therefrom the words :

"and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife."

She also again applied for an order for the production of the documents in Part III of Sched. I of the affidavit of documents. The master made no order and the judge in chambers supported his decision.

A The plaintiff then applied to the master for leave to administer to the defendant the following interrogatories:

"1. Did you not between the end of 1927 and the year 1931 make gifts of money to the plaintiff's husband . . . ? 2. If the answer to interrogatory No. 1 is 'Yes,' state the amount of such gifts of money. 3. Did you not from Jan. 10, 1928, or thereabouts, until some other and what date live at the same address with the plaintiff's said husband? 4. Did you not in or about April, 1930, provide the plaintiff's said husband with money to purchase the freehold messuage known as 'The Whins' . . . ? 5. Did you, in or about May, 1931 . . . consent to the plaintiff's said husband executing a mortgage on 'The Whins' . . . ? 6. If the answer to interrogatory No. 5 is in the affirmative, state whether the consent was in writing and if it was . . . identify the document . . ."

The master refused to allow the plaintiff to administer these interrogatories, and the judge in chambers supported his decision. The plaintiff appealed.

Linton Thorp, K.C., and C. J. T. Pensotti for the plaintiff.

P. B. Morle for the defendant.

D **SCRUTTON, L.J.**—This is a curious case, and some of the grounds put forward for not answering these interrogatories look rather odd, in the year 1934. A Mrs. Elliott brings an action against a Mrs. Albert in the King's Bench Division, alleging the well-established cause of action, that the defendant has deprived her of the consortium of her husband, and she claims damages against the defendant for wrongfully enticing away her husband and thereby depriving her of the consortium to which she is entitled. She alleges as a second claim that her husband, under a magistrates' order, had to maintain her, and he induced her to waive that order by agreeing with her that she should live in a particular house and that the defendant evicted her from that house. Those are the two causes of action alleged. It is obvious that both those causes of action can be proved without proving adultery between the defendant and Mr. Elliott.

F There is nothing in the statement of claim as to adultery before the end of para. 3:

"From the end of 1927 or thereabouts until Jan. 10, 1928, or thereabouts, the defendant wrongfully enticed and persuaded, and on the last-mentioned date procured and thereafter continued to entice, persuade and procure the plaintiff's husband to deprive the plaintiff of his consortium."

G Adultery is not an essential element to that claim.

"Particulars. The plaintiff will rely upon the fact that in and from the end of 1927 or thereabouts"

—that is before the alleged desertion—

H "the defendant constantly and persistently solicited the affections of the plaintiff's husband by (inter alia) providing him with large sums of money"

—adultery has nothing to do with that—

"on or about Jan. 10, 1928, the plaintiff's husband, in consequence of the said enticement by the defendant, deserted the plaintiff"

I —adultery has nothing to do with that—

"and from then until the present date the defendant has supported the plaintiff's husband"

—adultery has nothing to do with that—

"and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife"

—that is an allegation of adultery. It is one allegation material in proving the interference with the right of consortium, but the loss of the right of consortium

can be proved in a number of other ways which, in fact, are also alleged. Now the defence is a denial. A

First of all as to the question of discovery of documents the defendant made this affidavit:

"I say that I object to produce the same on the ground that to the best of my knowledge, information and belief they may tend to expose me to ecclesiastical censure and punishment." B

LORD LINDLEY, in 1890, said that ecclesiastical censure as a punishment is practically obsolete, and I should think that is still more true in 1934. I should not think there is likely to be any ecclesiastical censure and punishment for enticing away a wife's husband. But that plea was allowed by the master and the judge, and was not appealed from further. C

The next rather curious event was that the plaintiff applied to amend her statement of claim by striking out the words,

"and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife." D

Oddly enough, the defendant opposed that amendment; she did not want to be freed from the allegation that she and the plaintiff's husband had lived together as man and wife. It would seem that the defendant opposed that amendment as a matter of tactics to avoid discovery of documents and/or interrogatories. E

Then came the application with the result of which the court has to deal. The plaintiff applied for leave to administer interrogatories, and the first two relate to gifts of money alleged to have been made to procure the loss of consortium. The third is:

"Did you not, from Jan. 10, 1928, or thereabouts, until some other and what date, live at the same address with the plaintiff's said husband?" F

The fifth and sixth interrogatories are two interrogatories addressed to show that the defendant had consented to the plaintiff's husband dealing with this house which is the subject-matter of the claim for trespass. The master and the judge decided against both discovery of documents and the interrogatories, relying on a decision of the Court of Appeal in a divorce proceeding, that of *Redfern v. Redfern* (1). That case came before the court because the person who was asked to make discovery was an infant, and there is a rule in all divisions that infants cannot be compelled to make discovery either by interrogatories or by discovery of documents; but the case being in the Divorce Court the question was raised, apart from the question of infancy: whether discovery could be ordered against her inasmuch as she was being charged with adultery? Both LINDLEY, L.J., and BOWEN, L.J., pointed out that discovery in divorce cases was permissible both by way of discovery of documents and by way of discovery by interrogatories; LINDLEY, L.J., also pointed out that discovery as to cruelty or desertion in a divorce case is permissible. LINDLEY, L.J., said ([1891] P. at p. 146): G H

"On the other hand, adultery being an ecclesiastical offence . . . it would be wrong to compel discovery by means of interrogatories the object of which is to obtain answers tending to show that the person interrogated has been guilty of adultery";

and then he said: I

"If there is reason to believe that the affidavit is required only for the purpose of discovering documents tending to prove adultery by the person required to make the affidavit, no order for such affidavit ought to be made."

BOWEN, L.J., having read the statute, said ([1891] P. at p. 149):

"On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted. . . ."

A Now the question would arise, and later did arise, what is the position when the object of the action is not to prove adultery, when the cause of action is not based on adultery? In my view a different answer might be given, and such answer has been given, as appears from the decision of GORELL BARNES, J., in *Evans v. Evans and Blyth* (No. 2) (2). In that case there had been proceedings for divorce, and adultery had been proved, but later the following question arose on a proposal to vary the settlements. Here is a child: is that child the legitimate child of the original husband and wife or is it the child of the wife by the co-respondent? This question was raised in court and the co-respondent, being put in the witness-box, was asked: "Did you commit adultery with Mrs. Evans?" at a place named, and the objection was made that the witness was not bound to answer because the answer would convict him of adultery, and he would be liable to penalties, e.g., of ecclesiastical censure. It was held by GORELL BARNES, J., that, the issue in the proceeding being the determination of the status of the child, and not adultery, the witness should be compelled to answer the question.

The present case seems to me to be similar. The plaintiff proposes to prove that the defendant enticed her husband away from her. That cause of action can be proved without proving adultery at all; adultery is only one allegation which may be relevant to establish a cause of action which is entirely independent of adultery and may be proved whether there was adultery or not, namely, enticing the husband away from the wife, whereby the wife is deprived of the consortium to which she is entitled under the common law. It appears to be immaterial whether one of the elements which may be alleged to prove the deprivation of consortium is adultery. The cause of action has nothing to do with adultery, it can be proved without establishing adultery, and it appears to me that the interrogatories do not come within the language of BOWEN, L.J., and LINDLEY, L.J., in *Redfern v. Redfern* (1) as being addressed directly or indirectly to the sole proof of adultery or as wanted solely for the purpose of proving adultery; they are wanted for proving a cause of action which has nothing to do with adultery, but which is based on the loss of consortium.

F Now test the interrogatories by that. The first one is:

"Did you not between the end of 1927 and the year 1931 make gifts of money to the plaintiff's husband?"

G That was intended to show the means by which the desertion which was alleged to have occurred in 1928 was procured. So far as I can see that has nothing to do with adultery at all. It appears to be clear that interrogatories 1 and 2 should be allowed. Interrogatories 5 and 6 are addressed to proving the matter alleged at the end of the statement of claim, namely, trespass of a house in which the wife was said to be living by permission of the husband, permission having been given by him to free himself from liability under a maintenance order. It seems to me that these interrogatories are not put solely to prove adultery; adultery may have nothing to do with them. The interrogatory about which I have had more doubt is the third:

"Did you not from Jan. 10, 1928, or thereabouts until some other and what date, live at the same address with the plaintiff's said husband?"

I That, I think, would be relevant if the object of the action were to prove adultery, but it is equally relevant, it appears to me, to prove the action which led to depriving the plaintiff of the consortium and to show incidentally the object for which the defendant used the enticement which procured the loss of consortium.

I come therefore in this case to the opinion that these interrogatories are admissible and must be allowed. The appeal, therefore, will be allowed with such costs here and below as can be recovered by a poor person.

MAUGHAM, L.J.—I think it is desirable that I should add just a few words on the perhaps interesting question whether interrogatory No. 3 is a proper

interrogatory to be allowed in the present case, the nature of the action having been described by my brother SCRUTTON. I would observe that the action is for what is in the nature of a common law tort based on the view that without lawful justification the defendant has enticed the plaintiff's husband to leave her. It is not, as I understand it, an action based in any way on adultery or on a ground with which the Ecclesiastical Courts were solely seized. The question arises whether the defendant must answer this third interrogatory which I will concede might be a step in the proof of the allegation that the defendant had committed adultery with the plaintiff's husband. A B

The right to deliver interrogatories at the present time is based upon Order XXXI of the Rules of the Supreme Court and particularly upon rr. 1, 2, and 3 of that Order, and it is no longer necessary to refer back to the practice of the old Court of Chancery for the purpose of ascertaining what interrogatories may be delivered. Rule 1 of Order XXXI, however, which states the general principle as to the right to discover by interrogatories, is not intended to take away the general right of the party to whom interrogatories are delivered to object to answer certain interrogatories on well-recognised grounds. It may be worth while to remember that in the Annual Practice the note to Order XXXI is a note which has the high authority of SIR EDWARD BRAY, the author of BRAY ON DISCOVERY, and we may take it as being the last statement of the views on the subject of discovery by interrogatories for which that very learned lawyer was responsible. He pointed out in the note that there is a right to refuse to answer an interrogatory or to give any discovery which will tend to incriminate the party interrogated or expose him to the risk of any kind of punishment, whether it be by penalties or forfeiture. I do not doubt then that *prima facie* there is that general right on the part of the defendant to refuse to answer interrogatory No. 3, if it could be truly stated that, in the present action, to answer that interrogatory would expose her to some kind of punishment, and it is in that connection that the decision in *Redfern v. Redfern* (1) is invoked by the defendant. C D E

Now in the first place I would observe that it is well settled in an ordinary case that an objection of this kind ought to be taken on oath in the answer. I am aware that some people think that leads to waste of money, and it may be that the rule is not as strict as it used to be, but I mention it for the reason that in a decision of the Court of Appeal, the case of *Redfern v. Redfern* (1) is treated as being a somewhat special case depending on the fact that the question there determined was on a petition raised by a husband for dissolution of marriage. It is to be observed that in *Redfern v. Redfern* (1) the question was whether the respondent, who happened to be a minor, was bound to make an affidavit as to documents. That is the only point which was before the Court of Appeal, the action being, as I have said, an action for dissolution of marriage, and that was the only question with which the court was really concerned. The judgments of LINDLEY, L.J., and BOWEN, L.J., proceeded upon a consideration of the old practice of the Ecclesiastical Courts in a case of that kind with which we have, as I conceive it, nothing to do here, and the practice after the power of the Ecclesiastical Courts had been superseded of requiring discovery in divorce cases. After having considered in some detail that ancient practice, they came then to the consideration of s. 3 of the Evidence Further Amendment Act, 1869 (32 and 33 Vict., c. 68), which, I may mention, is now to be found in s. 198 of the Judicature Act, 1925, [now s. 32 (3) of the Matrimonial Causes Act, 1950] and they pointed out that the statute, dealing, as it did, with answers by witnesses *viva voce* in proceedings based upon adultery, threw no doubt whatever upon the view that the old practice in regard to divorce cases and to whether questions might be asked tending to establish adultery still continued. Having come to the conclusion that that practice continued, the Court of Appeal decided that no order for discovery or for an affidavit ought to be made in such a case, if the discovery or the affidavit was wanted solely for the purpose of proving adultery. That is most clearly stated by LINDLEY, L.J. ([1891] P. at F G H I

A p. 146), and the statement of the general rule by BOWEN, L.J. (at p. 149), I take to be to the same effect.

The proposition is not, however, sound that by reason of the decision in *Redfern v. Redfern* (1) no man or woman can be asked if they have committed adultery. I see no reason to doubt that the decision of GORELL BARNES, J., in *Evans v. Evans and Blyth* (No. 2) (2) was a correct decision. There, after a decree for divorce had been obtained the co-respondent was called as a witness on the hearing of an issue for the purpose of determining whether a child born during wedlock was or was not legitimate, the question being in these very words. "Did you early in November, 1902, commit adultery with Mrs. Evans" at a place named? In order to allow that question to be asked the learned judge considered very carefully the principles which were involved, including *Redfern v. Redfern* (1) and a number of other authorities, and he came to the conclusion that the co-respondent was running no risk of ecclesiastical censure or forfeiture if he were compelled to answer the question, and he was therefore made to answer it. He cited some exceedingly pertinent remarks by COCKBURN, C.J., of which I will take the liberty of reading one sentence, in order to justify his view. COCKBURN, C.J., in *R. v. Boyes* (3) said (1 B. & S. at p. 330):—

D "We are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct."

E As I understand the judgment in *Evans v. Evans and Blyth* (No. 2) (2) GORELL BARNES, J., thought that that was, in a case where adultery was not the issue in the action, a sufficient ground in a proper case for compelling a man to answer the question as a witness. In my opinion, if the ground of the danger of ecclesiastical censure is destroyed there is no reason, according to the modern law, for refusing to allow the interrogatory to be put, and I go further and say that there is no reason for thinking that the person to whom the interrogatory is administered is entitled to refuse to answer a proper question, such as the question involved here in interrogatory No. 3, on the ground of this fanciful suggestion that some ecclesiastical censure may follow. I referred in the course of the argument to the limitation to be put upon *Redfern v. Redfern* (1), which has already been before the Court of Appeal. It came before the Court of Appeal in *Spokes v. Grosvenor and West End Rail. Terminus Hotel Co.* (No. 1) (4), where a number of fraudulent directors—I say "fraudulent" because their fraud was subsequently established—objected to giving discovery of documents on the ground that discovery might tend to incriminate them. They relied upon *Redfern v. Redfern* (1) where the court had, as I have already said, stated that the affidavit of documents ought not to be required. *Spokes v. Grosvenor Hotel* (4) came before the Court of Appeal, consisting of LORD ESHER, M.R., A. L. SMITH, L.J., and CHITTY, L.J., where all three referred to *Redfern v. Redfern* (1). I need not cite all their observations. LORD ESHER, after referring to a previous decision to the effect that if a person thought he had an objection to an interrogatory he must take it on oath, said ([1897] 2 Q.B. at p. 132):

I "It is said that this decision which was given in 1878, is in conflict with *Redfern v. Redfern* (1) which was decided in 1890; but this latter case was decided"—[now mark these words]—"on the particular provisions of the Divorce Acts, and is not an authority as to the general law of discovery,"

and the other two Lord Justices in effect agreed with that observation. To my mind it is a mistake to suppose that *Redfern v. Redfern* (1) established that in no case can a party be interrogated if the answer to the interrogatory might tend to incriminate him, in the sense of tending to show he had committed adultery and would therefore expose him to this risk of ecclesiastical censure, although I do not

intend to throw the smallest doubt on the propriety of the rule in a proceeding A
founded on divorce.

For these reasons I think the interrogatories in question ought to be allowed.

Appeal allowed.

Order that the plaintiff have liberty to administer the interrogatories.

Solicitors: *Close & Co.; Powell, Rogers, & Merrick.*

[Reported by C. G. MORAN, ESQ., Barrister-at-Law.]

NEUMANN v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, and Lord Wright), November 14, 16, 17, 1933, February 1, 1934]

[Reported [1934] A.C. 215; 103 L.J.K.B. 210; 150 L.T. 481; 50 T.L.R. 246; 78 Sol. Jo. 121; 18 Tax Cas. 332]

Surtax—Income for purposes of surtax—Dividend paid out of rents which had borne tax under Sched. A—Payment of gross sum tax free—Amount liable to surtax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), All Schedules Rules, r. 20—Finance Act, 1931, s. 7 (2), s. 39.

N. was a shareholder in Salisbury House Estate, Ltd., which carried on the business of letting flats in a large block of buildings in the city of London owned by it. The rents received from the flats greatly exceeded the amount on which the company was assessed to income tax under Sched. A in respect of the property, and at all material times both the profits of the company available for dividend and the ordinary annual dividends of the company were greater than the amount on which income tax had been paid by the company. The Crown, treating the company as carrying on a trade, claimed income tax under Sched. D on its profits, including receipts from rents, an allowance being made for the amount of the assessment under Sched. A. The company, contending they were liable to tax under Sched. A only, appealed to ROWLATT, J., the Court of Appeal, and finally to the House of Lords, which held, on April 4, 1930 ([1930] A.C. 432) that the liability of the company to tax in respect of the rents was covered by the Sched. A assessments, and the rents could not be brought into computation of any liability under Sched. D. While the litigation was pending, the company set aside £18,325 out of its profits to the credit of an income tax reserve to meet the contingency of an adverse decision in that litigation. That sum being no longer required for the purposes of tax, on April 4, 1930, the company declared a further dividend of 5 per cent. free of tax out of accumulated rents which remained after profits had been distributed up to the amount of any assessments made on the company. On that date £4,275 was sent to N. in respect of his share of that dividend, equivalent to £5,343 15s., less income tax. In his return of income for the purposes of surtax, N. included £5,343 15s. in respect of this dividend. On May 9, 1930, *Gimson v. I.R.Comrs.* (1) ([1930] 2 K.B. 246) was decided by ROWLATT, J., who held that where no payment of income tax had been made on or deducted from the sum paid over to the shareholder, no charge for surtax could be made on it. In view of that decision, the company informed N. that the £4,275 paid to him represented a sum distributed out of untaxed income of the company, which should not have been included in his surtax return. N. thereupon claimed that surtax was not payable by him on either £5,343 15s. or £4,275.

Held: (i) the dividend paid by the company was liable to surtax in N.'s hands because (the company having paid tax under Sched. A) the rents received by the company were profits and gains to be charged on the company within the meaning of r. 20 of the General Rules applicable to All Schedules and it followed that the dividend was one from which deduction of tax was authorised, at (by virtue of the Finance Act, 1931, s. 39) the standard rate for the year of payment in respect of the whole dividend; *Gimson v. I.R.Comrs.* (1) [1930] 2 K.B. 246 approved; but

(ii) the amount so liable was £4,275 and not £5,343 15s., because £4,275 was the gross amount of the dividend, and there was nothing in the Finance Act, 1931, s. 7 (2), to entitle the Crown to treat the gross sum as being greater than in fact it was.

Notes. The Income Tax Act, 1918, All Schedules Rules, r. 20, is replaced by the Income Tax Act, 1952, s. 184.

The second part of this decision (i.e. in so far as the case decides that the dividend is not to be grossed) is overridden by the Income Tax Act, 1952, s. 186 (replacing the Finance Act, 1940, s. 20).

Distinguished: *I.R.Comrs. v. Pearson*, *I.R.Comrs. v. Pratt*, [1936] 2 All E.R. 731. Explained and distinguished: *Shrewsbury and Talbot (Countess) v. I.R.Comrs.*, [1936] 2 All E.R. 101. **Distinguished:** *I.R.Comrs. v. Cull*, [1938] 1 All E.R. 467. Followed: *Cull v. I.R.Comrs.*, [1939] 3 All E.R. 761. Referred to: *Duncan's Executors v. Adamson*, *Astor v. Perry*, [1935] All E.R.Rep. 713; *Benn v. I.R.Comrs.*, [1937] 3 All E.R. 852; *Re Home Grown Sugar, Ltd.*, [1938] 1 All E.R. 85; *Barnes v. Hely Hutchinson*, [1939] 3 All E.R. 803.

For the Income Tax Act, 1952, s. 184, s. 186, see 31 HALSBURY'S STATUTES (2nd Edn.) 184, 182.

Cases referred to:

- (1) *Gimson v. I.R.Comrs.*, [1930] 2 K.B. 246; 99 L.J.K.B. 532; 143 L.T. 704; 15 Tax Cas. 595; Digest Supp.
- (2) *Hamilton v. I.R.Comrs.*, [1931] 2 K.B. 495; 100 L.J.K.B. 693; 145 L.T. 303; 16 Tax Cas. 213, C.A.; Digest Supp.
- (3) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266, H.L.; Digest Supp.
- (4) *Bradbury v. English Sewing Cotton Co., Ltd.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H.L.; 28 Digest 81, 445.
- (5) *Purdie v. R.*, [1914] 3 K.B. 112; 83 L.J.K.B. 1182; 111 I.T. 531; 30 T.L.R. 553; 28 Digest 96, 570.
- (6) *Coman v. Governors of Rotunda Hospital*, [1921] 1 A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; 36 T.L.R. 646; 64 Sol. Jo. 548; 7 Tax Cas. 517, H.L.; 28 Digest 82, 462.
- (7) *Attorney-General v. Metropolitan Water Board*, [1928] 1 K.B. 833; 97 L.J.K.B. 214; 138 L.T. 346; 44 T.L.R. 135; 72 Sol. Jo. 30; 13 Tax Cas. 294, C.A.; Digest Supp.
- (8) *I.R.Comrs. v. Blott*, *I.R.Comrs. v. Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H.L.; 28 Digest 107, 663.
- (9) *Sheldrick v. South African Breweries, Ltd.*, [1923] 1 K.B. 173; 92 L.J.K.B. 112; 128 L.T. 485; 39 T.L.R. 26; 67 Sol. Jo. 95, C.A.; 28 Digest 94, 555.

Appeal and cross-appeal from a decision of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) (reported [1933] 1 K.B. 728) on a Case Stated under the Finance Act, 1927, s. 42 (7) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The Case Stated was as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Oct. 21, 1931, Ludwig Neumann (hereinafter called "the appellant") appealed against an assessment to surtax made upon him for the year 1929-30. A

On the basis of a letter dated April 4, 1930, from Salisbury House Estate, Ltd. (hereinafter called "the company"), the appellant included in his return for the purposes of that assessment an item of £5,343 15s., which, according to the letter, was the gross amount applicable to a net interim dividend of £4,275 received by him from the company in 1929-30. The assessment as made upon him included that sum of £5,343 15s. Later the appellant was informed by the company that the sum of £4,275 had been erroneously described by the company as a dividend of 5 per cent. free of tax, and that in fact it represented a sum, distributed out of the untaxed income of the company, which should not have been included in any surtax return made by the appellant. By a letter of Oct. 1, 1930, the appellant informed the clerk to the Special Commissioners that he had been notified that the dividend should not have been returned, that the company informed him that it was in communication with the Board of Inland Revenue on the matter, and that, in the meantime, the appellant gave notice of appeal against the assessment. B C

The company had year by year paid ordinary annual dividends to its shareholders, including the appellant, and in the year 1929-30 the company declared such a dividend on which no question arose in addition to the interim distribution which was the subject of dispute in the present case. The only question for the court was whether the item of £5,343 15s. was properly included in the assessment. D

The company owned a property in the city of London, the rents from which greatly exceeded the amount on which the company was assessed to income tax Sched. A in respect of the property. At all material times both the profits of the company available for dividend and the ordinary annual dividends of the company had been greater than the amount on which income tax had been paid by the company. It had been contended on behalf of the Crown that the company was carrying on a trade and that, in computing its profits for the purposes of assessment under Sched. D, it was necessary to take into account all its receipts, including receipts from rents, an allowance being made for the amount of the assessment under Sched. A. On appeal by the company against assessments on that basis the House of Lords, on April 4, 1930, held that the company was not so assessable and that liability to tax in respect of the rents was covered by the Sched. A assessments, and that the rents could not be brought into the computation of any liability under Sched. D. E F

While that litigation was pending the company had put aside out of its profits an income tax reserve. The decision of the House of Lords rendered that reserve no longer necessary, and the company at once, on April 4, 1930, resolved to declare thereout and pay forthwith a further dividend described at the time as an "interim dividend of 5 per cent. free of tax." It was not disputed that that sum was paid out of a surplus of accumulated rents which remained in the hands of the company, after profits had been distributed to the amount of any assessments made upon the company. G H

As a result of that declaration the appellant received a cheque for £4,275 together with a letter from the company dated April 4, 1930, in the following terms:

"Dear Sir,—I hand you herewith cheque for £4,275 in respect of an interim dividend for the year ending Dec. 25, 1930, of 5 per cent., free of tax, on the 85,500 shares registered in your name. I

"This dividend is equivalent to a gross amount of	...	£5,343 15 0
"Less income tax at 4s. in the £		1,068 15 0

£4,275 0 0."

There followed a certificate in the usual form as to deduction and payment of income tax.

On May 9, 1930, the case of *Gimson v. I.R. Comrs.* (1) was decided in the King's

A Bench Division, and in consequence of that decision the company came to the conclusion that the terms of its letter of April 4, 1930, were wrong. After vainly trying to persuade the Commissioners of Inland Revenue that the dividend in question fell within the authority of *Gimson's Case* (1) and was not income liable to surtax in the hands of its shareholders, the company (which had previously informed its shareholders as to the attitude it was adopting in its correspondence with the Inland Revenue) sent to its shareholders, including the appellant, a letter dated Feb. 28, 1931, of which the material part was as follows:

"Dear Sir,—With reference to my letter of April 4, 1930, enclosing a cheque in respect of an interim dividend for the year ending Dec. 25, 1930, described as of an amount of 5 per cent. free of tax, I have to inform you, in conformity with the opinion of the company's legal advisers, that the dividend should have been described as a dividend of 5 per cent. actual, being a distribution of untaxed income, and that this income not having been taxable in the hands of the company is not taxable in your hands and should therefore not be included in any income tax or surtax returns made or to be made by you. The certificate at the foot of the letter of April 4, 1930, is hereby withdrawn and should accordingly be ignored by you, and in place of the gross amount of the dividend as stated in the letter the following should be substituted, in order to comply with s. 33 of the Finance Act, 1924 (if applicable), namely:

"Gross amount of dividend	£4,275 0 0
----------------------------------	------------

"Rate and amount of income tax appropriate thereto ...	Nil
--	-----

"Net dividend	£4,275 0 0
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"At the same time I have to inform you that the Board of Inland Revenue do not concur in this opinion."

The appellant contended, inter alia, that since surtax was an additional duty of income tax, no liability to surtax could exist unless the sum in question was liable to income tax in the hands of the company, and that the company in fact made the payment out of moneys which were not liable to income tax; that rents as such were not liable to income tax, the liability to which was in respect of annual value only, and that the dividend in question was made out of a surplus of accumulated rents which were available after distributing profits year by year to the full amount of the annual value on which the company was assessable; that the decision in *Gimson v. I.R. Comrs.* (1) was applicable, and that *Hamilton v. I.R. Comrs.* (2) was distinguishable; that in any case the matter was concluded by s. 7 of the Finance Act, 1931, which was retrospective.

The Crown contended that the income of the company as represented by rents had been assessed to income tax under Sched. A, the difference between the amount of the rents and the amount of the assessment being due to the measure applied under Sched. A and the Valuation (Metropolis) Act, 1869; that the dividend had been paid out of that income; that it was a dividend to which s. 7 of the Finance Act, 1931, applied; that the gross amount had been properly included in the appellant's return; and that the case was concluded by *Hamilton v. I.R. Comrs.* (2), and distinguishable from *Gimson v. I.R. Comrs.* (1).

The question for decision by the Court of Appeal was whether surtax was payable on the £4,275 actually received or on £5,343 15s. as being the sum if the amount paid over was to be treated as having borne income tax.

The Court of Appeal held, reversing the decision of FINLAY, J., that the principle of income tax law was that a company and a shareholder were separate entities, and the company paid tax on the full amount of its profits before any division thereof was made; the £18,325 could not be treated as moneys not liable to income tax, as it was a surplus of accumulated rents from the profit rents, and the company paid income tax under Sched. A on the annual value of the properties out of which those profits accrued to the company. The measurement was under Sched. A, but the tax was a tax charged in respect of all property, profits, or gains comprised in

all the schedules. N. had to return his total income, and by the Finance Act, 1927, s. 38 (1) (b), pay surtax. The total income must include the £4,275, which must be regarded as a gross dividend. A wrong test was applied in *Gimson's Case* (1), as the liability to surtax did not depend upon ascertaining whether income tax had been paid on an item claimed to be included in a surtax return, and if it had not paid income tax, then the item was to fall out of the surtax return; such a principle was contrary to s. 38 (1) and (2) of the Act of 1927. Section 7 (1) and (2) of that Act were inapplicable. And per SLESSER, L.J.: The whole current of authority established that, notwithstanding the special powers of deduction given to companies in appropriate cases under rr. 19, 20 and 21 of the Income Tax Act, and by the Finance Act, 1931, s. 7, such powers did not operate to prevent the recipient of the profit or gain in the form of dividend from being liable to income tax by direct assessment.

N. appealed and the commissioners cross-appealed as to the amount of assessment.

Wilfrid Greene, K.C., A. M. Latter, K.C., and J. H. Bowe for the appellant.

The Attorney-General (Sir Thomas Inskip, K.C.), The Solicitor-General (Sir Donald Somervell, K.C.) and R. P. Hills for the respondents.

The House took time for consideration.

Feb. 1. **LORD TOMLIN.**—This appeal and cross-appeal arise out of an assessment to surtax for year 1929–30 made on the appellant by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts can be stated shortly. A company called the Salisbury House Estate, Ltd., owned and managed a block of buildings in the City of London containing numerous rooms, let unfurnished as offices to many tenants. The company for appropriate considerations provided for the tenants who required them services in connection with the cleaning and the heating of the rooms. For the four years ending April 5, 1925, 1926, 1927 and 1928, the company were assessed under Sched. A to income tax on the gross value of the building as appearing on the valuation list under the Metropolis (Valuation) Act, 1869. In regard to the profits and gains derived from the services rendered to the tenants the company admitted liability to be assessed to income tax under Sched. D, but the Crown claimed that in making the assessment under Sched. D the rents, which far exceeded the annual value as assessed under Sched. A, must be included, allowance being made for tax assessed under Sched. A.

The matter came on appeal before your Lordships' House and on April 4, 1930, your Lordships held (see *Fry (Inspector of Taxes) v. Salisbury House Estate, Ltd.* (3)) that the rents were profits arising from the ownership of land in respect of which the assessment under Sched. A was exhaustive and that such rents therefore could not be included in the assessment under Sched. D as trade receipts of the company. Pending that appeal to your Lordships' House the company distributed in dividend (from which the appropriate amounts for income tax were deducted) sums equal to their profits in respect of services assessable under Sched. D and also sums equal to the amounts of the assessments made under Sched. A. The company, however, set aside the sum of £18,325 (representing the amount by which their net rents exceeded the amounts of the assessments under Sched. A) to the credit of an income tax reserve account to meet such liability, if any, as might be established against them in the litigation then pending. On April 4, 1930, immediately after the decision of your Lordships' House was announced, the company distributed the £18,325 so set aside among their shareholders by way of dividend. The appellant, who held 85,500 shares of £1 each in the company, received from the company a cheque for £4,275, together with a letter from the company, dated April 4, 1930, informing him that the £4,275 was in respect of an interim dividend of 5 per cent. free of tax, on the shares registered in his name and that it was equivalent to a gross amount of £5,343 15s. Later the appellant was informed by the company that the sum of £4,275 had been erroneously described

A by the company as a dividend of 5 per cent., free of tax, and that in fact it represented a sum distributed out of the untaxed income of the company which should not have been included in any surtax return made by the appellant. Nevertheless, the Commissioners for the Special Purposes of the Income Tax Acts in making upon the appellant an assessment to surtax for the year 1929-30, included the sum of £5,343 15s. as being the gross amount applicable to a net dividend of £4,275. FINLAY, J., held that in respect of the dividend in question B nothing at all ought to have been included in the assessment, and the Court of Appeal have held that the sum of £4,275, and not the sum of £5,343 15s., ought to have been so included.

The case is a difficult one, and the difficulty in part arises from the fact that the amendments from time to time made to the Income Tax Acts, directed as they C frequently are to stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme on which the Acts originally rested.

The relative positions of a company and the shareholders of the company in relation to income tax, under the Income Tax Acts have always been recognised as special in character. It was never, I think, doubted that under the Act of 1842 D the profits of a business carried on by a company were taxable against the company under Sched. D, and were not taxable again after distribution in the hands of the shareholders under Sched. D or any other schedule. At the same time it was permissible to the company under s. 54 of the Act of 1842 to deduct from the dividend the proportionate part of the tax paid to the tax collector and the shareholders entitled to exemption from or abatement of income tax could on the footing E of the deduction obtain the necessary return of tax.

I cannot but think that the position under the Act of 1842 on its proper construction is correctly described in the following passage from the speech of LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co., Ltd.* (4) ([1923] A.C. at p. 769):

F "A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sched. D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon. If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there G would have been no reason why each shareholder should not in his turn have to return as part of his profits or gains under Sched. D the money received by him in dividends. Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of H income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or, to speak accurately the avoidance of increased taxation. But the law is not founded on the introduction of some equitable principle as modifying the statute; it is founded on the provisions of the statute itself; and the statute carries the analogy of a partnership further for it contemplates a company declaring a dividend on the I gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him."

In practice the matter did not work out quite so simply. It has to be remembered that the amount distributable in dividend in any year might, in view of the assessment of profits or gains under Sched. D being on the basis of the average of the three preceding years as it then was, be much more or much less than the

amount of the assessment for that year, so that if this proportionate deduction was treated as meaning the rateable proportion of the tax paid by the company in respect of the year of distribution it might much exceed or be much less than the amount which would be deducted from the dividend if the current rate of tax in respect of the gross dividend had been deducted. At any rate a practice seems to have grown up of companies deducting from dividends tax appropriate to the amount of the dividend at the current rate of tax quite irrespective of the amount of tax paid by the company to the Revenue, and of the shareholders claiming exemption or abatement being treated by the Revenue as having paid tax to the extent of that deduction. As the company making the deduction lay under no obligation to pay the Revenue anything more than the tax based on its own assessment the result was that the tax returned to those claiming exemption or abatement could rarely, if ever, have had any exact relation to the amount of tax received by the Revenue from the recipient of returned tax. A
B
C

When super tax was imposed in 1910 the return of total income (that is what may be called total income tax income) made for the purpose of obtaining exemption or abatement became also the basis of the assessment to super tax and therefore of increased importance and the Revenue then seem to have stood to gain on the whole to a greater extent by the continuance of the system which I have described. In fact when the Act of 1918 was passed a change was made in the language which I think gave effect to the practice. Rule 20 of the General Rules applicable to Scheds. A, B, C, D and E took the place of s. 54 of the Act of 1842, and is in the following terms: D

"The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." E

Under s. 237 of the Act of 1918 unless the context otherwise requires:

" 'Body of persons' means any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate." F

By the Finance Act, 1924, s. 33, a company is required on every dividend warrant or statement annexed thereto to show (a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid; and (b) the rate and the amount of income tax appropriate to such gross amount; and (c) the net amount actually paid. G

As the result of the Finance Act, 1927, surtax in and from the year 1929-30 took the place of super tax, and for the year 1928-29, and every subsequent year, income tax became chargeable at a standard rate instead of at a single rate. Section 38 (2) of the last-mentioned Act defines total income on which surtax is based. It is in the following terms: H

"The expression 'total income' in relation to any person means the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax." I

Section 39 of the same Act, so far as it is material, provides as follows:

"(1) Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due, or that there may be deducted from any dividend the tax appropriate thereto, or that a proportionate deduction of the tax charged shall be allowed by any person out of any produce or value payable to him, shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year

in which the amount payable becomes due: . . . (2) In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year. . . ."

The effect of this last-mentioned section seems to place beyond doubt this, that where tax may be deducted from a dividend the amount deductible is the sum which equals the standard rate of tax for the year of payment on the gross amount of the dividend and that whenever the profits were earned the sum from which the deduction is made and the deduction itself are to be treated as income and deduction in respect of the year in which the payment is made.

Thus the deduction permissible from the dividend clearly had no relation to the figure of tax payable by the company to the Revenue, though there was still no obligation on the company to account to the Revenue for what was deducted. The deduction, in fact, was only part of a system by which was measured (i) the extent of the shareholders' right to have exemption or abatement and (ii) the liability of the shareholder to surtax.

One other subsequent provision of the law important to this case must be referred to. By the Finance Act, 1931, s. 7, it was enacted so far as material for the present purpose as follows:

"(1) The provisions of r. 20 of the General Rules, which authorise the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period. (2) . . . a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-s. (1) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said r. 20, be equal to the net amount received:"

Now how do the foregoing provisions apply, and with what effect to the facts of this case? On the one hand it is said by the appellants: (i) That except so far as the dividend can be reduced by deduction it is not liable to tax because dividends as such are not directly assessable to tax. (ii) That the rents in excess of the annual value as assessed under Sched. A are not in the hands of the company taxable to income tax at all, and therefore that a dividend paid out of such excess rents is not in the hands of the shareholders taxable to income tax either by deduction or by direct assessment. (iii) That if the dividend is not liable to any deduction in respect of tax or taxable to income tax in the hands of the shareholder it is not taxable to surtax, and therefore that no part of the sum of £4,275 ought to have been included in the assessment of the appellant to surtax. On the other hand, the respondents say: (i) That dividends as such are taxable under Sched. D if not taxed by deduction and therefore upon any view of the case the dividend was income tax income. (ii) That the rents out of which the dividend in question was paid were in fact charged to tax within the meaning of the Finance Act, 1931, s. 7 (1), and the dividend must therefore be treated as a dividend from which

deduction of tax was permissible. (iii) That upon this footing, inasmuch as the sum of £4,275 was the net amount received, the gross dividend must under the provisions of the Finance Act, 1931, s. 7 (2), be treated for surtax purposes as the sum of £5,343 15s.

Now I may say at once that having regard to the view which I have expressed as to the general scheme and operation of the Income Tax Acts in regard to dividends I am unable to accept the view that dividends as such are taxable under Sched. D. I do not think they are. I think it is accurate to say as ROWLATT, J., said in *Purdie v. R.* (5) ([1914] 3 K.B. at p. 116): "There is strictly speaking no tax upon dividends at all." They are, however, under r. 20 of the General Rules and the Finance Act, 1927, s. 39, and apart altogether from the Finance Act, 1931, s. 7, liable where the dividends are made out of profits or gains charged on the company to suffer deduction of a sum equal to tax at the standard rate on the gross amount of the dividends, and in such cases the gross amount of the dividend is the income tax income to be taken into account whether it be for computing the amount of tax which the shareholder is entitled to have returned or for fixing his liability to surtax.

It is not disputed that if a dividend is paid out of the profits produced by a sale of a capital asset it is not made out of profits or gains charged on the company, and therefore no deduction from the dividend is authorised and the dividend itself is not liable to be taken into account in fixing the liability to surtax of the shareholder. Again, where the dividend was paid out of profits or gains not chargeable on the company by reason of the application of the rules relating to the measurement of taxable income, it was held in *Gimson v. I.R. Comrs.* (1) (decided before the passing of the Finance Act, 1931) that no deduction was permissible, and that the dividend ought not, therefore, to be taken into account for the purposes of surtax. The Court of Appeal, in the present case, have held that the decision was wrong. I do not think that it was wrong. The profits or gains in the case were not profits or gains assessed by reason of the rules at nil, but profits or gains not assessable at all. They were, therefore, not profits or gains to be charged on the company, and no deduction was permissible from a dividend paid out of them. It is unnecessary to express any opinion as to the effect, if any, of the Finance Act, 1931, s. 7 (1), on such facts as those dealt with in that case. In the present case dividends have been paid out of rents arising from hereditaments assessed to tax under Sched. A, the rents exceeding the annual value fixed by the assessments.

In my opinion, the rents are profits and gains to be charged on the company within the meaning of r. 20. The fact that the measure of liability in respect of them is an artificial one does not render the rents any the less the things to be charged. In *Coman v. Governors of Rotunda Hospital* (6) ([1921] 1 A.C. at p. 12), LORD BIRKENHEAD, L.C., said that Sched. A

"clearly shows that the object is to tax what for the sake of brevity may, with substantial accuracy, be called the landlord's income."

In this connection I may observe that I do not think that *Attorney-General v. Metropolitan Water Board* (7) affords support to a contrary view. Whether rightly or wrongly decided (as to which I express no opinion) it dealt with a different subject-matter, namely, the deduction of tax from interest, with different rules, namely, rr. 10 and 21, and with words differing both from those used in r. 20 and from those used in the Finance Act, 1931, s. 7 (1). It follows, therefore, that in my opinion, the dividend was one from which deduction was authorised, and having regard to the Finance Act, 1931, s. 39, authorised at the standard rate for the year of payment in respect of the whole dividend.

This result in my view follows in the circumstances of the present case from the true construction of r. 20, and s. 39, irrespective of the Finance Act, 1931, s. 7 (1).

Section 7 (1) of the Act, 1931, was intended to extend the authority to deduct, and seems to me to be directed to meeting the case where a dividend is paid out of a company's actual trading profits for the year, though under Sched. D, the

A company's liability to tax in respect of them is assessed by reference to the profits of the previous year. It does not seem to me to have any appreciable effect in such cases as the present.

It follows from what I have said that the dividend in question was part of the income tax income of the appellant to be taken into account in fixing his liability for surtax. The question, however, remains as to the figure at which it is to be brought in.

Now I think it would be repellent to most minds that the appellant should be charged as a part of his income with a sum which not only has never come to him but has never existed in fact. It is plain that the respondents' cross-appeal, which seeks to treat the sum of £4,275 as a net sum, corresponding to a gross sum of £5,343 15s., assumes that the amount divisible by the company was something in excess of anything they ever had to divide. It is said, however, that the Finance Act, 1931, s. 7 (2), compels the conclusion that £5,343 15s. is the correct figure to be brought into computation.

I do not think that the effect of the statutory provision is as contended for by the respondents. The subsection in effect provides that it is the gross amount before deduction which is to be treated as the income for the purposes of the Acts. If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is, in my opinion, nothing in the language of the subsection which entitled the Inland Revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view it makes no difference to the Revenue whether the deduction is made or not because the company does not have to account for what it deducts.

In my opinion, for the reasons which I have endeavoured to indicate, but which do not accord in all respects with those relied on by the Court of Appeal, both the appeal and the cross-appeal fail, and should be dismissed with costs, and I move your Lordships accordingly.

LORD WARRINGTON.—The appellant is a shareholder in a company called Salisbury House Estate, Ltd. In the tax year 1929–30 the appellant received from the company a sum of £4,275 described as a net interim dividend of £4,275 free of tax. This sum represented with the addition of tax at the standard rate for that year a sum of £5,343 15s. The question is whether any sum, and if so what sum, in respect of such interim dividend ought to be included in the appellant's return of income from all sources for the purposes of surtax in the year 1929–30. The appellant contends that he is under no obligation to include in his return any item in respect of such dividend or at all events no larger sum than the £4,275. The respondents contend that he is bound to include the gross sum of £5,343 15s., and such sum was accordingly included in the assessment for the year 1929–30. On appeal to the Special Commissioners this assessment was confirmed. On appeal to the King's Bench Division, FINLAY, J., allowed the appeal and discharged the assessment, but, on appeal to the Court of Appeal, that court by an order of Jan. 19, 1933, reversed the order of FINLAY, J., and confirmed the assessment, but for the sum of £4,275 only. The appellant seeks to restore the order of FINLAY, J., and the commissioners seek to have the assessment confirmed for the total amount of £5,343 15s.

The company owns a property in the city of London the rents of which greatly exceed the "annual value" on the amount of which the company is assessed to tax under Sched. A as the owner of the property in question. The profits of the company available for dividend, and the ordinary annual dividends, have for many years exceeded the amounts on which under Sched. A income tax has been paid by the company. The Crown then raised the contention that the company was carrying on a trade under Sched. D and that for the purposes of an assessment under that schedule all its receipts including receipts from rents must be included. This contention on the part of the Crown was finally disposed of by this House on April 4, 1930, in *Fry (Inspector of Taxes) v. Salisbury House Estate, Ltd.* (3)

In that case it was decided that, so far as the ownership of the house was concerned, the company had been fully assessed under Sched. A in respect of the annual value and was under no liability to be further assessed under Sched. D. The company then made to the appellant the payment of £4,275 above referred to. The payment was made out of a sum of £18,325 put aside out of its profits as an income tax reserve pending the decision above mentioned. This last-mentioned sum had been taken from a surplus of accumulated rents which remained in the hands of the company after profits had been distributed to the amount of any assessment made on the company.

The letter accompanying the cheque for £4,275 stated that it was an interim dividend for the year ending Dec. 25, 1930, at 5 per cent. free of tax and was equivalent to a gross amount of £5,343 15s. less income tax at 4s. in the £, £1,068 15s. = £4,275, and it contained the usual certificate that the income tax deducted had been or would be duly paid to the proper officer for the receipt of taxes. Later the company adopted the position that the funds out of which the dividend was paid was untaxed income in the hands of the company and not taxable in the hands of the appellant and should not be included in any return of total income. They also withdrew the certificate relating to the payment of tax.

The present appeal raises two questions: First, whether in the hands of the appellant as a shareholder the dividend in question is subject to tax, and, secondly, if it is, should the appellant include in his return of total income from all sources the gross sum of £5,343 15s. or the £4,275. In the Court of Appeal the first of these questions was decided in favour of the Crown and the second in favour of the appellant.

As to the first, in my opinion the judgment of the Court of Appeal was correct. I have had the advantage of reading and considering the opinion of my noble and learned friend on the Woolsack, and I am clearly of the opinion that the views he has expressed are correct. In particular I agree that dividends as such are not taxable under Sched. D, but that, where they are made out of profits and gains charged on the company they are liable to suffer deduction under the provision of r. 20 of the General Rules and the Finance Act, 1927, s. 39, and that the gross amount is income tax income to be taken into account whether it be for determining a claim for return of tax or for fixing the liability to surtax. In the present case the dividend has been paid not out of capital but out of rents arising from property assessed to tax under Sched. A, and these units are, in my opinion, profits and gains to be charged on the company under r. 20, notwithstanding that the measure of liability is not the amount of the rents themselves but the annual value of the hereditaments from which they arise. If this is so, then the dividend was one from which deduction of tax was authorised and would be income tax income to be included in the return of income from all sources for the purposes of surtax.

This brings me to the second question, namely, at what figure is the dividend to be brought in? Here again I agree with my noble and learned friend. In such a case as this, namely, where no deduction is in fact made, there is no distinction between a gross sum and a net sum. The actual sum paid, and not some wholly fictitious net sum, is therefore that which should be included in the return of income.

I concur in the order proposed by my noble and learned friend.

LORD WRIGHT.—I also agree.

By para. xvii of Sched. V to the Income Tax Act, 1918, a person claiming any allowance or deduction is required (inter alia) to state

“the amount of rents, interests, annuities, or other annual payments, in respect of which the claimant is liable to allow the tax”

as an item in the declaration and statement of his total income. After super tax was imposed in 1910 (the place of which is now taken by surtax) a taxpayer is similarly required to declare his total income including the same item. Thus the statement of total income which was originally required to enable the taxpayer to

claim a benefit is now required to enable the revenue authorities, in proper cases, to compute the surtax, and no doubt this latter purpose is now more important than the original object. Under the head of annual payments fall dividends from companies in which the taxpayer is a shareholder.

There are now certain rules with regard to such dividends which, so far as relevant for this appeal, are to be found in the Income Tax Act, 1918, in r. 20 of the General Rules applicable to all Schedules, and in certain subsequent amending Acts. Rule 20 is in these terms :

"The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

As I interpret this rule the profit or gains in respect of which the right of deduction is so given are profits or gains which have been charged to tax.

"Body of persons" by the definition in s. 237 of the Act includes companies; partnerships are separately dealt with. By the Finance Act, 1924, s. 33, every warrant or cheque of a company in payment of any dividend must have annexed thereto or be accompanied by a statement in writing showing (a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid, (b) the rate and the amount of income tax appropriate to such gross amount; and (c) the net amount actually paid. By the Finance Act, 1927, s. 39, it is enacted (*inter alia*) that the provisions for the deduction from any dividend of the tax appropriate thereto shall have effect as if they provided that the tax may be deducted at the standard rate for the year in which the amount payable became due. The Finance Act, 1931, s. 7, which is retrospective, by sub-s. (1) provides that r. 20 shall be construed as authorising the deduction of tax from the full amount paid out of profits and gains which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period. By sub-s. (2) any dividend paid by a body of persons shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-s. (1), be deemed for all the purposes of Income Tax Acts to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said r. 20, be equal to the net amount received.

Rule 20 is in effect based on the Income Tax Act, 1842, s. 54, with the substitution of the words "the tax appropriate thereto" for the words "the tax proportionate thereto." The scheme of these provisions, as I understand them, is to impose the tax on all the profits of the company at the source: if and so far as these profits have been so taxed, they are not liable to any further tax (other than surtax) in the hands of the shareholder receiving the dividend. The shareholder and the company are no doubt separate entities: the company is not an agent for the shareholder to pay tax on the dividend, nor is the company the collector for the revenue to deduct the tax from the dividend. The company is the taxpayer. The shareholder has no right to any share in the profits till a dividend is declared; the company may use the profits in any way it pleases *vis-à-vis* any shareholder; it may put them to reserve or capitalise them or use them for extensions or improvements; the profits declared and paid as dividends in one year may have been made in previous years when the standard rate of tax was different; it is only very rarely and in exceptional cases that dividends are paid out of any particular source of profit, usually they are paid out of the general revenue fund of the company. What is essential to the requirements of the Inland Revenue is that all the profits of the company should be taxed and if that is done the Revenue is not concerned with what is done with these profits. The company is not bound but only

authorised to deduct tax in paying dividends; whether it deducts or not is left to its discretion because the profits once having been taxed in the company's hands, do not bear further tax (apart from surtax) in the shareholders' hands. There is in fact only one profit, no new profit being created from the fact that the shareholder gets his share; the tax is a tax on the profits and not on the dividend. But if tax is deducted from the dividend the Acts have provided that it is to be at the standard rate of tax of the year of the dividend, in order to avoid obvious difficulties which might arise because profits divided in one year may have been earned in other years. The provisions of the Finance Act, 1931, s. 7, will be considered by me more particularly in connection with the cross-appeal.

On a careful review of these provisions, I reach the conclusion that a shareholder is not separately taxable (I disregard surtax) on a dividend, as a profit individual to himself, under Sched. D, Case VI, as the Court of Appeal held, or at all. Apart from what I conceive to be the clear effect of the Acts in this regard, I think the position has been so stated by this House more than once, at least as matter of observation; thus in *I.R. Comrs. v. Blott*, *I.R. Comrs. v. Greenwood* (8) LORD CAVE thus explained the system ([1921] 2 A.C. at p. 201):

"Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder."

In *Bradbury v. English Sewing Cotton Co., Ltd.* (4) LORD WRENbury thus expressed the same idea in concise form ([1923] A.C. at p. 766):

"The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend."

LORD PHILLIMORE expresses the same view ([1923] A.C. at p. 771):

"In ordinary cases of a taxed company the shareholder is taken to have paid the tax upon his dividends through the company and is not assessed or taxed upon them."

These cases and other similar statements of the principle which I need not quote were no doubt made with reference to the Income Tax Act, 1842, s. 54, but I do not think that the substitution in the later Act of the word "appropriate" for the word "proportionate" in the earlier Act, affects the principle. In 1842 the modern development of limited companies was not in contemplation: "proportionate" was an apt word for the simple cases of corporators where each year the corporators shared in definite proportions the available net income: "appropriate" tax, which is more precisely defined by the Finance Act, 1927, as being at the standard rate of the year of payment, is clearly a more apt term in connection with the dividends of a company. But the same view has been expressed in regard to r. 20 of the Act of 1918, for instance, by LORD STERNDale and WARRINGTON, L.J., in *Sheldrick v. South African Breweries* (9).

The Court of Appeal, in deciding against the appellant on the ground that the dividend he received was separately taxable in his hands at the standard rate (because charged with income tax under Sched. D), found some support for their decision in *Hamilton v. I.R. Comrs.* (2): in that case the shareholder claimed that he was only liable to be taxed to the extent of a proportionate part (i.e., in the proportion that his shareholding bore to the total issued capital of the company), and not on the basis of the tax appropriate to his actual dividend. That contention was rightly rejected both by ROWLATT, J., and by the Court of Appeal. But the decision did not involve, or require, as I think, any conclusion that dividends were separately taxable in the shareholder's hands under Sched. D, nor did ROWLATT, J., so think, though certain dicta in the Court of Appeal may seem to point that way. I cannot, with respect, go with the Court of Appeal in dismissing the appellant's appeal on the ground that the dividend, not being a capital distribution, was

chargeable with income tax under Sched. D. For the reason I have stated I think that is not in accordance with the provisions of the Acts.

But there still remains to be considered the question whether the company was authorised to deduct tax from the dividend either under r. 20 or now under s. 7 of the Act of 1931. The answer to that question depends on determining whether the dividend paid to the appellant was paid out of profits and gains charged to tax. Thus, where a dividend was paid out of profits which were not chargeable to income tax, it was held by ROWLATT, J., in *Gimson v. I.R. Comrs.* (1) that super tax was not payable. Part of the dividend was in respect of profits of a capital nature, part out of profits which were not assessable by reason of the rules of admeasurement. I think the decision was correct as the law then stood, though as regards the latter class of profits the case may now need to be considered afresh in the light of the Finance Act, 1931, s. 7.; that is, on the question whether such profits were or were not chargeable. The present case is peculiar in that the moneys out of which the dividend came are taken to be identified as paid out of the sums put aside from the profits of the company, the Salisbury House Estate, Ltd., as a reserve pending the decision of their dispute with the Inland Revenue; the dispute was eventually settled by the decision of this House in *Fry (Inspector of Taxes) v. Salisbury House Estate, Ltd.* (3), which went in favour of the company. The company's main business, being that of letting premises which were its property for use as flats, was assessed under Sched. A, that is, the property tax. The rents or profits amounted to a sum largely in excess of the assessment, but it was held that the excess beyond the amount of the Sched. A assessment could not be the subject of a separate and further assessment under Sched. D. The sum put to reserve by the company was therefore free, and out of that sum the dividend in question was thereupon paid. It was contended on behalf of the appellant that this sum, segregated in this way, was not taxable at all and hence neither r. 20 nor s. 7 applied: only so much, it was contended, was charged to tax as corresponded to actual figures of assessment, so that the Sched. A assessment exhausted the taxable capacity of the company's income from the flats, and hence the surplus fund, out of which the dividend was paid, was not charged to tax. But the reasoning of this House in the case just cited seems to me to show that the income or profits from the rents, whatever their amount, were exhaustively dealt with in their taxable capacity by the Sched. A assessment, so that no part of that income could be described as untaxed. The actual attempt to split up the fund into the amount taxed under Sched. A and the balance remaining beyond that amount was, in my opinion, a purely artificial segregation: the fund in truth was, I think, a single fund of profits which was assessed and charged as a whole and once for all under Sched. A. I think this is clear from the reasoning of the noble and learned Lords. Thus, if I may quote a few brief excerpts, LORD DUNEDIN says ([1930] A.C. at p. 440):

"The rents, having been assessed under Sched. A, are, so to speak, exhausted as a source of income."

LORD ATKIN says ([1930] A.C. at p. 458) that even if the company

"trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Sched. A and not Sched. D."

LORD MACMILLAN says ([1930] A.C. at p. 467):

"Property in land as a source of income is dealt with, and can only be dealt with, under Sched. A, and the rules of that schedule prescribe how the income from landed property is to be ascertained and measured. If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property so much the worse for the revenue."

In my judgment the dividend in question was paid out of the income, or profits and gains, from the company's property, which were taxed as a whole and comprehensively under Sched. A, irrespective of any subsequent dissection, and was accordingly paid out of profits and gains charged to tax.

The Court of Appeal, in deciding that the segregated portion of the rents out of which the dividend in question was paid had not been charged to tax, placed some reliance on *Attorney-General v. Metropolitan Water Board* (7), where large sums of interest were paid out of the actual profits of the year, but, owing to the rules applicable, the profits were not assessable in that year because in the preceding year there had been no profits, and hence the assessment in the year in which the payments were made was nil. That case was regarded by the Court of Appeal as involving a principle applicable to the facts of the present case that the profits and gains charged to tax were limited to the sum taken to measure the liability for the charge. That case did not relate to dividends payable to shareholders, but to annual payments to creditors of the company: to such a case not r. 20 but rr. 19 and 21 apply. I desire to express no view in regard to that case: I do not regard it as relevant here. Furthermore in the present case there is no question of a nil assessment: for the reasons I have attempted to summarise above, I think that there has been a full assessment of, and charge on, the profits and gains out of which the dividend was paid. On that view of the position, the dividend here in question was a dividend from which the deduction of tax was authorised so that whether tax were deducted or not, the dividend must be brought into account by the appellant in the return of his total income and accordingly becomes liable to surtax. On this ground the appeal should, in my opinion, fail.

I now turn to the cross-appeal of the Crown. The cheque or warrant originally sent to the appellant was for £4,275, with a statement that it represented a gross amount of £5,343 15s.; this was later corrected by a statement that £4,275 represented a distribution of untaxed income and was an "actual" sum. It was in fact the appellant's proportionate part of the total fund held in reserve as representing the amount of rents in excess of the Sched. A assessment. The Court of Appeal having held, as I have already stated, that the dividend of £4,275 was liable to income tax under Sched. D, and also held that the sum out of which it was paid was not charged to tax, went on to dismiss the cross-appeal on the ground that there could not be a charge of surtax unless on sums liable to be charged to income tax, and hence that £4,275 was all that the Revenue could bring into charge for surtax. I have already explained why I cannot agree with this view and must go on to consider the question on the basis that £4,275 was paid out of a fund charged to tax. The claim of the Revenue in the cross-appeal is no doubt anomalous, because if what was being distributed was in fact the whole balance of the rents in excess of the Sched. A assessment, the contention that the dividend is to be taken at the gross amount of £5,343 15s. means that so much more is taken to come out of the fund than was ever in the fund. It is, however, contended on behalf of the respondents that under s. 7 (2) of the Act of 1931, the dividend of £4,275 being paid out of profits such as are mentioned in sub-s. (1), must be deemed to represent the gross amount which results from adding the appropriate tax to £4,275, namely, £5,343 15s. This result it is argued follows because the subsection has fixed a purely arbitrary and conventional standard: the company paying the dividend is not bound, but only authorised, to deduct tax: that is a matter between it and the shareholder: the Revenue is not concerned so long as it gets the tax from the company: but the Revenue, being further concerned in regard to surtax with the position of the shareholder, the Act has provided that the shareholder, though he is not assessed to income tax on the dividend, is "deemed" to have paid it, because whatever sum he receives by way of dividend is "deemed" to have been reduced to its actual figure by deduction of the appropriate tax, and hence, it was contended, the returns of total income are to be taken at the higher or gross figure. This would no doubt redound to the benefit of the taxpayer, in cases where he is entitled to claim an allowance or deduction; but in such a case as the present, where surtax is involved, it would be very beneficial to the Revenue.

Such was the argument: it is an argument which would involve in this case a purely fictitious figure; the surtax would be levied on a figure of £5,343 15s., whereas the gross or total sum which the appellant could receive as his share out

of the whole fund of the profits which were being divided could not be more than £4,275. Yet however anomalous the claim, it must receive effect if the actual language of the section so requires. But I think the claim of the respondents fails because it ignores the word "net" in sub-s. (2). That word involves the idea of deduction, which, in this case, must be a deduction of tax. Thus in the Income Tax Act, 1924, s. 33, "the net amount actually paid" is the amount arrived at by the deduction from the gross amount of the appropriate tax. In *Hamilton's Case* (2) the very careful statement by the commissioners of "one of the accepted conventions under which the Income Tax Acts are regularly administered" deals with "the practice to deduct from the gross amount of the dividend the tax appropriate to that amount, or if the dividend is declared to be 'free of tax' to treat it, for the purposes of computing total income, as equivalent to the gross amount which, after deduction of the appropriate tax, corresponds to the net amount actually paid, without any reference to the amount of the company's 'statutory' income." But the present case has proceeded on the basis of a specially segregated fund, the whole of which was distributed without any deduction for tax, nor was the dividend in fact, nor could it be, described as "tax free," a phrase which is used to indicate that the dividend is net and under prior deduction of tax. Such a case as the present is unusual because a fund has been segregated and divided in toto; hence if the company had deducted tax it would have been from a gross amount, not of £5,348 15s. but of £4,275, and equally, if the dividend had been "tax free" it would have been a dividend of the net amount after the appropriate deduction of tax had been made from the sum of £4,275. Furthermore, in the company's hands no greater sum in respect of this fund was chargeable to income tax than £18,325, of which £4,275 was the appellant's aliquot proportion. What was distributed, being £4,275, was, in my judgment, the gross amount: the company, though authorised to deduct tax from it, were not bound to deduct it, and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount," and hence I conclude that s. 7 (2) of the Act of 1931 does not apply. I cannot treat the word "net" as mere surplusage or as simply meaning the actual amount, whether gross or net.

For these reasons I think that both the appeal and the cross-appeal should be dismissed.

Appeal and cross-appeal dismissed.

Solicitors : *Holmes, Son, & Pott; Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* PHILLIPS AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Branson and du Parcq, JJ.), October 4, 5, 1934]

[Reported [1935] K.B. 391; 104 L.J.K.B. 73; 152 L.T. 190; 98 J.P. 461; 51 T.L.R. 54; 78 Sol. Jo. 735; 32 L.G.R. 464; 30 Cox, C.C. 195]

Gaming—Lottery—Introduction of buyers of goods—Commission on future sales not effected by introducer—Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41—Vagrancy Act, 1824 (5 Geo. 4, c. 83), ss. 4, 21.

The respondents were the originators of a scheme for the sale of note-cases. These note-cases were obtained by them at 17s. 9d. per dozen, and were, therefore, worth about 1s. 6d. wholesale, and on payment of £1 the purchaser from the respondents received, in addition to one of the note-cases, a supply of leaflets, the order forms of which were marked with a registered number exclusively allotted to him. He was invited to introduce further purchasers. On the first three new orders sent to the defendants as a result of his introduction, the original purchaser received no benefit, but he became entitled to a "commission" of 10s. on every subsequent order sent to the defendants on his forms and on further sales made by the defendants as a result of such orders. It, accordingly, became possible for an original purchaser to obtain a large sum by way of "commission" as a result of sales which had been effected between persons over whom he had no control. It was admitted that the scheme had been carried out honestly by the defendants.

Held: the scheme was not a genuine commercial transaction and constituted a scheme for the sale of chances in a lottery.

Notes. The Lotteries Act, 1823, was repealed by the Betting and Lotteries Act, 1934, the prohibition against the sale, etc., of tickets or chances in a lottery being now contained in s. 22 of the Act of 1934.

Referred to: *Moore v. Elphick*, [1945] 2 All E.R. 155.

As to lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 238 et seq., and for cases see 25 DIGEST 452 et seq. For Betting and Lotteries Act, 1934, see 10 HALSBURY'S STATUTES (2nd Edn.) 785.

Cases referred to:

- (1) *Barnes v. Strathern*, 1929 S.C. (J.) 41; S.L.T. 37; Digest Supp.
- (2) *Howgate v. Ralph* (1929), 141 L.T. 512; 93 J.P. 127; 45 T.L.R. 426; 73 Sol. Jo. 253; 27 L.G.R. 432; 28 Cox, C.C. 633, D.C. Digest Supp.
- (3) *Taylor v. Smetten* (1883), 11 Q.B.D. 207; 52 L.J.M.C. 101; 48 J.P. 36, D.C.; 25 Digest 455, 443.

Case Stated by Worcestershire justices.

At the Pershore magistrates' court six informations were preferred by the Director of Public Prosecutions (hereinafter called "the appellant"), under s. 41 of the Lotteries Act, 1823, and ss. 4 and 21 of the Vagrancy Act, 1824, against Phillips and Thomas (hereinafter called "the respondents"), for that they at Pershore in the said county on June 21, 1933, Sept. 25, 1933, and Oct. 24, 1933, unlawfully published a scheme for the sale of chances in a lottery not authorised by any Act of Parliament, contrary to the said sections of the said Acts.

Upon the hearing of the informations the following facts were proved or admitted: (a) The respondents were directors of the Farm and Road Engineering Co., Ltd., of Pershore. They were the only two directors of the company and owned practically all its shares. (b) In March, 1932, the respondents originated a scheme for the sale of swastika note-cases (hereinafter called "the scheme"), as an alternative to closing down a portion of the works of the company owing to trade depression.

(c) From March, 1932, until the date of the hearing, the scheme was conducted in accordance with the terms of a leaflet distributed by the respondents. Under the scheme the purchaser paid the respondents £1 and received a note-case and a supply of leaflets, the order forms of which were marked with a registered number allotted exclusively to him. From the first three fresh orders sent to the respondents on the purchaser's forms, the purchaser obtained no benefit, but he received a "commission" of 10s. on every subsequent order sent on his forms and on further sales made by the respondents as a result of such orders. The respondents, on receiving an order (after the first three) on any of the original purchaser's numbered forms, sent to the new purchaser a supply of forms also marked with the original purchaser's number. On each of the first three sales negotiated by the new purchaser the respondents paid the original purchaser a further "commission" of 10s., and it, therefore, became possible for an original purchaser to obtain a large sum, amounting to a maximum of £20,000, by way of "commission" from fresh sales which he himself had not negotiated. (d) At first the scheme was conducted by the respondents for and in the name of the company, but in November, 1932, a new company, the Swastika Sales (England), Ltd., was formed by the respondents. The respondents were the only directors of the new company and held all its shares. No change in the conduct of the scheme was caused by the formation of the new company. (e) The note-cases which were sold by means of the scheme were purchased by the respondents at a price of 17s. 9d. a dozen. (f) From March, 1932, until Sept. 23, 1932, 7,416 note-cases had been sold in accordance with the scheme. By June, 1933, the sale of note-cases had dropped by approximately 70 per cent. from the figure reached when the scheme was at its zenith. At that date about twenty-five note-cases per week were being sold to persons in the British Isles. Sales of the note-cases were also being made to persons resident in the British Colonies, France, Germany, Holland and Belgium, and a few to persons resident in Switzerland. The scheme was still being carried on at the date of the hearing.

(g) All the sales of note-cases were carried out in accordance with the terms of the scheme. On the instructions of the respondents, large numbers of these leaflets were printed in English, and also in the French, German, Italian, Spanish, Dutch and Chinese languages, and these were dispatched daily to persons resident in various countries, as applications were received.

All the leaflets were dispatched direct from Pershore, and the respondents had no agents abroad, except in so far as the purchasers of the note-cases automatically became agents for the scheme.

(h) When the scheme first originated, fourteen clerks were employed in performing clerical work in connection with the scheme. This number rose to sixteen, but by June, 1933, had dropped to ten.

(i) From June, 1932, to June, 1933, an undergraduate at Oxford drew about £500 in commission from the scheme in accordance with the terms of the leaflet.

(j) The scheme was conducted by the respondents honestly in accordance with the terms of the leaflet, and none of the purchasers of the note-cases had made any complaint. The respondents caused to be published and circulated two lists of the names of prominent English and foreign supporters of the scheme.

(k) It was admitted that, if the scheme amounted in law to an unlawful scheme for the sale of chances in a lottery, the respondents were guilty of offences upon the various dates mentioned in the informations.

On the part of the appellant it was contended that the scheme was an unlawful scheme for the sale of chances in a lottery, and that therefore the respondents were guilty upon the informations.

On the part of the respondents it was contended (a) That the scheme was not a lottery. (b) That there was no evidence that the scheme was a lottery; and (c) That the facts set out in paras. (e), (f), (g), (h) and (i) hereof were irrelevant.

The justices accepted the contentions advanced by the respondents and dismissed the informations.

The Director of Public Prosecutions appealed to the Divisional Court. The question upon which the opinion of the court was desired was whether, upon the above statement of facts, the justices came to a correct determination in point of law.

G. D. Roberts for the appellant.

G. O. Slade for the respondents.

LORD HEWART, C.J.—I am clearly of opinion that this appeal ought to be allowed. Six informations were preferred by the Director of Public Prosecutions under s. 41 of the Lotteries Act, 1823, and ss. 4 and 21 of the Vagrancy Act, 1824, against the present respondents for that they at a certain place and at certain times unlawfully published a scheme for the sale of chances in a lottery not authorised by any Act of Parliament. The justices having heard the informations dismissed them, and the question for us is whether upon the facts of this case it was open to the justices so to dismiss the informations in law.

In cases of this nature—I do not mean of this particular species, but of this genus—one may quote the words of the Lord Justice General in *Barnes v. Strathern* (1) (1929 S.L.T. at p. 40):

“There is no limit to the ingenuity of the devisers of projects such as this, and there is, accordingly, no end to the variety of schemes which may constitute a lottery.”

It may well be, as counsel for the respondents in his able argument has contended, that there is no case quite on all fours with this. When I say that, I mean no case quite on all fours with this in its detail, but the principle of the matter is familiar. What the court has to do is to disengage, if it can, the reality of the transaction from the appearance which for good reason it is made to assume. When one reads the interesting document headed “Farm and Road Engineering Co., Ltd.” it is perfectly clear that the real consideration for the sum of £1, which the recipient of the leaflet is invited to part with, is not the note-case of the cost price of 1s. 6d. or thereabouts, but is, as I think is frankly conceded, the prospect that by laying down that sum of £1 upon the terms set out he may find himself the recipient of sums varying from 10s. up to a maximum of £20,000. In my opinion, this was not a commercial transaction at all. The seller and the purchaser were not concerned with note-cases. They were concerned with the chance which the buyer might procure of obtaining a large sum of money by the operation of persons over whom he had no more control than he has over the “countless laughter of the sea,” which does not laugh when the sun is not shining.

If this had been or could reasonably be regarded as a commercial transaction, other considerations might apply; but, wherever one looks in this undoubtedly ingenious scheme, it is impossible to find anything of the nature of a real commercial transaction. What one finds everywhere is the chance of drawing some large sum of money, of which the maximum in any particular case is £20,000. It seems to me that the case is very similar to, though in detail different from, *Barnes v. Strathern* (1), to which our attention has been directed. I need not re-read the judgments of the learned judges in Scotland. They are not binding upon this court, but they are extremely helpful, and *mutatis mutandis* it seems to me that the reasoning in all the judgments in that case is illuminating upon the true nature of this case. I think also that the decision of this court to which our attention has been directed, *Howgate v. Ralph* (2), throws light upon this matter. There is here a publication. That which is published is a scheme. What is the nature of that scheme? Is it not a scheme in the words cited from WEBSTER'S DICTIONARY and approved by HAWKINS, J., in the well-known case of *Taylor v. Smetten* (3) (11 Q.B.D. at p. 210), for the “distribution of prizes by lot or chance”? There is no magic in the word “distribution.” The word “payment” will do just as well. There is no magic in the word “prizes.” “Commission” or “reward” will do just

as well. Here, as it seems to me, it is quite obvious that the person who accepts the invitation contained in the leaflet is paying the sum of £1 in order that he may have the opportunity of setting a ball rolling over whose revolutions, after three or four, at any rate, he will have no control, and it is a pure matter of chance whether the return upon his money will prove to be a few shillings or a great many pounds.

I need not elaborate the matter. I think that the leaflet speaks for itself and has the word "lottery" written all over it. I entirely agree with the argument which we have heard from Mr. Roberts, and I think that this appeal ought to be allowed.

BRANSON, J.—I agree. The scheme is dressed in the guise of a commercial transaction in which persons desiring to sell goods are seeking to induce people to become customers by offering lucrative commissions to persons who will buy and undertake to induce others to buy note-cases. If that had been the real nature of the scheme, the position would have been very different from what it is. As my Lord has said, one has only to consider the detail of the scheme to see that that is not the position here. What people are buying when they paid £1 for one of these note-cases is not a note-case. They would not pay £1, and nobody would ask them to pay £1 for such a note-case. They pay £1 in order to participate in a scheme, which it is hoped will sooner or later result in the collection from the public of large sums of money, in which those who have these note-cases will participate in amounts dependent entirely upon chance, for they depend upon persons over whose actions the original purchasers themselves have no control at all. I think, therefore, that this case comes within the principle of the cases which have been cited and that this appeal should be allowed.

DU PARCQ, J.—I agree. The question is whether the justices ought to have convicted the defendants, who were charged in an information, which followed the words of s. 41 of the Lotteries Act, 1823, with having unlawfully published a scheme for the sale of chances in a lottery. Looking at those words and remembering the definition of "lottery," which has been referred to many times during this case, it seems to me that what the defendants admittedly did, according to the facts found by the justices, falls precisely within them. The justices have found that the scheme was conducted by the defendants honestly and that none of the purchasers of the note-cases made any complaint. I think that it is perfectly plain from that, first, that the defendants never pretended that the note-cases which they sold were worth anything like £1, and, secondly, that no purchaser was ever deceived into thinking that the note-cases were worth anything like £1, and, as counsel for the respondents very frankly said, £1 would not be paid for such a note-case. The greater part of the £1 was paid for a right which was to accrue to the purchaser after he had disposed of a certain number of note-cases himself. That was a right to receive sums of money which might be very small or which might in certain conceivable cases amount to £20,000, or even more than £20,000 upon one view of this offer. In my view, it is plain that the right given to the purchaser was, in truth, the chance of obtaining a rich reward, and it is perfectly plain that it did not lie in his hands to do anything to determine the question whether he would receive this great sum or any large sum. Just as in the Scottish case to which we have been referred—*Barnes v. Strathern* (1)—so here the matter into which we are inquiring is in the realm of chance. It seems to me idle to say, when one looks at the whole of the facts, that the reward was merely a reward in the form of commission for work and labour done. I cannot really think that any person acquainted with business reading this Case Stated would say: "This is a commercial transaction. The possibility of this vast sum of £20,000 being paid and the transfer of something less than that which might be paid are merely to be regarded as an agreement between the parties by which commission for work and labour done are to be obtained." It seems to me quite impossible to hold that, and, if that is so, I find it difficult to see how it can be successfully contended that this

scheme is anything else but the sale of a chance in a lottery, within the meaning of the decided cases. I, therefore, agree with the judgment of my Lord and of my brother.

Appeal allowed.

Solicitors: *Director of Public Prosecutions; Williamson, Hill, & Co., for Russell & Co., Malvern.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*] B

Re ALEXANDER DREW & SONS, LTD.

[CHANCERY DIVISION (Eve, J.), October 18, November 16, 1934]

[Reported [1935] Ch. 93; 104 L.J.Ch. 78; 152 L.T. 281; 51 T.L.R. 113; 78 Sol. Jo. 876; [1934-5] B. & C.R. 230]

Surtax—Company—Undistributed profits—Tax paid by company—Distribution of assets—Tax to be brought into account against amounts receivable by shareholders respectively in proportions in which income assessed—Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21 (as amended by Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 31 (3), (4)); Sched. I, para. 8.

A private company was incorporated in 1906, its capital in 1929 consisting of £80,000 preference and £140,000 ordinary shares of £1 each. In January and February, 1929, a special resolution was passed and confirmed for the voluntary winding-up of the company. In October, 1929, the Special Commissioners of Income Tax computed the income of the company for the purpose of assessment to supertax under s. 21 of the Finance Act, 1922 (as amended by s. 31 (3) of the Finance Act, 1927), at £52,911. £13,100 having been deducted in respect of dividends paid on both classes of shares, supertax in the sum of £9,129 was charged on the net figure of £39,811. No member of the company elected to pay the tax under s. 21 (3) and so it became payable, and was paid, by the company.

Held: the sum so paid should be brought into account against the amounts receivable by the shareholders on the distribution of assets in the winding-up in respect of which amounts the surtax was assessed, and in the proportion in which it was so assessed.

Notes. Part II of the Finance Act, 1922, which contained s. 21, and Sched. I to the Act were repealed by the Income Tax Act, 1952, their provisions being re-enacted by s. 245 et seq. of the Act of 1952.

Referred to: *F.P.H. Finance Trust v. I.R.C.*, [1945] 1 All E.R. 492.

As to the charge of surtax on the undistributed profits of companies, see 20 HALSBURY'S LAWS (3rd Edn.) 547 et seq., and for cases see DIGEST SUPPS., tit. Income Tax, case No. 674g et seq. For Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 1.

Summons.

Alexander Drew & Sons, Ltd., was a private company incorporated in 1906. By resolutions passed and confirmed in 1929 a voluntary winding-up was ordered and a liquidator appointed. There was a large surplus of assets. In October, 1929, the liquidator received a notice from the Special Commissioners to the effect that as the income from the end of March, 1928, to Feb. 13, 1929, had not been distributed, it was for the purposes of supertax deemed to be income of the members and apportioned. The actual income was afterwards assessed by them at £52,911

and apportioned under the Finance Act, 1922, Sched. I, para. 8. On appealing to the King's Bench by Case Stated from the decision of the commissioners, FINLAY, J., held that the appeal failed. £3,300 having been deducted in respect of dividend on the preference shares and £9,800 on the ordinary, the total sum chargeable was £39,811, on which the surtax was £9,129, which sum was paid by the liquidator, it having been assessed on the members, but none of them having paid. In these circumstances this summons was taken out, in which the liquidator asked whether that sum (a) ought to be treated as a liability of the company payable before the ascertainment of the amount available for distribution among the members, or (b) ought to be brought into account in such distribution against the amounts receivable by the holders of the preference and ordinary shares in respect of which income surtax was assessed in the proportion in which the same was assessed, or (c) how otherwise the payment of surtax ought to be dealt with.

D. L. Jenkins for the summons.

C. R. Romer for respondents liable to supertax on their incomes.

J. H. Stamp for respondents not so liable.

Finance Act, 1922 (12 & 13 Geo. 5, c. 17) provides :

Section 21: "(1) Where it appears to the Special Commissioners that any company to which this section applies has not within a reasonable time after the end of any year or other period ending on any date subsequent to April 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may by notice in writing to the company direct that for purposes of assessment to supertax the said income of the company shall for the year or other period specified in the notice be deemed to be the income of the members and the amount thereof shall be apportioned among the members: Provided that in determining whether any company has or has not distributed a reasonable part of its income as aforesaid the commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business. (2) Any supertax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company shall be assessed upon that member in the name of the company, and subject as hereinafter provided shall be payable by the company and all the provisions of the Income Tax Acts, and any regulations made thereunder relating to supertax assessments and the collection and recovery of supertax shall, with any necessary modification, apply to supertax assessments and to the collection and recovery of supertax charged under this section. (3) A notice of charge to supertax under this section shall, in the first instance, be served on the member of the company on whom the tax is assessed, and if that member does not within twenty-eight days from the date of the notice, elect to pay the tax, a notice of charge shall be served on the company and the tax shall thereupon become payable by the company. Provided that nothing in this subsection shall prejudice the right to recover from the company the supertax charged in respect of any member who has elected as aforesaid but who fails to pay the tax by the first day of January in the year of assessment or within twenty-eight days of the date on which he so elected, whichever is later. (4) Any undistributed income which has been assessed and charged to supertax under this section shall, when subsequently distributed, be deemed not to form part of the total income from all sources for the purposes of supertax of any individual entitled thereto. Where a member of a company has been assessed to and has paid supertax otherwise than under this section in respect of any income which has also been assessed, and upon which supertax has been paid under

this section, he shall, on proof to the satisfaction of the Special Commissioners of the double assessment, be entitled to repayment of so much of the supertax so paid by him as was attributable to the inclusion in his total income from all sources of the first-mentioned income. . . . (8) The provisions contained in the First Schedule to this Act shall have effect as to the computation of the actual income from all sources of the company, the apportionment thereof amongst members of the company, and otherwise for the purpose of carrying into effect and in connection with this section,"

Schedule I, para. 8:

"The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members, and the income as apportioned to each member shall for the purposes of supertax be deemed to represent his income from his interest in the company for the year or other period, and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require, and shall be deemed to be the highest part of that income."

Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 31 (3) provides:

"In s. 21 (6) [of the Finance Act, 1922] for the words from the beginning thereof down to and including the words 'beneficial owner of shares in the company' there shall be substituted the following:—'This section shall apply to any company which is under the control of not more than five persons, and which is not a subsidiary company or a company in which the public are substantially interested.' . . . (4) Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company and as respects that period and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words 'within a reasonable time' in sub-s. (1) of the said section were omitted therefrom."

Cur. adv. vult.

Nov. 16. **EVE, J.**, read the following judgment. The applicant is the liquidator in the voluntary winding-up of Alexander Drew & Sons, Ltd., a private company to which s. 21 of the Finance Act, 1922, applies. The respondents are shareholders representing some members liable to pay supertax on a higher scale than others and some not liable to pay it at all. They adopt different views as to the answers to be given to the questions submitted by the liquidator to the court.

Section 21 was passed with a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed. It enacts that where it appears to the Special Commissioners that any company to which the section applies has not within a reasonable time after the end of any year or other period for which accounts have been made up distributed to its members in such manner as to render the amounts distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax a reasonable part of its actual income from all sources for the said year or other period, the commissioners may by notice in writing to the company direct that for purposes of assessment to supertax the said income of the company shall for the year or other period specified in the notice be deemed to be the income of the members and the amount thereof shall be apportioned amongst the members.

The company was incorporated on March 30, 1906, and on Jan. 29, and Feb. 13,

1929, passed and confirmed a special resolution for voluntary winding-up. The issued capital at that date was £220,000 in £1 shares, of which £80,000 are preference and £140,000 ordinary shares. The company has been solvent throughout, the creditors have all been paid, the preference shareholders have been repaid their capital with interest thereon at 6 per cent. per annum down to the winding-up, and a surplus remains for distribution amongst the ordinary shareholders.

On Oct. 18, 1929, the Special Commissioners gave a direction to the liquidator under s. 21 to the effect that the income of the company for the period from March 31, 1928, to Feb. 13, 1929, should for the purposes of assessment of surtax be deemed to be the income of the members and that the amount thereof should be apportioned among the members. The commissioners subsequently computed the actual income of the company from all sources for the purpose of assessments to surtax under this s. 21 for the period in question at £52,911 and on May 16 gave the liquidator notice of the apportionment made. An appeal from the apportionment was finally disposed of by a judgment of FINLAY, J., dated June 13, 1932. The £52,911 was apportioned as to £3,845 9s. 7d. to the members in respect of preference shares, and as to £49,065 10s. 5d. to the members in respect of ordinary shares.

For the purposes of assessment to surtax under s. 21 there was deducted from the two above-mentioned sums the sums of £3,300 and £9,800, in respect of dividends paid on the preference and ordinary shares respectively. These deductions left a net figure of £39,811, and the surtax charged in respect of this net amount, £9,129 0s. 3d., was in due course assessed on the members of the company and notices of the charge were served upon them. None of the members elected to pay the tax (s. 21 (3)), and in due course a notice of charge was served on the company and the tax thereupon became payable by the company. It was paid by the liquidator out of the assets of the company and the question I am now called upon to decide is whether this sum of £9,129 0s. 3d. paid out of the assets of the company in discharge of the surtax assessed upon members ought to be treated as a liability of the company payable before the ascertainment of the amount available for distribution among its members in the winding-up or ought to be brought into account in such distribution against the amounts receivable by the holders of the preference and ordinary shares in respect of the income of which the surtax was assessed in the proportions in which the same was assessed.

In my opinion, the second of the two alternatives is the proper one to adopt; the other would be to apply assets distributable among all the members or a particular class of them in part payment of moneys charged upon and payable by other members, and this, in my opinion, would be to disregard the express provisions in para. 8 of Sched. I to the Act, that the apportionment is to be made in accordance with the respective interests of the members and that the income as apportioned to each member is for the purposes of surtax to represent his income from his interest in the company for the year or other period. Accordingly, I answer the question by saying that the second question is the right way of distribution. The costs of all parties will be costs in the winding-up.

Solicitors: *Pritchard, Englefield & Co.*, for *Boote, Edgar & Co.*, Manchester;
Cunliffe, Blake, & Mossman, for *Tatham, Worthington & Co.*, Manchester.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL OF ONTARIO v. PERRY

[PRIVY COUNCIL (Lord Blanesburgh, Lord Atkin, Lord Wright, Lord Alness, and Sir Lancelot Sanderson), April 26, 27, June 19, 1934]

[Reported [1934] A.C. 477; 51 T.L.R. 1; 78 Sol. Jo. 488]

Privy Council—Canada—Ontario—Succession duty—Gift inter vivos—Marriage settlement—Settlement made by settlor on own marriage—Ontario Succession Duty Act (R.S. Ont. 1914, c. 24), s. 7 (2) (b) as amended by 4 Geo. 5, c. 10, s. 4, s. 5.

By an indenture, dated June 23, 1903, made in contemplation of his marriage with F., then an infant, M. covenanted and agreed with F., F.'s father, and trustees that on the marriage taking place he would transfer to the trustees money or securities for money to the value of \$250,000 on trust to keep the same invested and to pay the net income to F. during her life and on her death to distribute the capital among their issue as she might by will appoint. The marriage took place and the transfer was made in accordance with the covenant. M. died in 1918, leaving F. and their issue surviving him. Succession duty was claimed in connection with M.'s death under the Ontario Succession Duty Act, 1914, s. 7 (2) (b), on the ground that the transfer made pursuant to the covenant was a gift within that enactment.

Held: the transfer, being made in consideration of M.'s own marriage, contained no element of bounty, and, therefore, it did not fall within s. 7 (2) (b).

Per Curiam: the final words of s. 7 (2) (b) as amended in 1914 (i.e., the passage beginning "of which property") did not refer to the second limb of para. (b) (beginning with the words "or taken under a disposition"), and, therefore, had M.'s transfer fallen within para. (b), the gift would not have escaped duty on the ground that actual and bona fide possession was assumed by the trustees immediately on the gift.

Notes. Followed: *Armstrong v. Estate Duty Commissioner*, [1937] 3 All E.R. 484. Referred to: *Re Earl Fitzwilliam's Agreement*, [1950] 1 All E.R. 191; *Re D'Avigdor-Goldsmid's Life Policy*, *D'Avigdor-Goldsmid v. I.R.C.*, [1951] 2 All E.R. 543.

As to gifts made in consideration of marriage, see 15 HALSBURY'S LAWS (3rd Edn.) 38, para. 73.

Cases referred to:

- (1) *Attorney-General v. Jacobs-Smith*, [1895] 2 Q.B. 341; 64 L.J.Q.B. 605; 72 L.T. 714; 59 J.P. 468; 43 W.R. 657; 11 T.L.R. 411; 39 Sol. Jo. 538; 14 R. 531, C.A.; 21 Digest 10, 47.
- (2) *Shadwell v. Shadwell* (1860), 9 C.B.N.S. 159; 30 L.J.C.P. 145; 3 L.T. 628; 7 Jur.N.S. 311; 9 W.R. 163; 142 E.R. 62; 12 Digest (Repl.) 238, 1785.
- (3) *Wheeler and others v. Humphreys and others*, [1898] A.C. 506; 67 L.J.Ch. 499; 78 L.T. 799; 47 W.R. 17, H.L.; 44 Digest 1241, 10719.
- (4) *Attorney-General v. Smyth*, [1905] 2 I.R. 553; 21 Digest 10, h.
- (5) *Lord Advocate v. Heywood-Lonsdale's Trustees* (1906), 43 Sc.L.R. 529; 8 F. (Ct. of Sess.).
- (6) *Attorney-General v. Holden*, [1903] 1 K.B. 832; 72 L.J.K.B. 420; 88 L.T. 729; 67 J.P. 135; 51 W.R. 685; 19 T.L.R. 385; 47 Sol. Jo. 419; 21 Digest 11, 48.
- (7) *Attorney-General v. Worrall*, [1895] 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807; 59 J.P. 467; 43 W.R. 118; 11 T.L.R. 48; 39 Sol. Jo. 58; 14 R.I., C.A.; 21 Digest 12, 54.
- (8) *Attorney-General v. Johnson*, [1903] 1 K.B. 617; 72 L.J.K.B. 323; 88 L.T. 445; 67 J.P. 113; 51 W.R. 487; 19 T.L.R. 324; 47 Sol. Jo. 367, C.A.; 21 Digest 12, 55.

Appeal from a judgment of the Court of Appeal for Ontario, dated May 31, 1933, reversing a judgment of GARROW, J., dated Jan. 30, 1932, in favour of the appellant.

The respondent was the surviving executor and trustee of the will and estate of Cawthra Mulock, who, by indenture made June 23, 1903, in consideration of his intended marriage with Adele Baldwin Falconbridge, an infant, agreed with her father, the trustees named in the indenture, and herself, that on the marriage taking place within twelve months from that date he would cause money or securities to the extent of \$250,000 to be transferred to the trustees so named, in trust to keep the same invested, and from and after the marriage to pay the net income to her during her life, and on her death to distribute the capital among their issue as she might by her last will appoint, or among their issue in default of such appointment, or to him if no such issue should survive her and he should survive her, or, if neither he nor any such issue should survive her, as she might by her last will appoint. The marriage took place within twelve months from the date of the indenture, and money and securities to the extent mentioned were transferred as agreed. Cawthra Mulock died on Dec. 1, 1918, leaving his said wife and issue of their marriage surviving him, and the said money and securities were held by a successor of the original trustees, as trustee under the said indenture.

The Court of Appeal held, reversing the judgment of GARROW, J., that property which passed in fact from the deceased to the trustees of his marriage settlement could not pass also on his death fifteen years later, and further, that the transfer of the money and securities for money was not a gift, but was a transfer for valuable consideration.

The Attorney-General of Ontario appealed.

Wilfrid Greene, K.C., and J. T. White, K.C. (of the Canadian Bar) for the appellant.

D. L. McCarthy, K.C., and A. M. Stewart, K.C. (both of the Canadian Bar) for the respondent.

C. H. A. Armstrong, K.C. (of the Canadian Bar) for unascertained persons or interests.

June 19. The judgment of their Lordships was delivered by

LORD BLANESBURGH.—The principal question for decision on this appeal is whether property to be held on trusts for the benefit of his wife and the issue of their marriage, transferred by a husband in pursuance of a covenant contained in marriage articles is, within the meaning of the Succession Duty Act of Ontario, a "gift" so as to be chargeable with succession duty on the death of the husband. That issue, with another of less general importance, was determined in favour of the Crown by the learned trial judge in the Supreme Court of Ontario: on appeal to the Court of Appeal the Crown's claim to duty was rejected, on every ground put forward in its support, and the suit of the Attorney-General of the province in which the claim was made was by judgment dated May 31, 1933, dismissed. From that order of dismissal the Attorney-General now appeals to His Majesty in Council.

The facts are not in dispute. As formulated in the statement of claim, they were and are accepted by the respondent defendant, the legal personal representative of Cawthra Mulock, the settlor. It was in contemplation of his marriage with Adele Baldwin Falconbridge, then an infant, that the marriage articles in question were on June 23, 1903, entered into. The parties to them were the settlor, of the first part, the father of the bride, of the second part, the trustees named, of the third part, and the bride herself, of the fourth part, and on a recital that a marriage was about to be solemnised between the parties thereto of the first and fourth parts, and that it had been agreed between the parties of the first, second, and fourth parts that the party thereto of the first part should assign and transfer, or cause to be assigned and transferred to the parties thereto of the third part, as trustees, the sum of \$250,000, or securities for that amount to be held on the trusts therein detailed or referred to, it was witnessed that in consideration of the said intended marriage the party of the first part covenanted and agreed with the parties

thereto of the second and fourth parts that on the contemplated marriage taking place within twelve months from the date of the articles the payment or transfer aforesaid to the trustees, parties of the third part, would be made. The trusts declared were those of a marriage settlement of personal estate, predominantly in favour of the wife and issue of the marriage, the settlor himself taking no interest thereunder except in the event, which did not happen, of his surviving his wife and all their children.

Their Lordships think it important at once to observe—the observation will be found to supply one key to the solution of the appeal—that the settlement here is one made by a husband of his own property for objects all of which are within the marriage consideration. The settlor's agreement to settle is made, and the covenant in pursuance of such agreement—expressly stated to be in consideration of the intended marriage—is entered into by him with the bride and her father alone. It may ultimately become a question decisive of the appeal whether a transaction from which, on the part of the settlor, every element of gift or bounty is so entirely absent is one on which any claim to duty under the Succession Duty Act can be based.

The marriage was shortly afterwards duly solemnised and the settlor's covenant duly performed. The trust funds have since been held by the trustees of the marriage articles, and are still so held, no further formal settlement having ever been executed. The settlor died on Dec. 1, 1918, and was survived by his wife and by issue of their marriage. More than twelve years afterwards the suit above mentioned was instituted, and by his statement of claim, the Attorney-General of Ontario made against the legal personal representative of the settlor, the demand for succession duty on the \$250,000, which more than twelve years before his death had been transferred by the settlor to the trustees pursuant to his covenant already stated. The institution of the proceedings so long after the death of the settlor is matter of comment. No explanation of the delay is forthcoming. It is not, however, suggested by the respondent that any equitable answer to the claim is on that score open to him. There are apparently still funds in his hands available to meet the demand for duty should it turn out to be otherwise well founded.

It is on s. 7 of the Succession Duty Act of Ontario, and in particular on sub-s. 2 (b), as the subsection stood at the date of the settlor's death that the claim is based. The immediately relevant provisions of the section are those which for convenience of reference are now set forth.

“(1) The following property . . . shall be subject to duty at the rates herein-after imposed :—

“(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere. . . .

“(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property. . . . (b) Any property taken as a donatio mortis causa, or taken under a disposition operating or purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise made since July 1, 1892, or taken under any gift whenever made, of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise, except as herein-after mentioned.

“(3) Notwithstanding anything herein contained no duty shall be payable in respect of the property. . . . (d) Actually and bona fide transferred for a consideration in money or money's worth paid to the transferor for his own use and benefit, except to the extent, if any, to which the value of the property transferred exceeds that of the consideration so paid.”

On the above enactment the judicial task is to ascertain how far a transfer not purely voluntary may still be a “gift” within the meaning of sub-s. (2) (b), and in

particular whether the transfer made by the settlor here can be properly so described.

In support of his submissions on that question, counsel for the Attorney-General invited their Lordships to trace in the Imperial statute law from which it was obviously borrowed the evolution of the subsection, and, having done so to utilise in its interpretation in relation to settlements made in consideration of marriage the authorities, English, Scottish and Irish, bearing on the corresponding Imperial enactment. For reasons which will emerge as they proceed, their Lordships are not satisfied that in the circumstances this course is properly open to them. Accordingly their acceptance of the appellant's invitation is made with all reserve and really because, as they believe, the inquiry may be generally illuminating, and, in so far as it throws permitted light on the Ontario enactment in relation to the present question, significant.

It will be convenient in what follows sometimes to refer to the British Finance Acts as the Finance Acts, and to the Ontario Succession Duty Act as the Succession Duty Act, and it may at once be accepted that s. 7 (2) (b) of the Succession Duty Act was originally inspired by, although it is not in its precise terms translated from, the Finance Act, 1894, s. 2 (1) (c). That subsection enacts that property passing on the death of a deceased shall be deemed to include

"Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

Section 38 (2) (a) of the Act of 1881 there referred to is that which is now in point. As amended by s. 11 (1) of the Act of 1889, and omitting words irrelevant, here the subsection runs as follows :

"Any property taken as a donatio mortis causa, or taken under a [voluntary] disposition purporting to operate as an immediate gift inter vivos, whether by way of transfer delivery, declaration of trust, or otherwise, which shall not have been bona fide made twelve months before the death of the deceased and property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

The similarity of this paragraph to s. 7 (2) (b) of the Succession Duty Act as above set forth is obvious. But the identity of the two is not complete. This was not possible if the scheme of the Ontario legislation was to be adhered to. Essential difference on this score does not, however, explain every variation between the two enactments.

To pass by, for the moment, one other to which reference must later be made, it may be taken that for present purposes the great difference between the two subsections consists in this—that the subsection appears in the Ontario statute as an original enactment with no trace of its origin or history to be found either in its terms or in any other Ontario legislation, whereas the British subsection is, on its face, an amendment of an existing Act of Parliament, which, as so amended, remains the substantive operative enactment.

Now, before considering the possible consequences of the above difference in the form of the two enactments, it will not be inconvenient at once to emphasise a clear line of demarcation between two classes of settlement made in consideration of marriage, the subject with which this appeal is immediately concerned. It will be found that this line of demarcation remains prominent throughout this judgment.

In the first class of these settlements—such settlements as the articles with which we have to do—settlements made by a husband on his own marriage for the

benefit of his wife and the issue of the marriage, we see, as KAY, L.J., put it in *Attorney-General v. Jacobs-Smith* (1)

"A settlement which as between the settlors is made for the most valuable consideration imaginable, that of marriage."

In other words, the husband's covenant or transfer of property, under such a settlement, is the price paid by him for the hand of his bride, with no element whatever either of gift or bounty involved. But there is a second class of settlement, such, for example, as one made by a father on the marriage of his son or daughter—a settlement made in consideration of marriage, truly enough, but not made in consideration of marriage with the settlor. In the case of such a settlement it is not true to say that the consideration moving to the settlor is "the highest consideration imaginable." In *Shadwell v. Shadwell* (2), for example, where a promise was made by an uncle in a letter to his nephew in anticipation of the marriage of the young man to a named lady, while ERLE, C.J., and KEATING, J., were with some difficulty able to find a consideration moving to the uncle, BYLES, J., could discover none. The truth is that the so-called consideration of marriage in such a case is based on results to the settlor totally distinct from those which follow his own marriage. Indeed, in the case of settlements of this second class in the contribution of the settlor there is, found even in common parlance, an element of gift or bounty. As LORD MACNAGHTEN observed in *Wheeler and others v. Humphreys and others* (3) ([1898] A.C. at p. 509): "You give your daughter in marriage and you give a portion with your daughter." And it will be found to be of the last significance in the examination of the Finance Acts, and the authorities thereon to which their Lordships now proceed that it is only in marriage settlements of this second class that any element of gift or bounty has ever been discovered. Nowhere has it been suggested that that element is even latent in the class of marriage settlement now in question.

It was always held in Great Britain, under s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881, amended as above but with the word "voluntary" remaining before the word "disposition," that an ante-nuptial settlement of the second class above alluded to, not being in law a voluntary settlement, did not fall within the second limb of the paragraph. It is interesting here to note, as will be seen later, that something which was not a "pure and simple" gift might, however, have come under the third limb. In other words "gift" in the two limbs had not the same meaning. It is, however, now settled as a result of the omission of the word "voluntary", from the paragraph as incorporated in the Finance Act, 1894, that marriage settlements of the second class are brought within its second limb as well. But so far as decision is concerned, only by reason of the form of enactment. This is made very clear by the leading authority on the subject—the judgment of PALLES, C.B., in *Attorney-General v. Smyth* (4). It was not permissible, the Chief Baron there held, in construing the subsection of the Finance Act, merely to strike out the word voluntary from the previous—the 1881—description, and then to construe the description thus modified as if it were contained in an original enactment without regard to its history or evolution and irrespective of the new context in which it was found. It had been argued that the description thus arrived at would contain the word "gift" as a substantive part without any controlling context, and therefore would exclude property comprised in a settlement of the second class. But the contention was inadmissible. It was necessary to look at the repealed portion of the Act of Parliament in order to see what was the meaning of that which remained of it, and accordingly, being entitled on that view of the statute to regard the "disposition" as one which need not be voluntary, the Chief Baron held that a settlement by a father on the marriage of his son might be regarded within the meaning of the Finance Act as a disposition "purporting to act as an immediate gift." And the same principle in relation to a similar settlement was applied in Scotland in *Lord Advocate v. Heywood-Lonsdale's Trustees* (5), and in England in *Attorney-General v. Holden* (6). But this con-

struction of the Act of 1894—never applied be it remembered to settlements in consideration of marriage other than those of the second class—did not ultimately commend itself to the British legislature, even with regard to them: and in 1910, by the Finance Act of that year (10 Edw. 7 & 1 Geo. 5, c. 8), s. 59 (2), it was enacted that the provisions relating to gifts inter vivos, in the Act of 1881, as amended, should not apply to gifts made in consideration of marriage.

Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of para. (a) sup., shows that the gift therein being dealt with need not be preceded by a "disposition," but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the paragraph it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not "a pure and simple gift." *Attorney-General v. Worrall* (7); *Attorney-General v. Johnson* (8) may be cited as typical. And see *Attorney-General v. Holden* (6) ([1903] 1 K.B. at p. 837). These authorities would have had greater significance on the present occasion, if on construction it were held that the final words of s. 7 (2) (b) of the Succession Duty Act applied to the second limb of the paragraph as well as to the third. But, as will presently be seen, this, in the opinion of their Lordships, is not the case.

Their Lordships now return to the consideration of the Ontario statute with the information culled from the immediately relevant authorities on the British Finance Acts, that—whereas under a form of statute in terms an amendment of another, but which as amended remains the substantive enactment, property transferred by a settlor on the marriage of another may, on the settlor's death, be subject to duty, as being in the nature of a gift—there is first of all no decision to that effect under an enactment which is original: and there is no decision anywhere that a transfer under such a settlement as the marriage articles here can for any purpose whatever be regarded as a gift.

First, then, is the Ontario subsection unlike the corresponding British enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be, so construed. It contains on its face no reference to any origin. It comes into Ontario legislation fully grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.

Next, even if the present were such a settlement as those which in Great Britain were by decision brought within the Finance Acts, ought that same result to follow under an enactment like the Ontario statute original in form? There is no British authority that it ought; it may, perhaps, be surmised that PALLES, C.B., would have held that it ought not. And quite certainly caution must be exercised before the opposite conclusion is reached, because such a decision in Ontario would lead to a result which, in Great Britain, has been avoided by subsequent legislation. And who can say that the absence of a similar amending statute in Ontario is not due to the fact that no such statute was deemed there to be necessary? Such so-called "gifts" were never caught by the Ontario Succession Act at all.

It is in these circumstances some satisfaction to their Lordships to find that they are not in this case called on to express any concluded opinion on this question. In its determination they would desire the assistance of the provincial courts which have not here dealt with it. They are able to dispose of the appeal on another ground, and they do so. It fails, they think, for a reason which they have elaborated throughout this judgment, that the settlor's covenant or transfer in this instance had in it no element of gift or bounty whatsoever, and is therefore in no way caught by the Succession Duty Act, whether in s. 7 (2) (b) of that Act, and in view of the later reference to a "gift" the word "voluntary" is, or is not, to be implied before the word "disposition."

This conclusion deprives of final importance the appellant's second attack on the decision of the Court of Appeal. But their Lordships must not pass it by. The question already referred to in another connection turns on the construction of the concluding words of s. 7 (2) (b) of the Succession Duty Act, and it raises a somewhat curious point into the consideration of which amendments successively introduced into that paragraph itself find their place. A

The paragraph as it stood at the date of the settlor's death is set out above. On reference to its terms it will be found that the word "property" referred to in its first limb is not repeated, but is implied, in relation to its second, and third limbs, and the question is whether the "property" mentioned last in the paragraph is by reference carried back to the only "property" previously named (that is to the word at the beginning of the paragraph), with the effect that the proviso applies not to the third limb of the paragraph only, but to all three. In other words the "property" here in question, coming under the second limb, escapes duty on the ground that actual and bona fide possession of it by the donee trustees was in fact assumed immediately on the gift. B C

Now before considering grammatically with regard to this point, the effect of the paragraph as it stood at the settlor's death, something should be said as to its Ontario legislative history in this regard. Section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, above quoted differs, it will be seen, from its existing Ontario reproduction in this: that its first two limbs are disjunctive, "any property taken as a donatio mortis causa, or taken under a disposition," &c., while the third limb is cumulative, and in terms independent, with the word "property" repeated: "and property taken under any gift." The repetition of the word "property" in the third limb, following the word "and," results in this, that the same word when next used in para. (a) is referable only to that last-mentioned property; that is to say, to the third limb of the paragraph. And such has been the construction placed on the paragraph in Great Britain. D

It will be noticed, however, that in the Ontario statute, unlike in this respect its British counterpart, all three limbs are disjunctive, the second and third being each introduced by the word "or." Moreover, when the paragraph first appeared in Ontario legislation, the word "property" remained inserted before the words "taken under any gift" the effect very clearly being, as in the British enactment, to refer the word "property" next mentioned to that third limb and to no other. But by 4 Geo. 5, c. 10, s. 5, s. 7 (2) (b) of the Succession Duty Act is re-enacted, with the word "property" before the third limb omitted, and thus the section stood as above seen at the settlor's death. But not for long. The matter was taken up again by the legislature in 1919, the year following the death, and the enactment now in force (9 Geo. 5 (Ont.), c. 9, s. 1) runs as follows: E F

"1. Clause (b) of sub-s. 2 of s. 7 of the Succession Duty Act as enacted by s. 5 of the Succession Duty Act, 1914, is repealed, and the following substituted therefor:—

"(b)—(1) Any property taken as a donatio mortis causa: H

"(2) Any property taken under a disposition operating or purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise made since the first day of July, 1892."

"(3) Any property taken under any gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary, or by contract or otherwise, except as hereinafter mentioned." I

In other words, the original sense is now restored to it without ambiguity of any kind. The question is, what interpretation is to be placed on the subsection in its intermediate state, between 1914 and 1919? Now on this point their Lordships are impressed with the purely grammatical difficulty in the way of the Crown's construction, even apart from any argument for the respondent resulting from the

amendment of 1914. Grammatically it seems to them the word "property" when last used should strictly be referred back to the same word where it alone previously appears in the paragraph, and being so referred back is then necessarily carried forward with that word into both the second and the third limbs of the paragraph. But this construction is strict and not, their Lordships think, necessarily compelling. It must, they are satisfied, yield to results, and if the result of it must be, and so they think, that referring the proviso to the first limb it would prevent there ever being under the section any donatio mortis causa at all, it must follow that the reference to "property" is confined to that word as impliedly introducing the third limb and to that word only. For no one has suggested that if the word does not apply to property covered by the first limb it can extend to property covered by the second. And their Lordships do not feel themselves precluded by the statute of 1919 from reaching this conclusion as to the meaning of the enactment thereby superseded. The new enactment did not necessarily mean more than that in the opinion of the legislature the enactment of 1914 being possibly ambiguous it was desirable that the Act of 1919 should resolve the ambiguity in the sense always intended.

On this point, therefore, their Lordships find themselves at variance with the Court of Appeal and in agreement with GARROW, J. On the whole case, however, the appeal in their judgment fails, and they will humbly advise His Majesty that it be dismissed and with costs.

Appeal dismissed.

Solicitors: *Blake & Rodden; Charles Russell & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re MAUNDY GREGORY. Ex Parte NORTON v. TRUSTEE

[COURT OF APPEAL (Lord Hanworth, M.R., Slessor and Romer, L.JJ.), June 29, July 6, 1934]

[Reported [1935] Ch. 65; 78 Sol. Jo. 550; 104 L.J.Ch. 1; [1934] B. & C.R. 165; 152 L.T. 58]

Bankruptcy—Summons to give evidence—Refusal to answer questions—Matter to which witness not party or privy—Fishing inquiry—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 25 (1).

In March, 1930, W. placed in the debtor's hands bonds of some £30,000 value. Shortly before his death on July 12, 1930, W. asked the debtor to hand the bonds to a bank to his, W.'s, order, but the debtor did not do so. On Feb. 23, 1931, W.'s executors brought an action claiming from the debtor the return of the bonds, but on Jan. 14, 1932, a compromise of the action was arranged, by which the debtor agreed to pay to the executors the value of the bonds. That payment was made. In November, 1931, correspondence between W. and the debtor was found indicating that the debtor had made proposals to W. with the view of securing that an honour should be bestowed upon him (W.). On May 2, 1933, a receiving order was made against the debtor, and on May 23, 1933, he was adjudicated bankrupt. The debtor did not file any statement of affairs and no public examination was held. N., an executor of the will of W., was summoned to give evidence under s. 25 (1) of the Bankruptcy Act, 1914, which gives a trustee in bankruptcy the right to summon any person for the purpose of obtaining information "respecting the debtor, his dealings or property." On his appearance to the summons N. was

asked questions to show that he knew of the proposed trafficking in honours, but on his counsel's advice he refused to answer. The answer was expected to enable the trustee to re-open the compromise of the action and to recover the money repaid to W.'s estate on the ground that, if originally the money had been paid to the debtor on an illegal consideration, W.'s executors could not legally claim its repayment.

Held: when a compromise of an action was not impugned by any evidence, documentary or otherwise, before the court it was not right to compel an answer from a witness in respect of a matter to which he was not a party or privy; a mere fishing inquiry based on a hope of building up a case as to which there was no information before the court could not be allowed; and, therefore, no order would be made compelling N. to reply to the questions.

Notes. As to the examination of the debtor and other persons, see 2 HALSBURY'S LAWS (3rd Edn.) 405 et seq., and for cases see 5 DIGEST 618 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Ehrenstrom, Ex parte Vogel* (1818), 2 B. & Ald. 219; 106 E.R. 347; 5 Digest 618, 5562.
- (2) *Re Wright, Ex parte Willey* (1883), 23 Ch.D. 118; 52 L.J.Ch. 546; 48 L.T. 380; 31 W.R. 553, C.A.; Digest Supp.
- (3) *Parkinson v. College of Ambulance, Ltd., and Harrison*, [1925] 2 K.B. 1; 93 L.J.K.B. 1066; 133 L.T. 135; 40 T.L.R. 886; 69 Sol. Jo. 107; Digest Supp.
- (4) *Re Debtor* (No. 27 of 1927), [1929] 1 Ch. 125; 140 L.T. 136; 97 L.J.Ch. 167; [1928] B. & C.R. 34, D.C.; Digest Supp.
- (5) *Re Cole, Trustee in Bankruptcy v. Public Trustee*, [1931] 2 Ch. 174; 100 L.J.Ch. 316; 145 L.T. 484; [1931] B. & C.R. 7; Digest Supp.
- (6) *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; 55 L.J.Ch. 801; 54 L.T. 582; 34 W.R. 669, C.A.; 12 Digest (Repl.) 137, 854.
- (7) *Re Debtor* (No. 3 of 1909), *Ex parte Goldstein* (No. 1), [1917] 1 K.B. 558; 86 L.J.K.B. 705; 116 L.T. 379; 62 Sol. Jo. 71; [1917] H.B.R. 155, D.C.; 5 Digest 617, 5547.

Appeal by W. T. Norton against an order of CLAUSON, J.

Tindale Davis for the appellant.

Gilbert Beyfus, K.C., and *Sir George Jones* for the trustee in bankruptcy.

Cur. adv. vult.

July 26. The following judgment of the court was read by

LORD HANWORTH, M.R.—The question to be decided in this appeal is whether Mr. W. T. Norton, a witness who was summoned to give evidence in this bankruptcy under s. 25 of the Bankruptcy Act, 1914, should be ordered to reply to certain questions put to him in the course of his examination by counsel for the trustee of the bankrupt's estate. The registrar allowed the questions to be put to the witness, but, under the advice of his counsel, he refused to answer them. The registrar thereupon reported the refusal to CLAUSON, J., who made an order requiring the witness to answer the questions with the usual caution in case he should refuse to obey that order. From that order the witness has appealed to this court.

It appears that bonds of a British issue of French Rentes of large value, together with £4,000 worth of 2½ per cent. Consolidated stock, in the form of certain specified bonds, were, on March 27, 1930, placed in the debtor's hands by Sir W. G. Watson, who died on July 12, 1930, and the witness, W. T. Norton, is one of the executors of his will. Just before he died—on July 6, 1930—the testator directed the debtor to hand over the bonds to Lloyds Bank at their head office in Lombard Street, to his—the testator's—order. The debtor did not comply with this direction, but converted the bonds and the coupons upon them to his own use. On Feb. 23, 1931, the executors commenced an action against the debtor claiming the

return of the bonds as wrongfully converted by the debtor, or, alternatively, as money had and received to the testator's, and thus to the plaintiffs' use. The debtor admitted the receipt of the bonds, but alleged that on April 22, 1930, they had been made a gift to him, and in answer to an interrogatory stated that he had sold the bonds in September, 1930, and that they had realised the net sum of £30,081 5s. after deducting the broker's commission.

The case came into the list for trial before WRIGHT, J., on Jan. 14, 1932, when a compromise by consent was arranged between eminent leading counsel for the plaintiffs and the defendant, whereby the defendant agreed to pay £10,000 forthwith, a further sum of £10,000 on July 13, 1932, and £10,206 on Jan. 13, 1933, and also a sum of £380 forthwith as the agreed cost of the action. The defendant was also to pay interest at 5 per cent. on any balance outstanding, and to provide security for the payment of the sums outstanding. Upon default in compliance with any of the above terms, the whole sum outstanding of principal and interest was to become immediately payable. On these terms all further proceedings in the action were stayed except for the purpose of carrying them into effect. The debtor paid the first instalment, and the last two instalments were paid by the guarantor by whom they had been secured as required by the terms of the compromise.

In November, 1931, some pencil draft letters in the testator's handwriting were discovered. One of them was dated Dec. 7, 1923, and one letter from the debtor, dated Nov. 29, 1923, to the testator indicated that the debtor had been making proposals to the testator with a view to securing that an honour should be bestowed upon the latter by His Majesty. There was a letter dated June 29, 1926, from the debtor which stated that "the strike has butted in and caused the entire side track of our collection of names which were otherwise fully approved of." All these letters were disclosed by the solicitors for the executors to the solicitor for the debtor by letters to the latter dated November 4 and 5, 1931, more than two months before the case came on.

The act of bankruptcy on which the present proceedings were founded was committed on April 6, 1933, under an execution: see s. 1 (1) (e) of the Bankruptcy Act, 1914. The debtor's goods were seized on March 18, 1933, and sold on April 6, 1933. The receiving order was made on May 2, 1933, and the adjudication followed on May 23, 1933. The debtor has not surrendered to the proceedings, and has not filed any statement of his affairs, with the result that the trustee has been placed in the difficulty of there being no preliminary examination of the debtor, no statement of affairs, and no public examination, and he has had no interviews with the debtor. The last instalment was paid within three months before the act of bankruptcy—within the period of the relation back of the trustee's title, while the compromise itself was outside this period, though within the two years within which, in certain events, a settlement of property not made in favour of a purchaser in good faith and for valuable consideration can be avoided by the trustee under s. 42 (1) of the Act.

Section 25 provides means whereby a trustee, placed in the difficulty which prevails in the present case, where the debtor has kept away and rendered no assistance, can make inquiry for the purpose of obtaining "information respecting the debtor, his dealings or property." That is, of course, information material to the duties imposed upon the trustee and to the matters with which he is concerned thereunder: see *Re Ehrenstrom, Ex parte Vogel* (1). It will be noted that the duty of deciding whether a person shall be summoned is given by s. 25 to the court—that is, the registrar—acting upon the application of the official receiver or trustee. The words are:

"The court may summon before it . . . any person whom the court may deem capable of giving information"

as above. The powers given to the court under the section are very wide, as, indeed, it is essential that they should be. Yet it is also important to bear in

mind the caution given by SIR GEORGE JESSEL in relation to it: see *Re Wright*, A *Ex parte Willey* (2). He said (23 Ch.D. at p. 128):

"It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised."

Later on (23 Ch.D. at p. 130) he draws attention to the distinction between the bankrupt and other people in this connection:

"You can examine him [the bankrupt] to any extent upon the application of anyone; but as regards the examination of other people I wish expressly to reserve my opinion, and treat the point as one still to come for decision."

See also per ABBOTT, C.J., in *Ex parte Vogel* (1) (2 B. & Ald. at p. 228), where he speaks of the great caution and discretion required.

The questions that were asked and which Mr. Norton refused to answer were these:

"Q. When you found the setting out by Sir George of his various gifts and the putting down of Viscount Esher's name as one of his references, you knew then that there was an honour in contemplation?"

The witness, on the advice of his counsel, declined to answer.

"Q. I suggest that when a man of your education and experience saw that letter [referring to a letter dated June 29, 1926, which had been read to the witness] and saw the previous letters, you knew quite well then that something was going on for what I call honour trafficking?"

The purpose of the questions—as we were told, and it is made plain by some other questions—was to discover the opinion of the witness upon the letters which dated in the years 1923 and 1926 and indicated that there had been some honour trafficking at that time. The answers, if in the affirmative, were claimed by counsel for the trustee to be useful to build up a case on which the settlement of the action made in January, 1932, could be re-opened and the money that had been repaid to the estate of the testator recovered by the trustee for the estate of the debtor and ultimately for the use of the creditors. *Parkinson v. College of Ambulance, Ltd.* (3) was cited to show that the payment of a sum in order to secure an honour was an unlawful transaction as contrary to public policy and could not found a good cause for the repayment of money advanced.

CLAUSON, J., decided that the questions ought to be answered because

"the answers may assist, and very likely will assist, the trustee towards making up some case which may or may not ultimately be successful, which may impugn the transaction by way of compromise of the action which took place within two years of the commencement of the bankruptcy."

It was decided in *Re Debtor* (No. 27 of 1927) (4) by a Divisional Court (ASTBURY, J., and CLAUSON, J.)—and we think rightly—that where an action is ended by a compromise, the Bankruptcy Court will not go behind the compromise if it has been made by independent counsel, and it is not impeached as fraudulent. It is only necessary to refer to the direction given by the testator on July 6, 1930, to make it plain that the executors had foundation—indeed, a duty—for their proceeding by action to endeavour to recover the moneys handed over.

In a recent case, *Re Cole, Trustee in Bankruptcy v. Public Trustee* (5), FARWELL, J., decided that a bona fide compromise of a bona fide action claiming rights against a defendant's property is valuable consideration within the words of s. 42 of the Bankruptcy Act, 1914, for a settlement of that property made by the defendant under that compromise. It is not for the court to determine whether or not the action could or would have succeeded if prosecuted to the end. The compromise of a bona fide claim is good consideration: see *Miles v. New Zealand Alford Estate* (6). Upon the materials before the court there is no ground for challenging the bona fides of the compromise and whether the questions were answered in the affirmative

or in the negative, the trustee would be in no better position in this respect. The debtor appears in no case to have had any moral claim to retain the bonds—if the interpretation sought to be derived from the letters in 1923 and 1926 that were discovered are to be used to colour the transaction.

The witness at the outset of his examination stated that he was not well acquainted with the affairs of the testator. He said—"Only since I took over the executorship"—though he had acted as his private secretary at an earlier date down to the very early part of 1917. There is no evidence that he was privy to whatever took place in 1923, or 1926, or that he induced the compromise, or acted otherwise than under the advice of his counsel.

In *Re Debtor* (No. 3 of 1909), *Ex parte Goldstein* (No. 1) (7) it is plainly laid down that s. 25 is not to be treated as if it embraced every one that the trustee, or official receiver, may wish to cross-examine, nor any person who makes—or might make—a proof; but only persons whom the court may "deem capable of giving information respecting the debtor, his dealings or property." It would not be wise to attempt a definition of the limits within which an order for examination can be made, or an answer compelled, under s. 25. But if the claim to either is challenged, it seems to us that when a compromise has been made which is not impugned by any documents, materials, or evidence before the court, and thus stands good and binding, it would not be right to compel an answer from a witness in respect of a matter to which he is not *prima facie* shown to have been a party or privy. The court must deem the witness capable of giving information upon some grounds that appear to have a foundation. It ought not to lend itself to a mere fishing inquiry based upon the trustee's hope to build up some case as to which there is before the court no information showing that the witness was implicated. In the present case we are not satisfied that the above conditions have been complied with, and we allow the appeal with costs here and below and discharge the order of June 11, 1934.

Appeal allowed.

Solicitors: *Lamb, Son, & Prance; Isadore Goldman & Son.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

R. v. LITTLEBOY

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Swift and du Parcq, JJ.),
June 25, 26, 1934]

[Reported [1934] K.B. 408; 103 L.J.K.B. 657; 151 L.T. 570; 98
J.P. 355; 32 L.G.R. 845; 24 Cr. App. Rep. 192; 30 Cox,
C.C. 179]

Criminal Law—Trial—Summing up—Comments on non-disclosure of defence at earlier date—How far permissible.

There is no general proposition of law that a judge may not, in his summing-up, comment on failure to disclose the defence prior to trial. Comments of this kind should be made with care and with fairness to the accused, but it is not open to objection to say, with regard to a defence of alibi, that the failure to disclose it in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence.

The judgment in *R. v. Naylor* (1), [1933], 1 K.B. 685, was not intended to be of universal application, and what was there held to be objectionable was to refer to the silence of the accused when before the magistrates as being capable of being regarded as evidence against him or as corroborating the evidence of an accomplice.

Notes. Referred to: *R. v. Dawkins*, *R. v. Toone* (1942), 28 Cr. App. Rep. 151; *R. v. Leckey*, [1943] 2 All E.R. 665.

As to summing-up in a criminal case, see 10 HALSBURY'S LAWS (3rd Edn.) 423 et seq., and for cases see 14 DIGEST (Repl.) 643 et seq.

Cases referred to:

- (1) *R. v. Naylor*, [1933] 1 K.B. 685; 102 L.J.K.B. 561; 147 L.T. 159; 23 Cr. App. Rep. 177; 29 Cox, C.C. 493, C.C.A.; Digest Supp.
- (2) *R. v. Moran* (1909), 3 Cr. App. Rep. 25, C.C.A.; 14 Digest (Repl.) 626, 6307.

Appeal against conviction.

The appellant was convicted at Norfolk Assizes of carnal knowledge of a girl above the age of thirteen and under the age of sixteen upon two occasions, and was sentenced by AVORY, J., to twelve months' imprisonment in the second division. With regard to the second occasion, June 29, 1933, the appellant set up the defence of an alibi. He did not disclose this defence prior to the trial, but at the trial gave evidence that he was at Wroxham (the offence having been alleged to have taken place at Norwich) at the material time, and called his wife and two other witnesses in support of his evidence. Notice of certain additional evidence was served on the appellant, but the evidence was not in fact adduced at the trial.

AVORY, J., in his summing-up, said that it was unfortunate that the prisoner had not said, when charged or when before the magistrates, that he was at Wroxham on June 29, and added:

"If he says it then and there, it gives the police, or those who are conducting the prosecution, an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying 'I reserve my defence,' of course, he deprives the prosecution of any opportunity of testing that statement."

Linton Thorp, K.C., and Gerald Dodson for the appellant.

Gerald Howard for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J., who referred to the terms of the indictment and the facts as summarised above, and continued: The summing-up, which was a very careful one, contained a passage on which great stress has been laid on behalf of

the appellant. Having referred to the defence of alibi, the learned judge observed that it was unfortunate that the appellant did not say then and there—that is to say, when charged and when asked by the magistrates before being committed for trial if he desired to give evidence on his own behalf or to call witnesses—that he was at Wroxham on June 29. The learned judge proceeded to say:

“If he says it then and there, it gives the police, or those who are conducting the prosecution, an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying ‘I reserve my defence,’ of course, he deprives the prosecution of any opportunity of testing that statement.”

In other words, the fact that that statement was not made before the magistrates was not treated as evidence against the appellant, but was used by way of observation on the defence of alibi which was set up at the trial. Counsel for the appellant has urged that there was here a misdirection, inasmuch as there was a comment in the summing-up on the failure to disclose the defence of alibi at an earlier stage. Reference was also made to questions put by the judge to the appellant at the conclusion of his cross-examination. The transcript reads as follows:

“Q. When you were asked after all the evidence had been given if you had anything to say in answer to the charge, why did not you then say to the magistrates that you were at Wroxham on June 29 and could prove it? A. Well, I believe I heard my solicitor say that he could prove where the defendant was on June 29. Q. Never mind what your solicitor said. I am asking why you did not say it when you were asked what you had to say in answer to the charge? A. Well, when I was asked if I had anything to say in answer to the charge, I simply said I was not guilty and I reserved my defence.”

A further point was taken on behalf of the appellant—that notice of additional evidence was served and that that additional evidence was of such a nature as to show that the police were aware that the defence of alibi was going to be raised and had taken steps to meet it. That additional evidence, which was not adduced at the trial, is before the court and we have carefully considered it. It is not by any means necessarily to be regarded as evidence to rebut an alibi; it may at least equally well have been evidence to support the testimony given on the part of the prosecution. Counsel for the Crown has told us that the evidence was not obtained for the purpose of rebutting an alibi and that it was not offered, because it was not thought to be necessary. The matter is, perhaps, a little unsatisfactory, but, after careful consideration, we do not think that there is any real substance in this point.

The real point urged on behalf of the appellant is that the judge was wrong in making observations upon the fact that the defence of alibi had not been disclosed before the magistrates, and our attention has been directed to *R. v. Naylor* (1). It is important to observe that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as evidence against him in corroboration of an alleged accomplice who had given evidence for the prosecution. It is important to remember that the judgment in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a judge may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.

It is apparent that in *R. v. Naylor* (1) the attention of the court was directed to

R. v. Moran (2), where the head-note, going a little beyond what was said in the judgment, is as follows:

"The defence of an alibi ought to be set up at the earliest possible moment, and ought to include a statement where the defendant was at the time charged."

The following observation by the Lord Chief Justice occurs at 3 Cr. App. Rep., p. 26:

"[The applicant] had, at the police court, a full opportunity of saying where he was. It is very unfortunate that he kept back this alibi until the trial."

In that case there was an application to call a witness on the appeal to prove an alibi and that application was refused, the court saying that it was impossible to re-open the case.

We are not seeking to lay down, nor would it be useful to lay down, any general proposition either with regard to the defence of alibi or with regard to the disclosure of defences. The question which we have to consider is a much more limited one—whether it is a misdirection for a judge to say that failure to disclose an alibi in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence. The judge in the present case, having made the observations to which I have referred, went on to say:

"It is only if you are satisfied by the evidence looked at as a whole that this offence is brought home to the defendant, and you are satisfied that there is in this case some corroboration of the girl's story, that you are justified in convicting: if you are not satisfied of that and entertain any reasonable doubt about it, your duty is to acquit him."

We have very carefully considered the whole matter and the various cases to which our attention has been directed, and we do not think that what was said in the summing-up amounted to a misdirection. No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case, but we do not assent to the general proposition that in no circumstances may comment be made upon the failure to disclose the defence in the police court. The observations of the court in *R. v. Naylor* (1) were never intended to go to that length. There is a great difference between making the comment that silence on the part of the prisoner is unfortunate, and a matter to be regarded with reference to the weight of the defence, when the defence of alibi is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice.

Looking at this summing-up, we are not prepared to say that there was any misdirection on the part of the judge. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Daynes, Keefe, & Durrant*, Norwich; *Director of Public Prosecutions*.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

MARSHALL AND ANOTHER v. BLACKPOOL CORPORATION

[HOUSE OF LORDS (Lord Atkin, Lord Warrington and Lord Thankerton), May 14, June 25, 1934]

[Reported [1935] A.C. 16; 103 L.J.K.B. 566; 151 L.T. 286; 98 J.P. 376; 50 T.L.R. 483; 78 Sol. Jo. 488; 32 L.G.R. 329]

Highway—Frontager's access to roadway across pavement—Sanction of local authority—Matters to be considered—Blackpool Improvement Act, 1879 (42 & 43 Vict., c. 199), s. 62.

By s. 62 of the Blackpool Improvement Act, 1879: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, and after having obtained the sanction of the corporation may execute the works at his own expense under the supervision and to the satisfaction of the surveyor, and not otherwise, and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds."

Held: that the section was directed to works only, and in considering whether or not to sanction a communication across a footpath the corporation could only take into account questions of the safety and convenience of the public in so far as those matters were affected by the nature of the works; they could not refuse sanction on the ground of public safety and convenience if the communication in itself was safe and sufficient for the proposed user.

Notes. The wording of s. 62 of this local Act is similar to provisions in many local Acts, and to those of s. 18 of the Public Health Acts Amendment Act, 1907. By Sched. III to the Trunk Roads Act, 1936, the functions of local authorities exercisable in relation to these matters are, in the case of trunk roads, made exercisable exclusively by the Minister of Transport.

Referred to: *Edgington v. Swindon Borough Council*, [1938] 4 All E.R. 57.

As to the right of access to the highway of the owner of adjoining land, see 19 HALSBURY'S LAWS (3rd Edn.) 78 et seq., and for cases see 26 DIGEST 332-336. For Public Health Acts Amendment Act, 1907, see 19 HALSBURY'S STATUTES (2nd Edn.) 183, and for Trunk Roads Act, 1936, see 11 *ibid.*, 231.

Appeal from an order of the Court of Appeal ([1933] 2 K.B. 339) upon a Case Stated by the Lancashire Quarter Sessions.

William Marshall and Rhodes William Marshall (the frontagers) applied to the Blackpool Corporation under s. 62 of the Blackpool Improvement Act, 1879, to sanction the making and construction of a communication across a footpath which the frontagers desired to construct as a means of access to and egress from their premises, No. 1, St. Chad's Road, Blackpool, for vehicles. The frontagers were charabanc proprietors who used to park their charabancs when plying for hire in St. Chad's Road, a street opening on to the Blackpool Promenade. They bought No. 1, St. Chad's Road at the corner of the promenade, a house with a garden in front enclosed by a wall with no opening in it for the exit of vehicles. Outside the wall ran a paved and kerbed footpath constructed under s. 149 of the Public Health Act, 1875, the property of the Blackpool Corporation. The frontagers proposed to use the garden as a standing place for their charabancs, and so required an opening in the wall and an approach over the footpath, which would need to be reconstructed. The corporation refused to sanction the proposed works, and the frontagers appealed, under s. 111 of the Blackpool Improvement Act, 1879, to quarter sessions, who allowed the appeal, but stated a Case for the opinion of the High Court. From the Case Stated it appeared that the corporation, in exercising

their discretion, had taken into account not only those matters specifically mentioned in s. 62, such as the place where the communication would cut the footpath, the provision made for kerbing and for a paved crossing, and the dimensions and gradients of the proposed works, but also (i) matters in regard to the safety of the public and the convenience of pedestrians and of vehicular traffic; and (ii) matters in connection with a proposed town-planning scheme, whereby that portion of the borough where was situate the frontagers' premises was "zoned" for residential purposes only.

The Court of Appeal (SCRUTTON and SLESSER, L.JJ.; EVE, J., dissenting) held, reversing the decision of the Divisional Court, that the corporation, in considering an application under s. 62, were entitled to consider the safety of the public and the convenience of pedestrians and of vehicular traffic.

The frontagers appealed.

Wilfrid Greene, K.C., T. Eastham, K.C., and T. E. Hinchliffe for the appellants.
R. M. Montgomery, K.C., and Keith Groves for the corporation.

The House took time for consideration.

June 25. **LORD ATKIN.**—My Lords, the question in this case arises on a Case Stated by the court of quarter sessions for the county of Lancaster on an appeal by the appellants from the refusal of the corporation of Blackpool to sanction works forming a communication from the appellants' premises across a footpath in St. Chad's Road, Blackpool. The appellants are motor-coach proprietors and are the owners of premises No. 1, St. Chad's Road. St. Chad's Road is a road running into the Blackpool Promenade. The premises No. 1 have a narrow frontage to the Promenade and a long frontage to St. Chad's Road. They abut on the road, the footway about 8 ft. wide intervening between the premises and the roadway, which is about 20 ft. wide. As the appellants wished to have access from their premises to the roadway in St. Chad's Road, and for that purpose their vehicles would have to cross the footpath, they had to comply with the provisions of s. 62 of the Blackpool Improvement Act, 1879. That section is as follows:

"Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, and after having obtained the sanction of the corporation may execute the works at his own expense under the supervision and to the satisfaction of the surveyor, and not otherwise, and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds."

A plan of the proposed communication was duly submitted to the corporation containing the statutory particulars. The corporation refused to sanction the execution of the works. No objection was taken to the works as such, but, as found by quarter sessions, the corporation took into consideration matters in regard to the safety of the public and convenience of pedestrians and vehicular traffic which might use Chad Street and also had regard to certain powers which they hoped to obtain under their proposed town-planning scheme whereby this portion of the borough would be zoned for residential purposes only. The court of quarter sessions, to whom by s. 111 of the Act an appeal lay from the refusal of the corporation, came to the conclusion that the corporation was not entitled to take into consideration the foregoing matters, and subject to a Case Stated allowed the appeal. The Divisional Court, consisting of LORD HEWART, C.J., AVORY, J., and BRANSON, J., affirmed the decision of quarter sessions. The Court of Appeal by a majority (SCRUTTON and SLESSER, L.JJ.; EVE, J., dissenting) allowed the appeal. They agreed that the zoning question could not be considered, but thought that

the first question could, and remitted the matter to the corporation for decision upon that footing.

In order to construe the section it seems desirable to consider what the rights of the appellants would be if no such enactment were in existence. The law appears to me to be as stated by the Lord Chief Justice, who has cited the relevant authorities. With no hope of improving that statement, but as a foundation for my own opinion, I propose to say shortly what I conceive the legal position to be. The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. Apart from any statutory provision there is no obligation upon an adjoining owner to fence his property from the highway, and though in urban districts fencing is usual your Lordships will be familiar with many instances to the contrary, as, for instance, in country towns where it is common to find large open forecourts to country inns and the like where market carts and farm vehicles are left during business hours. Moreover the ordinary traffic on any highway is always liable to be increased by the exercise by an adjoining owner of this right of access. A building estate may be developed, or a theatre, concert hall, cinema, or hotel erected on premises which will necessarily involve incalculable increase of traffic. Subject to special statutory provisions protecting footpaths, the right of access is not affected by the fact that part of the highway is only dedicated as a footway, or is otherwise lawfully appropriated to foot passengers. The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway; and the dangers, if dangers there be, of a pedestrian having his path crossed by vehicles exercising right of access may be increased, and lawfully increased, by the adjoining owner or owners increasing their means of access.

As was pointed out by the Lord Chief Justice, it would be remarkable to find this well-established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect. So far as I can see the section does not even purport to affect the right at all. It is directed to works, and to works only. The place of the communication must be stated, not to enable the corporation to reject the place apart from the nature of the works, but to fix it on the plan and enable the corporation to judge what provision is made for kerbing and for a paved crossing, and to consider the dimensions and gradients of the necessary works. Plainly, the corporation may consider the nature of the proposed user in order to judge how the way should be constructed, both as to surface and kerbing and in relation to the gradient. If the actual works, either by the steepness of the gradient or the depth of the side kerbing, would be likely to affect the safety of pedestrians on the footway or of vehicles on the roadway, there seems to me no reason why they should not take those factors into account. But, in my opinion, they are not entitled to take into account questions of safety and convenience of the public except in so far as affected by the nature of the works. They may not, therefore, take into account the nature and extent of the proposed user of a communication in itself safe and sufficient for that user. That user is, as has been pointed out, controlled by the general highway law.

It follows that however large the existing traffic in St. Chad's Road may be, both of vehicles and pedestrians, the corporation may not restrict the addition of further traffic to it, even for the promotion of the convenience or safety of the public, by using the powers of s. 62 so as to refuse sanction to works which in themselves are safe and adequate. That there is no objection to the works as works is stated in the agreed Case; and I feel no doubt that the order of quarter sessions operates to give the sanction which was withheld by the corporation, a power which the

unrestricted terms of s. 111 undoubtedly confer upon quarter sessions. For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of the King's Bench Division should be restored. The appellants should have the costs here and in the Court of Appeal.

LORD WARRINGTON.—I concur.

LORD THANKERTON.—I agree.

Appeal allowed.

Solicitors: *Johnson, Peacock, Hepworth, & Chowne*, for *James E. Harrison*, Blackpool; *Sharpe, Pritchard & Co.*, for *D. L. Harbottle*, Town Clerk, Blackpool.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

LEE AND OTHERS v. McGRATH

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.JJ.), June 21, 22, 25, July 9, 1934]

[Reported [1934] 2 K.B. 415; 103 L.J.K.B. 660; 151 L.T. 553;
50 T.L.R. 518; 78 Sol. Jo. 586; 32 L.G.R. 380]

Local Government—Audit—Salary of officer—Payment of additional remuneration in respect of past services—Surcharge on members of local authority—Appeal against surcharge—Right of objectors to be heard—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 247 (6), (7), (8).

By the Roads Act, 1920, county councils were required to levy the duties imposed on licences for mechanically propelled vehicles by the Finance Act, 1920, and the Minister of Transport was required to pay to the councils an amount equal to the expenses incurred by them. By a resolution passed by the D. county council in 1925 the county accountant's salary was increased by £100 a year as from Jan. 1, 1925, in respect of the additional duties and responsibilities in connection with the levying and collection of the duties. Sums in excess of the £100 a year having been received from the Minister, on July 29, 1931, the council resolved that £700 out of those moneys should be paid to the accountant in respect of his supervision of the collection of the duties. The district auditor disallowed this sum as being contrary to law and surcharged it on certain members of the council.

Held: when the remuneration of a local government officer had been fixed it was contrary to law, within the meaning of s. 247 (7) of the Public Health Act, 1875, for the authority at some later date to make a payment to that officer by way of further remuneration for past services, and, therefore, it was the duty of the auditor, under the subsection, to disallow the £700.

Where an auditor has disallowed an item of account under s. 247⁷ (7) and surcharged members of the local authority and those members appeal under s. 247 (8) the successful objectors to the account under s. 247 (6) have a right to appear on the appeal and support the disallowance.

Notes. Section 247 of the Act of 1875 was repealed by the Local Government Act, 1933, s. 226 of which reproduces s. 247 (6) of the Act of 1875, s. 228 (1) reproduces s. 247 (7), and s. 229 reproduces s. 247 (8).

As to local government accounts and audit, see 21 HALSBURY'S LAWS (2nd Edn.) 219 et seq., and for cases see 33 DIGEST 19, 39, 89, 113. For Local Government Act, 1933, see 14 HALSBURY'S STATUTES (2nd Edn.) 353.

Cases referred to :

- (1) *Edwards v. Salmon* (1889), 23 Q.B. 531; 58 L.J.Q.B. 571; 54 J.P. 180; 38 W.R. 166, C.A.; 33 Digest 17, 61.
- (2) *Roberts v. Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 41 T.L.R. 436; 69 Sol. Jo. 475; 23 L.G.R. 337, H.L.; 33 Digest 20, 83.
- (3) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 78 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103, D.C.; 30 Digest (Repl.) 229, 735.
- (4) *R. v. Mayor of Ramsgate* (1889), 23 Q.B.D. 66; 58 L.J.Q.B. 352; 61 L.T. 333; 53 J.P. 740; 37 W.R. 781; 5 T.L.R. 434, D.C.; 33 Digest 16, 59.

Appeal from an order of the Divisional Court (LORD HEWART, C.J., AVORY and CHARLES, JJ.), allowing an appeal under s. 2 (1) of the Audit (Local Authorities) Act, 1927, by one Peter Lee and fifty-nine other members of the Durham County Council who asked for an order to quash a disallowance made by the district auditor, and for a declaration that, in making a certain payment of £700 to one Bottomley, the county accountant, in respect of his services in the supervision of the local taxation department, the members of the Durham County Council acted reasonably and in the belief that their action was authorised by law, and for an order that the members be relieved from personal liability in respect of surcharge for that sum.

In a joint affidavit of three members of the Durham County Council on behalf of themselves and other councillors it was stated that from the auditor's certificate it appeared that a payment of £700 to Mr. Bottomley was made in pursuance of a resolution adopted by the county council on July 29, 1931. The facts as stated in the affidavit were these. On Feb. 4, 1925, the council adopted a report of the finance committee to increase the county accountant's salary by £100 per annum, by way of extra remuneration for additional work cast upon him, and his salary was accordingly increased as from Jan. 1, 1925. On account of industrial unrest in the years that followed, the matter of his salary was not again laid before the county council for their consideration until 1931. On July 29, 1931, they adopted a report of the salaries, wages, and hours committee, recommending the county council to pay the county accountant £700 out of the £1,575 received from the Minister of Transport in respect of his services in the supervision of the local taxation department and that in future all moneys paid by the Minister in respect of the services of the accountant be paid to the accountant. That sum, £700, the respondents submitted, was paid in a proper and bona fide exercise of the discretion of the county council given to it by the Municipal Corporations Act, 1882, and the Local Government Act, 1888.

The auditor in his certificate stated, *inter alia*, as a reason for disallowing the sum of £700, that it purported to be remuneration for work done during a number of years before July, 1931, and as such was a retrospective payment, and that such payments were not authorised by statute or otherwise. The Divisional Court held that as, under the Municipal Corporations Act, 1882, the council were to allow to every officer such remuneration as they thought reasonable, and as in the circumstances the payment of £700 was reasonable, the surcharge must be quashed. There must also be a declaration that in relation to the subject-matter of the surcharge the county councillors acted reasonably and in the view that their action was authorised by law. The district auditor appealed.

Croom-Johnson, K.C., *C. Erskine Simes* and *C. E. Scholefield* for the auditor.
Arthur Morley, K.C., and *Denis H. Robson* for the councillors.
E. L. Mallalieu for two ratepayers.

Cur. adv. vult.

July 9. The following judgments were read :

SCRUTTON, L.J.—In auditing the accounts of the Durham County Council for the year ending March 31, 1932, the district auditor disallowed a sum of £700 in

the item "Salaries of county officers," paid to Mr. Harry Bottomley, the county accountant, under a resolution of the council dated July 29, 1931, as being contrary to law and unreasonable on various grounds stated in the certificate; he also surcharged the sum of £700 on various members of the council named in the certificate. They brought the matter before a Divisional Court of the King's Bench Division appealing against the disallowance, and asking for a declaration, among other things, that they be relieved from personal liability in respect of the surcharge. The court (LORD HEWART, C.J., AVORY, J., hesitating but concurring, and CHARLES, J.) allowed the appeal, quashed the disallowance and rather unnecessarily, as it appears to me, granted the declaration asked for. The district auditor now appeals to this court, asking that the original disallowance and surcharge be confirmed.

The facts are as follows. By s. 13 of the Finance Act, 1920, a duty was imposed on licences for mechanically propelled vehicles, and by the Roads Act, 1920, county councils were required to levy these and other duties on carriages and to pay them into the Road Fund established by s. 3 of that Act. Subsection (4) of s. 3 required the Minister of Transport to pay out of the Road Fund to every county council by whom the duties were levied an amount equal to the expenses properly incurred by that council. Before the Roads Act, 1920, was passed the Minister of Transport, in order to be ready to provide the county council with funds to carry out their duties, issued a circular asking for an estimate of the probable expense to be incurred by them. One of the headings in the form to be filled in was (A) Supervising staff. Under this head there was appended the following note:

"The Minister anticipates that, in many cases, it will not be necessary (especially with the larger authorities) to make an apportionment of existing salaries of chief administrative officers upon whom any new or extended duties may devolve in connection with registration and licensing. Where, however, local authorities consider that the increased duties and responsibilities thrown upon such officers require some addition to be made to their salaries, the Minister will be prepared to give the fullest consideration to any representations in this sense. He recognises that in some cases an adjustment of an existing administrative officer's salary may secure more efficient administration than would the appointment of a new officer at a lower salary."

This note, apparently, contemplates three states of things as possible: (i) That with the larger authorities it may not be necessary to increase the salaries of whole-time officers because a new Act throws additional duties on them. The judges do not get increased salaries because new legislation like the Rent Restriction Acts or the Agricultural Holding Acts gives them a great deal of extra work. I think the circular, however, contemplates that the existing salaries, though not increased, may be "apportioned," and a part of them representing the new work may be claimed from the Road Fund. (ii) That it may be necessary to increase the salary of existing officers and claim the increase from the Road Fund. (iii) That it may be necessary to appoint new officers and claim their salaries.

The Durham County Council had in 1920 a county accountant, Mr. Bottomley, a whole-time officer, at a salary of £1,700 a year. They sent in to the Minister of Transport estimates of expenditure quarterly, filling in for the supervising staff £50 a quarter up to April-June, 1922, when they reduced the figure to £37 10s. a quarter, at which it remained until February, 1925, when the council passed the first resolution to be referred to. The change from £50 to £37 10s. is referred to in a letter from Mr. Bottomley to the Minister of Transport, dated Feb. 2, 1922, in these terms:

"With regard to the £50 per quarter for supervision, this was a general credit to the county fund and is for supervision by myself and deputy. This is a figure that I think might be reduced, and I shall be glad of some advice of what is done in some other counties."

Besides the estimates of expenditure, a yearly return of actual expenditure was also made by the county council, and until 1925 this included at first £200 and

then £150 a year for the supervising staff. These amounts were paid by the Minister of Transport to the county council, and by them paid into the county fund. No part of these payments was set aside to a reserve fund or suspense fund or earmarked as due to the county accountant or his deputy. In spite of these estimates and claims for actual expenditure, no increase was made in the salary of the county accountant. The proceedings of the county council so far can only be justified if they are treated as "apportioning" a part of the existing salary to the expenses of supervising the collection of the duties on licences. In the early estimates and accounts of actual expenditure a sum of £40 a quarter was estimated and claimed for "Expenses of audit by county accountant's staff." This disappears in 1921; it is referred to in Mr. Bottomley's letter of Feb. 2, 1922, but no further evidence was given to explain it.

In February, 1925, the matter of Mr. Bottomley's remuneration was brought before the county council. Neither Mr. Bottomley's affidavit nor the affidavit of those representing the councillors surcharged, nor any minutes, represent that it had been mentioned or discussed before. It came before the council because the local taxation licences committee had asked the salaries and finance committees to consider and recommend an increase of the county accountant's salary by £100 per annum as from Jan. 1, 1925, and the salaries committee had reported to the finance committee agreeing this. This appears in document 10 in this way:

"We have considered and approved the following report of the salaries committee" [this is the finance committee's report] "We have considered and agreed to the following resolution passed by the local taxation licences committee, namely, 'That the salaries and finance committees be recommended to increase the county accountant's salary by £100 per annum as and from the 1st inst. The Ministry of Transport has, since the coming into operation of the Roads Act, 1920, paid into the county fund the sum of £600 in respect of the county accountant's supervision of the department, and the county accountant has up to the present received no extra remuneration for the additional work cast upon him.'"

The finance committee also agreed and reported to the council, which approved their report on Feb. 2, 1925. The last part of the report appears to allege the reason for the recommendation. In pursuance of this resolution, Mr. Bottomley was paid a salary of £1,800 a year from Jan. 1, 1925. The council continued to "estimate" and claim from the Minister of Transport as "actual expenditure" £150 a year for supervising staff, but only paid £100 a year extra to Mr. Bottomley. The balance of £50 a year was paid into the county fund, and no suspense or reserve fund or earmarking in favour of Mr. Bottomley was constituted. There is no record in the minutes of any further discussion of the position in committees. Mr. Bottomley's affidavit says in paras. 5 and 6:

"(5) At the time the resolution of Feb. 4, 1925, granting me £100 a year was passed I had conversations with representatives of the party then in power, and from those conversations I understood that the matter of my said salary was not finally disposed of and that I was to be entitled to raise the matter again at a later date. (6) The party then in power was defeated at the polls in March, 1925, and Mr. Peter Lee became chairman of the finance committee. I frequently spoke to him about my said salary, and again I understood that the matter was not finally disposed of, but owing to industrial unrest it was shelved and not taken up again immediately."

Mr. Lee, chairman of the finance committee, says in his affidavit, after mentioning the resolution of 1925:

"The county accountant's salary was, therefore, increased as from Jan. 1, 1925, by £100 per annum, but this was not understood by us, these deponents" [there are two other deponents to the affidavit] "or by the county accountant to be a final settlement of the matter. I, Peter Lee, for myself, say that since I became chairman of the finance committee in the year 1925 the county

accountant has frequently spoken to me about his salary with regard to the said work concerning the taxation of mechanically-propelled motor vehicles. The matter, although open to further consideration, was not dealt with again after the resolution of Feb. 4, 1925, had been passed on account of the industrial unrest in the years that followed. The matter was not laid before the county council for their consideration again until the year 1931, although it had in the meantime been discussed in committee."

There is no minute supporting the latter statement.

The next relevant matter is the resolution of the council on July 29, 1931, relied on as authorising the payment of £700 disallowed by the district auditor. This came before the council on a reference of the finance committee to the salaries committee, who reported to the council as follows:

"We have had under consideration the following matter which was referred to us by the finance committee: (a) The question of the difference between the sums received from the Minister of Transport for the services of the county accountant, and the amount paid to him out of such sums, as it appears to us undesirable that an exception should be made in the case of this officer and that the county council should make a profit out of the arrangement made with the Minister. (b) The out-of-pocket expenses of the county accountant during the last seven years. The total sum received from the Minister of Transport under the arrangement for the supervision and control of the local taxation department by the county accountant, now amounts to £1,575, but of this sum only £600 has been granted to the county accountant. We recommend the county council to pay to the county accountant the sum of £700 out of the moneys received from the Minister of Transport in respect of his services in the supervision of the local taxation department, and that in future all moneys paid by the Minister in respect of the services of the accountant be paid to the accountant."

It will be noticed that the council retained £275 of the amount they had received from the Road Fund and that they did not purport to increase the salary of Mr. Bottomley, nor did they specify in respect of what period, if any, they were making this payment to him. Mr. Bottomley says he was paid the sum of £700 "in respect of my services in the supervision of the said department," without specifying for what period he was paid. Mr. Lee says in his affidavit:

"The said sum was remuneration for work done prior to March 31, 1931, but was paid out of moneys specifically allocated for such remuneration, and as such was a delayed payment and was not retrospective and was a payment of moneys to which he was at all times entitled."

The latter contention was abandoned before us by counsel for those surcharged who, however, stated to us, as I understood him, that it was remuneration either (i) for services in the years 1921 to 1924 inclusive, for which he had been paid nothing, or (ii) that it was made up of £150 a year received from the government before 1925, and £50 a year received from the government since 1925 and not paid to Mr. Bottomley. I think he preferred the former view, having regard to the language of the resolution of 1925.

The Divisional Court appear to have taken the view that the resolution of 1925 was only provisional and left over the final adjustment until a later occasion. The Lord Chief Justice says:

"In my opinion, it is reasonably clear upon the materials which are before the court that this resolution giving him another £100 a year in 1925 was not intended to deal exhaustively with the matter. . . . The final adjustment was left for a future occasion. It is not suggested that the county accountant might have commenced an action to recover the sum of £700 as money had and received to his use. The argument is that in all the circumstances this

payment was reasonable. In our opinion, that argument is sound. . . . Upon a fair view of these affidavits, the decision of 1925 did not conclude the matter."

AVORY, J., concurs with some hesitation, as he thinks there was material on which the auditor might have regarded the payment as made *ex gratia*. He thinks there is just sufficient evidence that after 1925 the question of further remuneration to be paid to the county accountant for extra services rendered was left in abeyance and for future consideration. He says: "I think there is just sufficient evidence."

CHARLES, J., says:

"The evidence is not, perhaps, as satisfactory as it might be, but is quite sufficient to impel us really to come to the conclusion that the resolution of 1925 was not a determinate resolution, but the matter of the alteration of the amount of the salary was left open."

I am not able to take the view of the evidence taken by the Divisional Court. From 1921 to 1925, the council took no step to increase the remuneration of £1,700 a year paid to Mr. Bottomley. When, in 1925, they did consider the matter, they gave him extra remuneration by increasing his salary after Jan. 1, 1925, to £1,800 a year. The records of the council or its committees contain nothing to show that this determination was provisional and that the period from 1921 to 1931 was still open to review. I cannot think that in 1931 it was open to the council to resolve that they had not paid Mr. Bottomley sufficient for a period beginning in 1921 or for a period after Jan. 1, 1925, in respect of which they had already passed a resolution fixing his remuneration, and to resolve that they would then pay him some further sum making his remuneration in the year 1931 over £2,500. It is not as if they had waited until a period when the work was concluded to fix the remuneration, as in *Edwards v. Salmon* (1). I cannot think that the matters mentioned by Mr. Bottomley, unrecorded conversations with "representatives of the parties in power," understood by him to mean that the matter of his remuneration for past services was still open, or the matters mentioned by Mr. Lee that he did not understand that the matter of past remuneration was finally settled, can control or interpret the clear language of the resolution. It appears to me that to allow representative bodies, years after the remuneration of their officers has been clearly fixed, to make further payments in respect of past years because they thought that their predecessors had not paid enough, would be most prejudicial to the working of local government and unreasonable in the highest degree.

By s. 247 (7) of the Public Health Act, 1875, the duty of the auditor is to disallow every item of account "contrary to law." The decision in *Roberts v. Hopwood* (2) shows that a payment unreasonable in amount, or based upon circumstances which it is unreasonable to consider, is "contrary to law," and may be disallowed. I do not think there was any difference in principle between my judgment and that of the noble Lords. I still remain of the opinion as to principles which I expressed in that case. I, like LORD BUCKMASTER, endeavoured to follow the principle laid down by LORD RUSSELL OF KILLOWEN, C.J., in *Kruse v. Johnson* (3)—that the courts should be very reluctant to interfere with the discretion conferred by statute on a representative body. The noble Lords thought I had misjudged the point at which the court should so interfere. I am of opinion, in the present case, that the action of the Durham County Council in voting remuneration in 1931 for work already provided for by resolution covering the period from 1921 to 1931 is unreasonable and contrary to law. I am, therefore, of opinion that the decision of the Divisional Court quashing the disallowance by the district auditor of the payment of £700 to Mr. Bottomley should be reversed and the disallowance reinstated.

On the question of surcharge the matter is difficult. If surcharges are to be effective as deterrents for the future, they should be enforced, but, if my memory serves me, the Minister remitted the surcharges which the House of Lords approved in *Roberts v. Hopwood* (2). The Audit (Local Authorities) Act, 1927, by s. 2 (2) allows a person surcharged to appeal to the court for a declaration that in the

matter of the surcharge he acted (i) reasonably, or (ii) in the belief that his action was authorised by law, and the court may make such an order, if satisfied there is proper ground for doing so, and may relieve such person wholly or partly from personal liability in respect of the surcharge. The district auditor does not deny that the persons surcharged were acting in the belief that their action was authorised by law, but says very reasonably that unless they are surcharged, the only effect will be to throw on the ratepayers an unreasonable payment contrary to law. I think there may be another effect of the decision to establish that this kind of retrospective *ex gratia* payment is contrary to law and possibly to make for better government in the future. Having regard to the occupations of the persons surcharged, as shown in the affidavit, I should be reluctant, if they have honest belief in the legality of the action they sanctioned, to require too high a standard of knowledge of law from them. I should, therefore, not interfere with the declaration of the Divisional Court on the point, which now becomes necessary, except by deleting the words "reasonably and." I should allow this appeal to the extent of restoring the auditor's disallowance, and order the Durham County Council to pay the taxed cost here and below of the district auditor. The members surcharged should not have any costs of this appeal.

A curious but incidental question arises as to the position of certain independent ratepayers of Durham county. As authorised by s. 247 (6) of the Public Health Act, 1875, they appeared before the district auditor to object to that item in the accounts. The auditor allowed their objection. The persons surcharged appealed to the court against the disallowance, and it was objected that the ratepayers had no right to appear to support the disallowance they had procured. I do not find any express words giving them that right, but I am of opinion that being expressly allowed to appear to obtain a disallowance, it must be implied that they may appear on the appeal to protect the disallowance they have obtained. They neither receive nor pay costs.

GREER, L.J.—On July 29, 1931, the Durham County Council recommended a payment to the county accountant of the sum of £700 out of moneys received from the Ministry of Transport in respect of his services in the supervision of the local taxation department, and thereafter paid the said sum to the county accountant. The said payment appeared in the general county revenue account for the year ending March 31, 1932, and the district auditor, in pursuance of his statutory powers, and, as he conceived, in pursuance of his duty as auditor, disallowed the said sum, holding that it was an illegal payment, and surcharged the same on the members of the council who had supported the resolution approving the payment. The members so surcharged appealed to the Divisional Court, and on Jan. 25 last the Divisional Court set aside the surcharge.

The various statutes material for consideration, and the circumstances leading up to the said payment, are as follows. Section 247 of the Public Health Act, 1875, which now applies to county councils, provides for the audit of the accounts of the council for every year, and by sub-s. (7) it is provided that

"any auditor acting in pursuance of this section shall disallow every item of account contrary to law and surcharge the same on the person making or authorising the making of the illegal payment,"

and it was in acting in pursuance of, and exercising his authority under this section, that the auditor disallowed the payment of the £700, and surcharged the amount on the members of the council above mentioned. By s. 20 of the Municipal Corporations Act, 1882, which, by the Local Government Act, 1888, applies to county councils, it is provided that the council shall require every officer appointed by them to give such security as they think proper for the due execution of his office, and shall allow him such remuneration as they think reasonable.

Immediately before the Roads Act, 1920, was passed, a Mr. Bottomley was the county accountant of the Durham County Council, and was in receipt of a salary of £1,700 per annum. The Act known as the Roads Act, 1920, received the Royal

assent on Dec. 23, 1920. This Act imposed on county councils the duty of levying and collecting the duties on licences imposed by s. 13 of the Finance Act, 1920, as amended by the Roads Act, 1920, and provided for the payment of the sums so collected into a fund called the "Road Fund," and for certain payments to county councils of certain sums out of the Road Fund. The section relevant to the consideration of the question involved in the present appeal is s. 3 (4). This section provides as follows:

"There shall be paid out of the Road Fund in every year (a) to every county council by whom the said duties are levied an amount equal to the expenses properly incurred by that council in accordance with directions issued by the Minister (of Transport) with the approval of the Treasury in or in connection with the levying of the duties, the registration of vehicles, and the issuing of licences to drivers of vehicles, and such directions may provide for advances being made to county councils from time to time as may be necessary during the year on account of any expenses so incurred by them as aforesaid."

In a circular letter dated Nov. 22, 1920, the Minister of Transport sent to various county councils, including the Durham County Council, the form which he recommended for use for the purpose of stating the approximate estimate of the expenses to be incurred in respect of licences, and by a note to the form he said:

"The Minister anticipates that, in many cases, it will not be necessary (especially with the larger authorities) to make an apportionment of existing salaries of chief administrative officers upon whom any new or extended duties may devolve in connection with registration and licensing. Where, however, local authorities consider that the increased duties and responsibilities thrown upon such officers require some addition to be made to their salaries, the Minister will be prepared to give the fullest consideration to any representations in this sense."

After the Act was passed the county council sent in documents described as quarterly estimates of expenditure actually incurred during the years 1921 to 1933. The first one supplied was an estimate of expenditure actually incurred and estimated to be incurred up to March 31, 1921. It was an estimate for one quarter, and it estimated the expenditure that would be incurred until March 31 in respect of supervisory staff at the sum of £50. The same sum was included in the estimate of expenditure actually incurred during every quarter down to March 31, 1922. This is at the rate of £200 per annum. After that date the quarterly estimates in respect of the supervisory staff appear at the reduced figure of £37 10s., that is, at the rate of £150 per annum. The sums appearing in these estimates were from time to time paid by the Minister out of the Road Fund to the county council, and were placed by them to the credit of the county fund, but in respect of Mr. Bottomley's salary the county council did not incur any additional expense by reason of the additional work which by reason of the Road Act he was required to do when supervising the county council accounts. Until the year 1925 it must be taken that the council regarded his existing salary as a reasonable remuneration for all the work he was doing, including such additional work, and when the matter came up for consideration in the year 1925, it is beyond question that the council did not owe to their accountant any sum by way of additions to his salary. Whether they were or were not entitled to regard the moneys they had so received from the Minister of Transport as an apportioned part of the salary that they were paying the accountant, or whether they had improperly claimed the amount as an additional expense incurred under the Act when they had not incurred any such additional expense, is, in my judgment, irrelevant to the consideration of the questions involved in this appeal.

On Feb. 4, 1925, there was included in the business of the county council the consideration of a report of the finance committee which contained the following recommendation:

"We have considered and agreed to the following resolution passed by the local taxation licences committee, namely, "That the salaries and finance committee be recommended to increase the county accountant's salary by £100 per annum as and from the first instant. The Ministry of Transport has since the coming into operation of the Roads Act, 1920, paid into the county fund the sum of £600 in respect of the county accountant's supervision of the department, and the county accountant has up to the present received no extra remuneration for the additional work cast upon him.' "

The county council approved that report, and thereby, on consideration of the matters stated by the finance committee, increased the county accountant's salary by £100 per annum as and from Jan. 1, 1925.

Even if they could have done so, they did not purport to grant him *ex post facto* any additional salary for the years prior to the year 1925. There was no amendment or addition to the resolution passed at the meeting of the county council. The resolution stands by itself as a resolution to increase for the future the salary of the accountant by £100 per annum. There was no decision by the council that the consideration of paying him something additional in respect of the past years was postponed for further consideration, and the fact that some members of the council had discussed such an intention is entirely irrelevant to the questions we have to consider. The council could only act by a resolution duly proposed and passed, and no discussion between the members of the council, either in council or otherwise, can properly be treated as a decision of the council to adjourn the consideration of further remuneration in respect of the past years to some later date. The salary, as increased by the resolution of Feb. 4, 1925, was paid each year down to July 29, 1931, and there is no record of any further consideration of the accountant's remuneration until July 29, 1931, over six years later, when the council considered and approved the recommendation of the salaries, wages and hours committee, which is in these terms :

"We recommend the county council to pay to the county accountant the sum of £700 out of the moneys received from the Minister of Transport in respect of his services in the supervision of the local taxation department, and that in future all moneys paid by the Minister in respect of the services of the accountant be paid to the accountant."

It will be observed from the form of this recommendation that the sum of £700 is to be paid in respect of the accountant's services in the supervision of the local taxation department, that is to say, for his services in the past, including the services in respect of which they had, in 1925, awarded him the additional salary of £100 per annum, and, I suppose, in respect of his services before that date also, and they increased his salary for the future to the amount of all moneys paid by the Minister in respect of the services of the accountant. It seems to me quite clear that the payment of the £700 was made without consideration in respect of past services for which they had already paid him the amount thought reasonable under s. 20 of the Municipal Corporations Act, 1882. They were entitled in July, 1931, to say with regard to the future: "We think it reasonable that he should have as part of his reasonable remuneration all moneys paid by the Minister in respect of the services of the accountant," but, in my judgment, the payment of £700 in respect of services which the accountant had carried out in return for his current salary before 1925, and in respect of his services after 1925, which the council had expressly measured by an addition of £100 a year, was contrary to law within the meaning of the Public Health Act, 1875, and the auditor was right in disallowing the item and surcharging the members of the council who were responsible for the resolution under which the amount was paid.

I think, however, that the members of the county council who voted for the resolution acted *bona fide* in the belief that inasmuch as the moneys had been received from the Minister on the representations contained in the quarterly estimates, it was their duty to hand over the moneys so received to the accountant.

I think they were mistaken, and the surcharge was right, but that they have made out a good case for relief. I agree that the order of this court should be as stated in my Lord's judgment.

MAUGHAM, L.J.—I am of the same opinion. The facts have been fully stated in the judgments just delivered, and but for the circumstances that we find ourselves bound to differ from the judgments in the court below, I should not have thought it necessary to add any remarks of my own. So far as I understand the judgments of the Divisional Court, we are in effect differing from them only because we take a different view of the resolution passed by the Durham County Council in the year 1925, a resolution which was regarded in that court as being provisional, and as leaving over the question whether some further payment should be made to the county accountant on a future occasion. I am unable to take that view of the resolution. I think insufficient attention has been given to the circumstance that the resolution of the council is in the form of an adoption of the report of the finance committee which reads in the following terms :

"We have considered and agree to the following resolution passed by the local taxation licences committee, namely, that the salaries and finance committees be recommended to increase the county accountant's salary by £100 per annum as and from the 1st inst.,"

that was from Jan. 1, 1925. I pause there to say that what follows in the report of the finance committee, is I think, merely a reason for the recommendation. The report continues as follows :

"The Ministry of Transport has since the coming into operation of the Roads Act, 1920, paid into the county fund the sum of £600 in respect of the county accountant's supervision of the department and the county accountant has up to the present received no extra remuneration for the additional work cast upon him."

I cannot read this report of the finance committee as a suggestion to the county council that the salary of the county accountant was being increased by £100 per annum only as a temporary measure, and that their intention was that there should be a further increase of his salary ex post facto by some future action of the council. No reason whatever has been given for any such proposal being made by the finance committee, who might well have recommended an increase of the county accountant's salary as and from Jan 1, by some sum large enough to absorb the amount paid into the county fund by the Ministry of Transport in respect of his supervision of the department. I am driven to the conclusion that when the county council adopted the report in question they approved the definite recommendation to increase the county accountant's salary by £100 per annum, and they adopted also the reason given by the finance committee, founded, as it was, on a previous report of the local taxation licensing committee. Such a body as a county council necessarily acts by the resolution of a majority of the members present at a particular time, and, in my view, evidence is not admissible to show that some of the persons present and voting took a particular view of the resolution which they concurred in passing. I can well understand that opinions may differ on such a point as that of the meaning and effect of such a resolution as I am dealing with, but I find myself unable for the reasons given to agree with the view taken in the Divisional Court.

The position of a local authority like the Durham County Council in regard to the payment of salaries and wages has been finally determined by the House of Lords in *Roberts v. Hopwood* (2). The discretion conferred upon such a body must be exercised reasonably. The payments made are to be reviewed by the auditor for the purpose of ensuring, among other things, wise and prudent administration. It is, I think, clear that the local authority cannot out of public moneys give gratuities to their officers or servants over and above their fixed salaries and wages. That, I think, is not in dispute. Further, I am of opinion that it is not

within the powers of members of a local authority administering public funds to give to an officer or servant by formal resolution a fixed salary, and at the same time to reserve, not merely to themselves in the current year but to a council meeting at some future date, with, it may be, a very different composition, a power to give a larger wage or salary to such an officer or servant so that the resolution shall have a retrospective application. It seems to me that a later resolution of that kind can be nothing other than one giving a gratuity to the officer or servant in question. Different considerations might well apply to a case where the officer or servant was asked to perform extra services in respect of a specified job or undertaking, on the understanding that as soon as the work was complete the authority would determine the amount of his special remuneration. *R. v. Mayor of Ramsgate* (4) and *Edwards v. Salmon* (1) are both cases of that character, and they differ widely from the circumstances of the present case.

I have carefully considered the question whether the persons surcharged ought to be relieved wholly or partly from personal liability in respect of the surcharge, by virtue of the provisions of s. 2 (2) of the Audit (Local Authorities) Act, 1927. It has to be proved that the person surcharged acted reasonably or in the belief that his action was authorised by law, and the court has further to be satisfied that he "ought fairly to be excused." This subsection in effect follows the same principle as the provisions in relation to trustees (see s. 61 of the Trustee Act, 1925, reproducing the Judicial Trustees Act, 1896, s. 3; and compare the Companies Act, 1929, s. 372). I have come to the conclusion that upon the evidence put before us in this case we must hold that the persons surcharged acted in the belief that their actions were authorised by law, and having regard to all the circumstances of the case we ought in our discretion to decide that they ought fairly to be excused, with, however, the consequences as to costs mentioned by my brother SCRUTTON. With regard to the question of the independent ratepayers who desired to have a right to appear for the purpose of supporting the surcharge I do not think it necessary to add anything to what SCRUTTON, L.J., has said.

Appeal allowed in part.

Solicitors: *Park, Nelson & Co.*; *Sharpe, Pritchard & Co.*, for Harold Jevons, Durham; *Doyle, Devonshire & Co.*, for Molineux, McKeag, & Cooper, Newcastle-on-Tyne.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re **BIRKENHEAD (CAMBRIDGE PLACE) CLEARANCE ORDER, 1934. Ex Parte FROST AND OTHERS**

KING'S BENCH DIVISION (Swift, J.), December 20, 21, 1934]

[Reported [1935] 1 K.B. 286; 104 L.J.K.B. 218; 152 L.T. 330;
99 J.P. 87; 51 T.L.R. 171; 83 L.G.R. 20]

Housing—Clearance order—Validity—Ex parte advice given by Ministry to local authority before order made—Alteration, without further resolution, of scheme by exclusion of buildings originally included—Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 1 (1).

Although the Minister of Health is acting judicially when determining whether to confirm a clearance order made under the Housing Act, 1930, after a local inquiry has taken place, he is acting ministerially until an objection is made which renders a local inquiry necessary, and is, therefore, entitled at that stage to advise a local authority as to the manner in which the scheme is to be carried out, without the knowledge of, and in the absence of, the persons who subsequently object to the order.

When a local authority, acting in pursuance of s. 1 of the Act, has passed a resolution declaring an area to be a clearance area it has power, without any further resolution, to alter the area so defined by excluding buildings originally included therein, and the Minister of Health has jurisdiction to confirm a clearance order dealing with the area as so altered.

Notes. Section 1 (1) of the Housing Act, 1930, was repealed by the Housing Act, 1936, which in turn was repealed by the Housing Act, 1957, s. 42 (1) of which reproduces the provisions of s. 1 (1) of the 1930 Act. The Minister now concerned is the Minister of Housing and Local Government.

Referred to: *Offer v. Minister of Health*, [1935] All E.R.Rep. 148.

As to clearance areas, see 26 HALSBURY'S LAWS (2nd Edn.) 533 et seq., and for cases see DIGEST SUPPS., tit. Public Health, case No. 502g et seq. For Housing Act, 1936, see 11 HALSBURY'S STATUTES (2nd Edn.) 444.

Cases referred to:

- (1) *Errington v. Minister of Health*, ante, p. 154, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; 51 T.L.R. 44; 78 Sol. Jo. 754; 32 L.G.R. 481, C.A.; Digest Supp.
- (2) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 80 T.L.R. 672; 12 L.G.R. 1109, H.L.; 22 Digest (Repl.) 298, 2986.

Application under s. 11 (3) of the Housing Act, 1930.

Birkenhead Corporation, acting pursuant to s. 1 of the Act, caused an area within their district, known as Cambridge Place, to be defined on a map, and passed a resolution declaring that area to be a clearance area. The area included certain houses which were the property of the corporation, and the town clerk asked for and obtained the advice of officials of the Ministry of Health whether those houses were properly included in the area. Acting on that advice, the corporation removed those houses from the map and excluded them from the clearance area. Subsequently, a public local inquiry was held, as provided for in Sched. I, cl. 4 of the Act. At the inquiry the applicants, who were owners of part of the property to be demolished, objected to the inquiry being held, on the ground that the order which it was proposed to confirm dealt with a different area from that originally marked on the map, in that it excluded the corporation's own houses. The objection was overruled, and the inquiry proceeded, and the Minister, after considering the report of the holder of the inquiry, confirmed the order. The applicants thereupon made this application under s. 11 (3) of the Act.

They contended (i) that the Minister had confirmed an order other than that originally put forward, and, therefore, that he had acted outside the powers of the

Act, or, alternatively, that there had been a failure to comply with a requirement of the Act whereby they had been prejudiced, and (ii) in reliance on *Errington v. Minister of Health* (1), ante, p. 154, that he had departed from his judicial capacity by advising one party without the knowledge of, and in the absence of, the other parties. They therefore asked that the order should be quashed.

The arguments of counsel, and the relevant sections of the Housing Act, 1930, are set out in his Lordship's judgment.

F. E. Pritchard for the applicants.

The Solicitor-General (Sir Donald Somervell, K.C.) and *W. Bowstead* for the respondent.

SWIFT, J.—By s. 1 (1) of the Housing Act, 1930, it is provided :

"Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained: Provided that, before passing any such resolution, the authority shall satisfy themselves—(a) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and (b) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect."

Subsection (2) provides that the

"local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area."

Subsection (3) provides :

"So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following"

two ways. The duty of the local authority, as laid down by the Act, appears to me to be that on an official representation or other information in their possession the authority are to define the area on a map. They are then to pass a resolution that the area so defined is a clearance area, to transmit a copy of that resolution to the Minister of Health, and to proceed to secure the clearance of the area. They are to advertise what they have done, and, finally, the clearance order comes into effect if and when it is confirmed with or without modifications by the Minister of Health.

Acting under the provisions of that Act, the Birkenhead Corporation resolved, on Sept. 19, 1933, on a resolution of the Health Committee, which was confirmed by the council on Oct. 4, 1933, to obtain the confirmation of an order by the

Minister for the clearance of a portion of the buildings in their jurisdiction, known as Cambridge Place. On Dec. 5, that resolution having then been passed, the town clerk of Birkenhead consulted some of the officials of the Ministry as to the form which the order should take, and on Dec. 9 he wrote a letter to Mr. E. C. H. Salmon, who is one of the principal officers of the Ministry of Health, saying :

"Referring to our conversation in London on Tuesday last, the necessary particulars for the schedule to the proposed clearance order have now been obtained, but before formally submitting the order (and resolutions) to the Ministry I should be very glad if you would be good enough to peruse the draft order which I send herewith and let me have your observations. You will observe that whilst the areas are situate in different parts of the borough it is proposed to deal with them by one order, and I am not quite clear whether this is likely to meet the Ministry's requirements. It will, I am sure, be appreciated that if there are to be twenty-six separate orders, the advertising cost will be no small amount. Assuming that one comprehensive order will be acceptable, I propose to have each area map numbered to correspond with the schedule similar to the specimen map forwarded herewith, which perhaps you will be good enough to return with the draft order. I also enclose a key map showing the geographical positions of the various areas. I hope you will not mind my troubling you."

In answer to that letter of Dec. 9, Mr. H. H. George wrote, on behalf of the Ministry of Health, on Dec. 23, this letter :

"Dear Mr. Tame, I regret that your letter of the 9th inst. addressed to Mr. Salmon was mislaid so that the reply has been delayed. I am afraid that we cannot agree that an omnibus order can be made. It will be necessary to prepare a separate order and map for each of the twenty-six areas, but it would not be necessary in advertising the orders to publish verbatim copies of each order. A summary would be quite sufficient. In connection with the draft order enclosed with your letter the following points need consideration— (a) You have omitted from the preamble reference to 'other buildings' although the schedule refers to a lock-up shop, a workplace, &c. The reference should go in if you wish to include them in any of the orders. (b) Separate blocks of w.c.'s or other buildings, if not linked up with other property in the area, should be separately referenced and numbered. (c) If the tenancy of any property is less than monthly there is no need to mention the tenant in the schedule to the order. (d)" [and upon this considerable stress has been laid in argument in the case] "You will remember that property belonging to the local authority can only be included in the clearance area if it was acquired for the purposes mentioned in s. 4 of the Act of 1930."

The plan of the area which had been the subject-matter of the resolution passed by the council on Oct. 4 showed included in the area houses Nos. 8 to 22 in Cambridge Place. Those houses were the property of the corporation, and, having regard to para. (d) in the letter of Dec. 23, those who were responsible for the conduct of this scheme decided to omit those houses from the scheme, and the matter proceeded, from Dec. 23 onwards, without any further resolution of the council, on the basis that those houses were left out of the area.

Under the Act, opportunity is given to anybody interested in the properties which are to be affected by a clearance order, to make objection to the order being made, and by Sched. I, cl. 4, it is provided :

"If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification; but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn, and the report of the person who held the inquiry, and may then confirm the order, either with or without modification."

The applicants in this case made objection to the making of and the confirmation of the order which was sought by the Birkenhead Corporation, and, accordingly, a public local inquiry was ordered to be held. That inquiry took place on May 29, 1934, and Mr. Edward Lloyd, a solicitor of Liverpool, appeared representing the present applicants, who were the owners of dwelling-houses and premises which were marked upon the map referred to in the schedule to the clearance order. Mr. Lloyd took objection at the inquiry to the order being made, among other things, upon the ground that the plan which was before the gentleman holding the inquiry was not the same plan which had been defined as a clearance area by the resolution of the council on Oct. 4, the difference being that the houses which belonged to the corporation and were included in the demolition scheme of Oct. 4, upon the new plan were excluded from the scheme. The argument which he put forward before the inspector was that this was a new scheme which there was no resolution of the council to support, and that therefore the whole matter failed ab initio. The inquiry, nevertheless, went on, the Minister confirmed the order, and the applicants come before this court under s. 11 (3) of the Housing Act, 1930, by way of appeal.

It must be remembered that the right of a person who is aggrieved by the making of a clearance order to appeal to this court is very strictly limited, and is clearly defined by s. 11 (3) of the Act, which commences: "If any person aggrieved by an order desires to question its validity." No doubt, a person who owns property in a clearance area is aggrieved by the making of the order, because his property is demolished without any compensation, or with very inadequate compensation, for the benefit of the whole of the community; individuals are compelled to suffer and they have no right, so far as I know, of appealing to anybody about the grievance that they feel, except that under s. 11 (3) they may come to this court to question the validity of the order, not the justice of the order, not the hardship to them, but the validity of the order, and they can only come to question its validity on the ground that it is not within the powers of the Act, or that some requirement of the Act has not been complied with. They must satisfy the court either that the order which was made was not within the powers of the Act, or that some requirement of the Act has not been complied with, and upon one or other or both of those two grounds they may make an application within six weeks after the publication of the notice of confirmation. When they have made such an application as has been made in this case, the court may interfere, but again, the powers of the court are strictly limited by the terms of the Act. First of all,

"(i) The court may by interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings"

—we are not concerned with that clause in this case—and,

"(ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant."

The court, therefore, has to be satisfied, before it can give any relief, that the order is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with. There is a marked distinction drawn between things done which were not within the powers conferred by the Act and the failure to comply with the requirements of the Act. It seems to me to be quite clear that a failure to comply with some one or more requirements of the Act does not prevent what has been done being within the powers conferred by the Act.

In this particular case, one of the complaints, for there were three, was that this order was not within the powers conferred by the Act, because there was no resolution authorising the application for a clearance order for the particular area in respect of which the order was made, because it was said the resolution referred to

the whole of the houses in Cambridge Place, whereas the area was changed, after the resolution had been passed, by the elimination of Nos. 8 to 22, which were the property of the corporation. It was argued by counsel for the applicants that what came finally before the Minister for his confirmation was a different area from that which the resolution of Oct. 4 had started upon its way, and that, in fact, there was no resolution which could be the support, the foundation, or, as he called it, the root, of the order which the Minister purported to confirm. I do not think that that contention is right. I think that it is quite competent, after a resolution has been passed defining an area, for the council themselves to make modifications in it. It is certainly competent for the Minister himself to make modifications right up to the last moment. It does not seem to me that the omission of these houses was the propounding of a new scheme which required a fresh resolution, and it certainly was nothing, in my view, which took the matter out of the powers of the Act. The Act conferred the powers upon the corporation to make this application for a clearance order, and conferred upon the Minister the power to make it in the circumstances in which it was brought before him, and if there was a lack of a resolution, as counsel contended, and if there was no resolution covering the new plan, it seems to me it was not a matter which took it outside the powers of the Act, but that it was a matter in which a requirement of this Act had not been complied with. I need not consider, in this case, what would be the position if a resolution were never passed at all; some day I may have to, and then other considerations may arise. But I am satisfied that a mere alteration in the plan, after the resolution has been passed, so as to take out of the demolition area certain property which it is thought ought never to have been included in it, does not amount to an act which takes the matter out of the powers of the Act; but that, putting it at its highest and most strongly against the local authority, it is merely the non-compliance with a requirement of the Act. If that view be right, then the applicants have got to satisfy the court that the interests of the applicants have been substantially prejudiced. In this case I fail to see any evidence in fact of such prejudice, and, indeed, it was not contended before me that they had been prejudiced. They knew, before the inquiry came on, that these houses were the property of the corporation, and they knew, when the inquiry came on, that the corporation intended to demolish this property, along with or soon after the rest of the houses in the area. I cannot see that it made the slightest difference to them whether the corporation's property was included in this area or whether it was not, and their counsel never suggested to me any ground whatever for supposing that his clients were prejudiced by a non-fulfilment of some requirement of the Act. I think, therefore, upon his first point, which was that there was no resolution upon which this order could be based, he fails. He says that after the transmission to the Minister of a copy of the resolution of Oct. 4, the sequence was broken and a new area and a new plan was started without any resolution to support them. I do not think that that is right, and I am against him on his first point.

The next contention which was made on behalf of the applicants was that the Minister improperly intervened in this case by having the interview of Dec. 5, 1933, and by writing the letter of Dec. 23, 1933. It was held by the Court of Appeal in *Errington v. Minister of Health* (1) that for certain purposes under this Act the Minister was in a quasi-judicial position, and that all the obligations and duties which rest upon a person occupying such a position, rest upon him. By that decision I am, of course, bound, and I have not the slightest desire to question it here. I loyally follow it. One never follows so loyally as when one follows blindly, and I may say that, while I accept that decision, I do not understand it. How the Minister himself can be in a quasi-judicial position in the administration of or the carrying into effect of the powers conferred by this Act, I do not understand. It seems to me that the whole scheme of the Act is against such a contention. The Minister may, if he thinks that the local authority is not doing the work of clearing areas which ought to be cleared, sufficiently rapidly or effectively, take the whole matter into his own hands and do it himself. Would he then be

acting judicially? He may make, if there is no objection, an order, and not only may he make an order in the terms of the resolution of the local authority, but he may modify or vary its terms. It seems to me clear that throughout the Act he is acting administratively and not judicially.

Reliance was placed upon *Local Government Board v. Arlidge* (2), but that case seems to me to be very different from this. In that case the facts were that by s. 39 (1) of the Housing, Town Planning, &c., Act, 1909, on any appeal under s. 17 of that Act to the Local Government Board, the procedure should be such

"as the [Local Government Board] may by rules determine. . . . Provided that . . . (b) the rules shall provide that the Local Government Board shall not dismiss any appeal without having first held a public local inquiry."

That put upon the Board itself the duty of making the inquiry, and it was held in that case that in holding that inquiry themselves, they were in a quasi-judicial position and were bound by the ordinary rules of natural justice. No such obligation is put upon the Minister under the Housing Act, 1930. He is not enjoined to hold a public inquiry; on the contrary, the words of cl. 4 of Sched. I seem to me clearly to indicate that he does not cease to be an administrator and to be acting under the powers of the Act as an administrator. Clause 4 says that if there is an objection

"he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry."

It seems to me that that language excludes the notion of the Minister himself holding the inquiry, or of him acting as a judicial officer in any of the functions in which he has to act under this Act. In order that he may perform the duties under the Act and administer the Act properly, he must, if any objection is made, consider that objection, and he must get a report from somebody other than himself, and he must consider that report. I think it is quite plain that he does not act judicially, but, as I say, I am bound by the decision of the Court of Appeal in *Arlidge's Case* (2), and I adopt, for the purposes of this judgment, the language of GREER, L.J., in the case of *Errington v. Minister of Health* (1) (ante, p. 157):

"But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. In deciding whether the order shall be confirmed in spite of the objections which have been raised by the owners, it seems to me reasonable that the Minister should be regarded as exercising quasi-judicial functions."

I accept that. When objection is made then for the purpose of determining the objection and deciding whether the order is to be confirmed or not, the Minister is exercising judicial functions; but I also rely upon an earlier passage in the learned Lord Justice's judgment, in which he said (ante, p. 157):

"The powers of the Minister are contained in the Act, and the First Schedule thereto. Under those powers he could, if no objection had been taken on behalf of the persons interested in the property, have made an order confirming the order made by the council. . . . In so far as the Minister deals with the matter in the absence of objection by the owners, it is clear to me, and I think to the other members of the court, that he is acting in a ministerial or administrative capacity, and is entitled to make such inquiries as he thinks necessary to enable him to make up his mind whether it is in the public interest that the order should be made."

Reading those two passages together, and reading them, not as I stated them first, but in their proper order, it seems to me to be clearly recognised by the Court of Appeal that up to the time of objection being made, at any rate, the Minister is acting in an administrative and not in a judicial capacity.

The allegation made against this order is that, before the public inquiry was held,

the town clerk approached the Minister for advice with regard to the matter. I should have thought that that was an essentially sensible thing to do. Local authorities require the assistance of the Minister of Health in determining the form that their applications should take, and they may, I think, discuss with him the substance of what those applications should be, and, in my view, he is perfectly entitled, at any rate up to the moment of objection being made, to give them such advice as seems good to him.

The third ground of appeal was that the advice which the Minister of Health gave was wrong. It is said that he misconstrued s. 4 of the Housing Act, 1930, and that it is inaccurate to say that the property of the corporation cannot be included in a clearance area. Having regard to the view which I have expressed already, it does not seem to me that I need determine whether or not the Minister's view or the applicants' view of s. 4 is the correct one in law. Whether his view of the law was right or whether it was wrong, in my view, he was entitled, at the time when he did it, to express an opinion about the matter, and whether he was right or whether he was wrong in law does not make any difference. If he was right, that would not get over the difficulty which counsel contends exists, of the absence of a resolution, and, if he was wrong, it does not seem to me that that either affects the question of the resolution. In my view, the town clerk was entitled to consult the Minister, and the Minister was entitled to give him advice at that stage. What he could do after objection was made, I do not know. Whoever is sent to hold an inquiry, the inspector is, of course, in a quasi-judicial position. Nobody suggests that the gentleman who is holding the public inquiry could hear one side behind the back of the other, or that he could receive information upon which to base his report which was not made known to the other. To my mind, the Minister and the person who holds the inquiry are not the same person, and whilst the inspector is clearly in a quasi-judicial position, the Minister, at any rate up to the time of objection being made, in my view is not. I, therefore, think that this application fails.

Application dismissed.

Solicitors: J. J. Edwards & Co., for E. Lloyd, Liverpool; Solicitor to Ministry of Health.

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

RICHARDS v. PORT OF MANCHESTER INSURANCE CO., LTD. AND BRAIN

[COURT OF APPEAL (Greer, Maugham and Roche, L.JJ.), November 27, 1934]

[Reported 152 L.T. 413]

Insurance—Motor insurance—Using and permitting vehicle to be used on road without policy of insurance being in force—Hire of vehicle to Jew—Cover note issued by owner excluding Jews from cover—Plaintiff injured by vehicle—Hirer liable, but unable to meet claim—Liability of owner for breach of statutory duty under Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35 (1). Practice—Striking out pleading—Statement of claim—Action for breach of statutory duty—Permitting vehicle to be used on road without policy of insurance being in force—Allegation that no such policy in force—Allegation that person primarily liable unable to satisfy claim—Sufficiency of allegations—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35 (1).

A statement of claim alleged: (i) that the defendant B. owned a motor car which he let out on hire and permitted F. to use; (ii) that the defendant B. was an "agent" of the defendant insurance company; (iii) that the defendant B., as such agent, issued to F. at the hiring in relation to the car a cover note of insurance against third-party risks, purporting to be in compliance with the requirements of Part II of the Road Traffic Act, 1930; (iv) that the cover note was ineffective, as (a) it was expressed not to insure Jews, and (b) F. was a Jew; (v) that the plaintiff was injured through the negligent driving of the car by F.; (vi) that F. was at no time possessed of property or means to satisfy the plaintiff's claim for damages; and (vii) that the defendant B. was thereby guilty of a breach of his statutory duty under s. 35 (1) of the Road Traffic Act, 1930, in that he caused or permitted F. to use a motor vehicle on a road without there being in force in relation to the user of the vehicle by F. a policy of insurance or such a security in respect of third-party rights as complied with Part II of the Road Traffic Act, 1930.

On a preliminary point that the statement of claim disclosed no cause of action the defendant B. contended that the statement of claim (i) was defective in that it contained no allegation that the plaintiff had recovered judgment against F., (ii) alleged facts which showed that a policy complying with the requirements of the Act was in force.

Held: the statement of claim disclosed a cause of action because (i) the cause of action was that the statute had been broken and damage caused to the plaintiff in that the person primarily liable was in such a financial position that he could not satisfy the plaintiff's claim for damages: *Monk v. Warbey* (1), ante, p. 373, followed.

(ii) it alleged that the cover note was ineffective and that no policy of insurance complying with the requirements of the Act was in force.

Notes. As to the responsibility for insurance of any person causing or permitting any other person to use a motor vehicle on a road, see 18 HALSBURY'S LAWS (2nd Edn.) 561, para. 908. As to cover notes given by agents, see *ibid.* 423, para. 605, and for cases on the subject see 29 DIGEST 56, 179-181. For the Road Traffic Act, 1930, s. 35 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 602.

Case referred to:

(1) *Monk v. Warbey*, ante, p. 373; [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; 51 T.L.R. 77; 78 Sol. Jo. 783, C.A.; Digest Supp.

Appeal from a decision of GODDARD, J., on preliminary points of law set down by order of the Court of Appeal for trial, namely: whether a cause of action was shown by the plaintiff's statement of claim against either the defendants the Port of Manchester Insurance Co., Ltd., or the defendant Brain.

The plaintiff's statement of claim, as amended, was as follows :

1. The plaintiff is a machinist in the leather trade; the Port of Manchester Insurance Co., Ltd., are authorised insurers within the definition of s. 36 (9) of the Road Traffic Act, 1930, and William Arthur Brain is now a director of the Arsenal Garage, Ltd., but was at all material times sole proprietor of the Arsenal Garage and "Drive Yourself Hire Co.," Blackstock Road, Finsbury Park, N., and an agent of the said insurers.

2. On or about Aug. 29, 1931, the defendant, William Arthur Brain, hired a private motor car, index No. J.W. 79, to Leonard Franks, to be driven by the said Leonard Franks.

3. At the time of the said hiring the said William Arthur Brain gave to the said Leonard Franks a covering note issued by the Port of Manchester Insurance Co., Ltd., on or about Aug. 29, purporting to be a policy of insurance in force in relation to the user of the said motor car by the said Leonard Franks in respect of third-party risks and to be in compliance with the requirements of Part II of the Road Traffic Act, 1930, whereas in fact the said cover note was and is ineffective by reason of the conditions upon which the said cover note was issued, namely, that inter alios Jews were excluded from the insurance to be thereby effected; on the material date the said Leonard Franks was a Jew, and therefore excluded from the said insurance and therefore there was no policy of insurance in force in relation to the user of the said motor vehicle as aforesaid.

4. At 8.45 p.m. on Aug. 29, 1931, the said Leonard Franks so negligently drove the said motor car that he came into collision with the plaintiff's motor cycle at the junction of Amhurst Road and Stoke Newington Road, N.16, thereby causing the plaintiff loss, expense and personal injury. [There followed particulars of (a) negligence, (b) loss and expense and (c) personal injuries.]

5. The said Leonard Franks is and at all material times was of no financial substance, and is and at all material times was possessed of no property or means whereby to satisfy the claim of the plaintiff for damages to compensate the plaintiff in respect of such loss, expense, and personal injury, as aforesaid.

6. By s. 35 of the Road Traffic Act, 1930, there is imposed upon any person causing or permitting any other person to use a motor vehicle on a road a statutory duty to insure or cause to be insured as the said Act requires such other person so caused or permitted to use such motor vehicle, and by virtue of such insurance to enable the third party to recover the amount of loss, expense and personal injury sustained by such third party in consequence of the negligence of such person so caused or permitted to use such motor vehicle.

7. By reason of the said hiring and the said issue of the said covering note, the said William Arthur Brain and the said Port of Manchester Insurance Co., Ltd., were persons causing or permitting the said Leonard Franks to use the motor vehicle on a road, and the plaintiff is a third party within the contemplation of the said Act.

8. By reason of the said hiring and of the fact that the said covering note was and is ineffective, and there was no policy of insurance in force in relation to the user of the motor vehicle as aforesaid, the said William Arthur Brain and the said Port of Manchester Insurance Co., Ltd., unlawfully caused or permitted the said Leonard Franks to use the said motor car contrary to and in breach of the said statutory duty, whereby the plaintiff has suffered damage in that the said Leonard Franks was not insured as the said Act requires and the plaintiff is unable to recover the amount of loss, expense and personal injury sustained by the plaintiff as aforesaid.

9. Alternatively, by virtue of s. 1 of the Third Parties (Rights Against Insurers) Act, 1930, the plaintiff would and ought to have been entitled to recover from the said Port of Manchester Insurance Co., Ltd., as the insurers of the said Leonard Franks the amount of the loss, expense and personal injury sustained by the plaintiff had the said Leonard Franks been duly insured as the said Road Traffic Act, 1930, requires. By reason of such breach of such statutory duty as aforesaid

by the said William Arthur Brain and the said Port of Manchester Insurance Co., Ltd., in that the said covering note was and is ineffective and there was no policy of insurance in force, the said William Arthur Brain and/or the said Port of Manchester Insurance Co., Ltd., have wrongfully deprived the plaintiff of the said right to recover intended to be conferred upon him by the Third Parties (Rights Against Insurers) Act, 1930, whereby the plaintiff has suffered damage.

And the plaintiff claims damages.

By s. 35 of the Road Traffic Act, 1930 :

(1) "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

GODDARD, J.—[after stating the facts, continued:] The question that I am directed by the order of the Court of Appeal to decide is whether a cause of action is shown in this statement of claim against either the company or Mr. Brain.

Now, taking the company first, I am bound to say that I think the matter is very much clearer against them, so far as they are concerned, than it is so far as Mr. Brain is concerned. It is frequently very difficult to decide these questions by this process of demurrer, because it is often very difficult to find out exactly what are the facts. I was certainly impressed by the fact that whereas Mr. Brain alleges that he was the agent of the company, there is a denial by counsel for the company that Mr. Brain was the agent of the company; but whether Mr. Brain was the agent of the company or not, I have got to decide whether or not this statement of claim discloses a cause of action against the company, the cause of action being, or being alleged to be, that they permitted Franks, in breach of a statutory duty, to drive the car.

I think so far as the company is concerned that it is necessary to clear one's mind of any confusion that may arise by reason of the fact that Brain is not alleged (I do not say more) to have been an agent of the company, but is alleged to have been a person carrying on this business of hiring out cars to other persons to drive. So far as he hires out cars to other persons to drive, there is no pretence of saying that he is doing that as the agent of the Port of Manchester Insurance Company, nor do I think that it is intended by the pleadings to raise such an allegation; indeed, counsel for the company has expressly disclaimed it, and I should so read the statement of claim. What he may do as an agent of the Port of Manchester Insurance Company as an insurance agent and what he may do as regards letting out cars to people to drive in his capacity as a garage proprietor are two wholly different things, and, in letting out the car to Franks, he was not acting in his capacity as an insurance agent either for the Port of Manchester Insurance Company or for anybody else. Therefore, I think that the statement of claim, so far as the Port of Manchester Insurance Company are concerned, merely alleges that the Port of Manchester Insurance Company by their agent issued a policy, underwrote a policy, which, in the facts when they become known to them and as the facts turned out, they were entitled to repudiate.

Now that, to my mind, is a very long way removed from the case of *Monk v. Warbey* (1) and, indeed, has nothing whatever to do with it. I do not think that because a company issues a policy of insurance which they are entitled to repudiate, either because there has been a breach of warranty or because there has been a failure to observe or a breach of a condition, that is a fact which can be said to amount to permitting a person to drive a car; and, keeping entirely to the facts, not as they may ultimately turn out to be in this case, but to the facts which are alleged, what is alleged is that Brain, in his capacity as a garage proprietor, hired out the car to Franks. The Port of Manchester Insurance Company had nothing to do with the hiring out of that car; they did not hire out the car; and Brain did

not hire out the car to Franks as their agent. It is true that he occupied a dual capacity, but it seems to me that it would be carrying the case of *Monk v. Warbey* (1) a very great deal farther than the judgments themselves go if I were to hold that because the company had issued a policy, which, it is alleged, they are entitled to repudiate, if those facts were proved, it would entitle the plaintiff to say: "You (the company) have permitted the use of this car." I think that would be quite wrong.

Take the ordinary case in which a company insure A. for his own car—no question of hire at all. A. runs over and injures B. B. brings an action against A. When A. seeks indemnity from his insurance company, the insurance company say: "We are not going to indemnify you, because you (A.) misrepresented the true facts, or concealed some fact from us when you effected the policy. Therefore, the policy is void." How can it be said, under those circumstances, if those were the facts, that the insurance company had permitted A. to drive a motor car without there being a policy in force? I have never heard it suggested that the matter could be so held, and, if it could, it seems to me that there would be very little point in the insurance company taking the attitude: "We are entitled to repudiate the policy," because the only effect of their taking up that attitude would be that the injured person would then bring an action against them under *Monk v. Warbey* (1), and say, on the authority of *Monk v. Warbey* (1), "You are bound to pay me damages because you have permitted the car to be used without a proper policy being in force." I do not think that, that being the whole of the allegation against the company, I could possibly hold that they had permitted any other person, that is to say, Franks, any person not the person named in the policy, to use a motor car on the road; and, therefore, I think that the statement of claim, as that is the only matter it alleges against the company, does not disclose a cause of action.

I have not overlooked the point that counsel for the company raised in which he says that, on the face of the pleadings, it shows that Brain had no authority to issue the policy that he did issue. I think that is a very formidable point. I do not give any decided opinion upon it, because, when I am deciding this matter, although it is a decision on demurrer, when I am looking at the pleadings, I find a document mentioned and I think I am entitled to look at that document, and, having looked at that document, I should find it exceedingly difficult at the present moment to say exactly what the contract of insurance was and who was the assured—whether it was Brain, or whether by the issue of the cover note, which is alleged, there was a fresh insurance or a new insurance intended of Franks. I do not think it is necessary for me to give a decision upon that point, and I should hesitate to do so without, at this stage of the case, having the facts more clearly proved before me. Of course, in these circumstances, I have to deal with it simply as a bare allegation, but as in my opinion, so far as the company are concerned, it is a mere allegation that the company permitted the use of the car because they repudiated liability on what must be taken to be on the statement of claim an existing policy, thereby showing that the policy was ineffective, I do not think that that entitles me to hold, I should hesitate to hold, and I should be sorry to have to hold, that that was a permitted use by the insurance company of the person who hired this car to drive without a policy being in force.

Therefore, I hold that, as against the defendant company, the Port of Manchester Insurance Co., Ltd., there is no cause of action disclosed on the statement of claim.

With regard to Mr. Brain, the matter is far more difficult, and many things may arise in the course of the trial. I am not saying that facts may be proved which will establish a liability. The plaintiff may fail to establish a liability; I do not know; but I think that as I am dealing with this merely as a preliminary point in deciding whether there is a cause of action disclosed, the less I say about it the better. But I am not prepared to hold that, as against Mr. Brain, there is no cause of action disclosed on the pleadings. I regard the statement of claim against Mr. Brain as alleging this. It alleges that Franks hired a car from him; that, therefore, it was his duty to see that a policy of insurance was in force in respect

of that car which would insure Franks. It is alleged that in his capacity as an insurance agent Brain issued to Franks a policy which was void or voidable, because Franks was a Jew, and the insurance company stipulated that they would not insure Jews; or, to put it more accurately, that any liability which fell upon them was excluded if the driver turned out to be a Jew. Now, I am at a loss at the present moment to know whether the true facts are, as I strongly suspect they are, that Brain had a policy with the defendant company under which they undertook to insure him, or to insure people who might drive cars that he hires out to them, providing that those people were not Jews, actors or actresses, bookmakers, and the like. It may be that the facts will show that Brain, by issuing a covering note, intended, or meant, or was attempting to issue a new policy to Franks—a policy under which Franks would be the direct assured of the defendants, the Port of Manchester Insurance Company, and not merely a person or class of persons who would be insured, or against whose acts the Port of Manchester Insurance Company agreed to provide indemnity if he was a driver or they were drivers of one of Brain's cars. The facts to my mind are at the present moment obscure; I cannot go into them; but I am not prepared to hold that this statement of claim does not disclose a cause of action against Brain. I think it alleges that Brain let out a car without an effective policy of insurance having been taken out upon it. That is a matter which I think must be tried.

I may say that I have not overlooked the strenuous argument which counsel for Brain put up that the action was defective and that the statement of claim was defective because it did not allege that a judgment had been recovered against Franks by the plaintiff, or because Franks had not been made a party to the action. With all due respect to that argument, and it was very clearly and concisely presented, I am quite unable to accept that view. True, the plaintiff will have to show as part of his cause of action, because he will have to show that he has sustained damage: (a) that he was injured; (b) that he was injured by the negligence of Franks; and (c) that he thereby incurred expense and suffered damage; but that is all, I think, that can be treated as part of his cause of action against the defendant, because he says: "I have suffered damage because you omitted your statutory duty of seeing that this car was insured, whereby, as the person to whom you lent it turns out to be a man of straw" (which is a matter which will also have to be proved) "I having been injured by his negligence am unable to recover compensation from anybody. There is no effective insurance, and the man you lent it to was a man of straw," but I can find nothing in the somewhat abbreviated report of the Court of Appeal judgment that indicates that, in those circumstances, the person to whom the car was hired out by the defendant is a necessary party, or that you cannot prove as part of your case against this present defendant the facts which I have indicated as forming part of the cause of action. I think it is a necessary part of the cause of action to show the damage and the negligence, and to show that the man was a man of straw. I quite realise that the fact that the man Franks is not before the court may make the task of the defendant in rebutting the charge of negligence, or as trying to show that there was no negligence in fact, a more difficult one. That may be a misfortune for him; but it is a matter which he might be able to guard against because it is for him to decide to whom he lets out his cars; but if he lets out his cars to people who cause accidents and those people disappear, either because they do not live here, or for any other good reason, I do not see why that is to prejudice the plaintiff, who may otherwise have a good cause of action.

I think, therefore, that that point raised by counsel quite clearly fails, and about that I confess I have no doubt.

With regard to the other part of the case, in spite of the argument which has been addressed to me, I still think that there is enough shown on the statement of claim for me to say that a cause of action is shown, and, therefore, so far as the defendant Brain is concerned, the action must be sent for trial.

The defendant Brain appealed.

Terrell for the defendant Brain, the motor-car hirer and insurers' agent.
Viscount Erleigh, K.C., and *Gabriel Cohen* for the plaintiff, the injured man.

GREER, L.J.—This is an appeal from a decision of **GODDARD, J.**, holding that this statement of claim discloses a cause of action as against the defendant Brain, the existence of which it will be for the plaintiff to prove at the trial of the action. Counsel for the defendant Brain asks this court to say that the decision of **GODDARD, J.**, was wrong upon two grounds: he contends that the learned judge was wrong in holding that a cause of action was shown against Brain, in that there was no allegation that the plaintiff had recovered judgment against Leonard Franks, who, the plaintiff alleged, had by his negligent driving injured him, and counsel also contends that the learned judge was wrong in holding that it was alleged that the defendant Brain permitted the driver Leonard Franks to use a motor vehicle on a road without there being in force a policy as required by the Act of 1930, as in fact what was alleged was that there was such a policy.

As to the first point, that there was no allegation that the plaintiff had recovered judgment against the driver, Leonard Franks, in my opinion, that cannot now be taken, being precluded by the judgment of this court in *Monk v. Warbey* (1) and I need not elaborate that, because I said in my judgment ([1935] 1 K.B. 82; ante, p. 377):

“The third point taken was that in any event the action against the appellant Warbey was premature. That involves the question whether the quantification of the damage is an essential part of the cause of action. I think it is not. The cause of action is that the statute has been broken and that damage has been caused to the plaintiff. All that has to be shown is that the person primarily liable is in such a financial position that nothing is obtainable from him, and that nothing can be effected by bankruptcy proceedings against him, as, being an uninsured person, there can be no recourse against an insurance company.”

It is right to say that an action for damages for breach of a statutory duty involves proof of two propositions: first, that there has been a breach of statutory duty, and second that it has resulted in damage to the plaintiff. These propositions may be proved in any of the ways in which somewhat difficult propositions of fact are presented to courts for decision and are decided. Here, the first proposition depends upon the construction of s. 35 (1) of the Road Traffic Act, 1930. Has there been a breach of statutory duty as it is laid down in the subsection? The second, which will also have to be proved at the trial, is this: can the plaintiff prove that he is hurt or damaged by reason of this breach of statutory duty?

With regard to the allegation of a breach of statutory duty, I consider this statement of claim as alleging—see para. 6—that the defendant Brain caused or permitted Leonard Franks to use a motor vehicle on a road whilst there was not in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third-party risks as complies with s. 35 (1) of the Act of 1930. The facts alleged in the statement of claim show that there was no such policy in existence: that is stated in the clearest language in para. 3 of the statement of claim. It remains to be determined at the trial, whether this allegation that the defendant Brain had so “permitted” Franks to use the motor car is made out. If it is not made out, the defendant Brain will succeed. It will be open to the trial judge to consider the question whether the word “permitting” in s. 35 (1) of the Road Traffic Act, 1930, necessarily involves the mind of the permitter going with the act of hiring at the time the hiring took place when there was in fact no policy in existence. That will still be open to the plaintiff to contend at the trial. I do not think it necessary at this stage to say anything about proof that the mind of the defendant Brain did not go with the permission—that he did not know of this prohibition being included in the policy. It will be a difficult fact for the defendant Brain to prove; but, if he does prove it, he is not shut out from defending upon this ground by the decision of **GODDARD, J.**, and of the court to the effect

that if "permission" within the meaning of the subsection is proved the plaintiff will be entitled to succeed. That is all that was decided on this preliminary point of law by way of demurrer.

Counsel for the defendant Brain has mentioned the difficulties that may arise as a result of the decision of this court in *Monk v. Warbey* (1) in a case in which, before an action for breach of statutory duty comes on for trial, the person whose negligence is alleged dies so that the cause of action against him has disappeared by reason of his death. When that case comes up for decision, the court will have to decide whether in those circumstances it is established that no damage has arisen by reason of the breach of statutory duty; but that has nothing to do with the question which this court is now engaged in determining.

As to the second point, that the facts set out in the statement of claim show that there was in fact a policy of insurance in relation to the user of the vehicle by Franks—such a security in respect of third-party risks as complied with the requirements of that part of the Act of 1930—it is not contended that the policy was other than voidable. It is consistent with the facts set out in the statement of claim that the policy was voidable by the insurance company whose agents—not Mr. Brain—had issued the policy. I do not think that this question was raised by the argument before GODDARD, J. The statements of fact in the statement of claim are those to be regarded on the issue whether a cause of action has been disclosed. The last words of para. 3 are :

"Whereas in fact the said cover note was and is ineffective by reason of the conditions upon which the said cover note was issued, namely, that inter alios Jews were excluded from the insurance to be thereby effected; on the material date the said Leonard Franks was a Jew and therefore excluded from the said insurance, and therefore there was no policy of insurance in force in relation to the user of the said motor vehicle as aforesaid."

If this is a question of fact, it is there sufficiently alleged in the statement of claim. If it is really a question of law, it is accurately stated; that there was no policy of insurance in force in relation to the user of the said motor car. It is a case of a policy which was bad ab initio, because there was no authority to issue it, and it did not purport to be a policy issued by Mr. Brain at all. It could be treated only as a policy by the company and one which was void. That is to say, on the facts as alleged in the statement of claim, there was at the time of the hiring to Franks of this motor vehicle no policy in existence, and so, if there was a "permission" within the meaning of s. 35 (1) of the Act of 1930, then there was a breach of statutory duty. In that case the plaintiff will prove, if he can, that Mr. Franks is a man who could not possibly pay anything. If he succeeds he will be in a position to succeed against the defendant Brain on the principle laid down by this court in *Monk v. Warbey* (1).

For these reasons, as well as those given by GODDARD, J., I think that this appeal should be dismissed.

MAUGHAM, L.J.—I agree.

ROCHE, L.J.—I also agree.

Appeal dismissed.

Solicitors : *Sweepstone, Stone, Barber, & Ellis; Tudor & Rowe.*

[*Reported by V. R. ARONSON, Esq., and G. C. MORAN, Esq., Barristers-at-Law.*]

WILLIAMS-ELLIS v. COBB AND OTHERS

COURT OF APPEAL (Lord Wright, Slesser, L.J., and Talbot, J.), October 11, 12, November 2, 1934]

[Reported [1935] 1 K.B. 310; 104 L.J.K.B. 109; 152 L.T. 133; 99 J.P. 93; 51 T.L.R. 131; 79 Sol. Jo. 11; 33 L.G.R. 39]

Easement—Right of way—User over period of living memory—Presumed date of dedication—Terminus ad quem—Way leading to sea.

If user of a way as a right of way is established over the period of living memory, a *prima facie* presumption of dedication is raised, the date of which dedication may be in a period beyond living memory.

A right of way may be proved even though it does not lead to a public place. A public way may, for instance, lead to the sea although the public have no right of crossing the foreshore. If there is a public way down to the sea which has been used in connection with fishing and navigation, it may be contended that the public have a further and an ancillary right to go from the end of the way over the foreshore as the tide recedes to fish or to land or embark goods, fish or passengers.

County Court—Appeal to Court of Appeal—Law wrongly applied to facts—Right of Court of Appeal to remit case.

There is no jurisdiction in the Court of Appeal to entertain an appeal on fact from the decision of a county court judge, but, if the court considers that he has proceeded in some material respects on erroneous views of the law, the court can remit the case to him for re-consideration in the light of principles of law laid down by the court.

Judgment—Judicial decision as authority—Decision of fact—Not binding on another court.

Per Talbot, J.: A decision of fact in one case cannot bind a judge who has to decide a similar question of fact in another.

Notes. Referred to: *A.-G. and Newton Abbot Rural District Council v. Dyer*, [1946] 2 All E.R. 252.

As to appeals from county courts to the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 320 et seq.; as to rights of way, see *ibid.*, vol. 12, 569 et seq.; and for judicial decisions as authorities, see *ibid.* (2nd Edn.), vol. 19, 251 et seq. For cases see 13 DIGEST 514, 19 DIGEST 93 et seq., and 30 DIGEST (Repl.) 211 et seq.

Cases referred to:

- (1) *Behrens v. Richards*, [1905] 2 Ch. 614; 74 L.J.Ch. 615; 93 L.T. 623; 69 J.P. 381; 54 W.R. 141; 21 T.L.R. 705; 49 Sol. Jo. 685; 3 L.G.R. 1228; 1 Digest 39, 310.
- (2) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, 312.
- (3) *Folkestone Corp'n. v. Brockman*, [1914] A.C. 338; 83 L.J.K.B. 745; 110 L.T. 834; 78 J.P. 273; 30 T.L.R. 297; 12 L.G.R. 334, H.L.; 26 Digest 284, 189.
- (4) *Poole v. Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest 286, 194.
- (5) *Stoney v. Eastbourne Rural District Council*, [1927] 1 Ch. 367; 95 L.J.Ch. 312; 135 L.T. 281; 90 J.P. 173; 70 Sol. Jo. 690; 24 L.G.R. 333, C.A.; Digest Supp.
- (6) *A.-G. v. Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414; 66 J.P. 71; 50 W.R. 22; 26 Digest 281, 178.
- (7) *Moser v. Ambleside Urban District Council* (1925), 89 J.P. 118; 23 L.G.R. 533; 26 Digest 294, 256.
- (8) *Eyre v. New Forest Highway Board* (1892), 56 J.P. 517; on appeal, 8 T.L.R. 648; 26 Digest 260, 5.

- (9) *Tyne Improvement Comrs. v. Imrie and others* (1899), 81 L.T. 174; 26 Digest 261, 9.
- (10) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 26 Digest 261, 18.
- (11) *Brinckman v. Matley*, [1904] 2 Ch. 313; 73 L.J.Ch. 642; 91 L.T. 429; 68 J.P. 534; 20 T.L.R. 671; 48 Sol. Jo. 639; 2 L.G.R. 1057, C.A.; 26 Digest 262, 20.
- (12) *Davies v. Stephens* (1836), 7 C. & P. 570, N.P.; 26 Digest 289, 219.
- (13) *Turner v. Walsh* (1881), 6 App. Cas. 636; 50 L.J.P.C. 55; 45 L.T. 50, P.C.; 26 Digest 289, 216.
- (14) *R. v. Petrie* (1855), 4 E. & B. 737; 3 C.L.R. 829; 24 L.J.Q.B. 167; 24 L.T.O.S. 271; 19 J.P. 483; 1 Jur. N.S. 752; 3 W.R. 243; 6 Cox, C.C. 512; 119 E.R. 272; 26 Digest 284, 187.
- (15) *Beaufort (Duke) v. Bates* (1862), 3 De G. F. & I. 381; 31 L.J.Ch. 481; 6 L.T. 82; 10 W.R. 200; 45 E.R. 926; 8 Jur. N.S. 270, L.J.J.; 31 Digest (Repl.) 226, 3634.
- (16) *Bidder v. North Staffordshire Rail. Co.* (1878), 4 Q.B.D. 412; 40 L.T. 801; 19 Digest 111, 713.
- (17) *Dawes v. Hawkins* (1860), 8 C.B.N.S. 848; 29 L.J.C.P. 343; 4 L.T. 288; 7 Jur.N.S. 262; 26 Digest 295, 270.
- (18) *Winterbottom v. Lord Derby* (1867), L.R. 3 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 81 J.P. 566; 16 W.R. 15; 26 Digest 293, 251.
- (19) *Cubitt v. Maxse* (1873), L.R. 8 C.P. 704; 42 L.J.C.P. 278; 29 L.T. 244; 21 W.R. 789; 37 J.P. 808; 26 Digest 282, 181.
- (20) *Mann v. Brodie* (1885), 10 App. Cas. 378, H.L.; 26 Digest 281, 177.
- (21) *Rowley v. Tottenham Urban District Council*, [1914] A.C. 95; 83 L.J.Ch. 411; 110 L.T. 546; 78 J.P. 97; 30 T.L.R. 168; 58 Sol. Jo. 233; 12 L.G.R. 90, H.L.; 26 Digest 308, 407.
- (22) *A.-G. v. Manchester Corpn.*, [1931] 1 Ch. 254; 100 L.J.Ch. 33; 144 L.T. 122; 46 T.L.R. 629; 28 L.G.R. 684; Digest Supp.

Appeal from Pwllheli County Court, in an action for trespass to land.

On June 7, 1933, the defendants broke open certain locked gates which the plaintiff, who was owner in fee simple of land called Penrhyn Du, had caused to be placed across two footpaths. In consequence of this act the plaintiff claimed damages, and an injunction to restrain the defendants from continuing their trespass. The defendants pleaded that there were of right common and public highways over the plaintiff's land for all persons to go and return on foot at their free will and pleasure, and that the plaintiff had wrongfully obstructed the highways. The county court judge gave judgment for the plaintiff, and the defendants appealed.

Trustram Eve for the defendants.

Ralph Sutton and J. A. Reid for the plaintiff.

Cur. adv. vult.

Nov. 2. The following judgments were read:

LORD WRIGHT.—The action out of which this appeal arises was brought in the county court of Pwllheli before Judge Artemus Jones. The plaintiff is the owner of an estate in Caernarvonshire, and the defendants were sued for trespass. Their defence was that they were not trespassers but acting lawfully in exercise of a public right of way. There was also a claim based on a local custom or right of the inhabitants which is now immaterial. Neither the Attorney-General nor the county council were parties, thus no question of public right could be determined by the proceedings, in which the issue of the right of way arose merely as between the parties as being the defence set up by the defendants. The learned judge decided in favour of the plaintiff, awarded £5 damages for trespass, and granted an injunction. The defendants now appeal.

The land over which the right was claimed is on a headland called Penrhyn Du, on the Caernarvonshire coast-line near Tudwal Islands, a few miles from Abersoch

and Pwllheli. Two pathways were claimed as being subject to rights of way. One runs along the cliff up to the point where there is a gap in the cliff which is at that place about 90 ft. high. By this gap, access may be obtained to the sea, which comes to the bottom of the cliff at high water—at low water the sea can only be reached by passing over the foreshore—at some time a tramline had been laid over this track, and for this purpose the rock had been cut. A lifeboat house was built near the point in about 1894 on a piece of ground let for that purpose by the plaintiff's predecessor.

The other track leads to a small cove called Porth Bach, a short distance away, where a path led down the cliff, which was there about 30 ft. high, to the sea or foreshore. Recently the plaintiff has put steps there as for his private user; no claim was made in respect of those steps. The path had been stopped some years ago by a fence, but a gate was placed somewhat to the right of the original path, and the defendants claimed that they were not trespassers in using the alternative track to Porth Bach, which they allege had thereafter been used.

The land in question had been the scene of mining operations, at least, it seems, since the eighteenth century. Three mining leases of 1846, 1859 and 1870 respectively were put in, and old shafts still remain.

Counsel for the defendants claimed that the judge's detailed finding of fact embraced findings of user up to the limit of living memory, which, in the absence of matters established to rebut the *prima facie* presumption arising from them, necessarily involved as a matter of law the conclusion that the right of way was made out; he urged that no such facts in rebuttal were found by the judge; he contended that the judge was then bound to find for the defendants and that this court should enter judgment for them. In particular, he relied on the judge's findings which were thus summarised in the judgment:

"The effect of the evidence . . . for the defence was to show that five different classes of people had, during the last sixty years or more, used the pathways:

(i) Sailors in vessels riding in the Tudwal Roads, who rowed to and landed upon Penrhyn Du or Porth Bach for the purpose of buying ashore potatoes and other things; (ii) tenants of grazing land at the Tudwal Islands, who used to embark and land at both points (though there was evidence that some also embarked and landed at Abersoch and Pwllheli) for the purpose of landing or shipping sheep; (iii) mariners yachting off the coast, who rowed to and landed chiefly at Porth Bach; (iv) summer visitors to Abersoch, who used the path for the purpose of bathing and paddling, and fishing at both points; (v) some local fishermen who caught lobsters and placed their catch in a lobster pot at Porth Bach and then carted them along the path to Gate A."

Counsel argued that there were no facts found to nullify the necessary conclusion from these findings that there had been a dedication at some time in the past of these rights of way; the land, it was true, had been in strict settlement since 1856, but there was admittedly at least some period between 1820 and 1856 where the then owner had been capable of making a dedication, so that on that ground the presumption of dedication arising from the proved user could not be rebutted; he further contended that in the case of either path there was a *terminus ad quem* either to the edge of the cliff or to the edge of the sea, so as to remove any objection that might otherwise have been raised on that ground. He went on further to contend that the judgment appealed from was vitiated because the four questions which the judge propounded to himself in order to decide the case involved material errors in law. These questions were thus stated by the judge: "Four questions are raised for determination in this case: (i) Whether these were public rights of way established at a period anterior to the construction of the tramroad in 1846; (ii) whether, during living memory, there was a person in possession of the land who was at all material dates in a position to make an effective dedication; (iii) whether the acts of interruption proved by the mining leases granted by the owners in 1846 and at subsequent dates, the lease granted by Lord Penrhyn to the Lifeboat

Institution in 1894, and the fence put across one of the alleged paths by the plaintiff's father in 1908, were consistent with the hypothesis of dedication; (iv) whether the rule as to the terminus ad quem was broken by these two passages which terminated at the cliffside, or was it subject to what LORD WRENBURY (then BUCKLEY, J.) called the right of public navigation in *Behrens v. Richards* (1). Each of these questions was answered by the judge adversely to the defendants' claim.

Counsel contended as to question (i) that on the findings of the judge it could only be answered in the affirmative; as to question (ii) that it was irrelevant in law; as to question (iii) that the leases were not inconsistent with the right of way, and that the fence merely led to a favourable deviation of the path; and as to question (iv) that in law, in the case of each right of way there was such a terminus ad quem as to complete the right of way.

I shall consider later whether the judgment shows any such misconception of law as would justify the court in sending the case back to the judge for him to re-consider his conclusion or in setting aside the judgment and ordering a new trial; but I must hold that this court has no jurisdiction to accede to the submission of counsel for the defendants and enter judgment for the defendants. In my opinion, the same principles apply in an appeal such as this on questions of right of way from a county court as having long been applied to such issues where the trial has been before a jury or the facts have been found by a court of summary jurisdiction. Indeed, the case of an appeal from a county court is, if anything, a fortiori: see *Smith v. Baker* (2) and s. 120 of the County Courts Act, 1888. It is only the appropriate tribunal of fact that can decide the issue whether or not a right of way is established, because that issue depends on whether the tribunal is satisfied that there has been in fact a dedication, which can only be found if the necessary intention has been made out. There can only be dedication if there is the relevant intention, actual or presumed, in an owner capable in law of dedicating. In truth, the contention now made by counsel for the defendants has been discussed and rejected in principle by the House of Lords in *Folkestone Corpn. v. Brockman* (3), where magistrates had held that there was no dedication, but the Court of Appeal by a majority had set aside that finding and had held that "these facts (sc. those which had in detail been found by the magistrates) amount in law to dedication." The House of Lords reversed that decision. LORD ATKINSON ([1914] A.C. at p. 362) quoted with approval the words of PARKE, B., used in regard to the finding of a jury in *Poole v. Huskinson* (4). PARKE, B., said (11 M. & W. at p. 830):

"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment."

LORD ATKINSON thus stated ([1914] A.C. at p. 361) the contention which had prevailed in the Court of Appeal:

"Proof of open, uninterrupted, and continuous user raises a *præsumptio juris* in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. Tribunals which are exclusive judges of fact, whether juries or justices, are bound in law to act upon it, and their finding against it is an error in law. In the present case there was such evidence of user, no rebutting evidence was produced, the justices were, therefore, bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law."

LORD ATKINSON then went on to say ([1914] A.C. at p. 361):

"The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing,"

namely, to find that the owner had intended to dedicate, and had dedicated, this footway to the public.

LORD ATKINSON observed that no authority could be found for the proposition which had been accepted by the Court of Appeal, and went on to say on the next page:

"On the contrary, the invariable well-established practice, followed by many of the most able and distinguished judges for many, many years, has, I think, been, no matter how strong the evidence of user, to leave all the evidence to the jury, to ask them to consider it as a whole, and determine whether the owner of the soil intended to dedicate to the public a highway over it. The justices in cases such as the present are, if anything, more absolute and exclusive judges of fact than is the jury in a trial before them. Their finding cannot, like the finding of a jury, be set aside as against the weight of evidence."

I need not pursue further the course of reasoning, and the authorities by which LORD ATKINSON developed and justified his statement of principle. It is enough to say that the rule which he applied in the case of justices applies equally or indeed a fortiori in the case of a decision on fact of a county court judge where the issue is dedication or no dedication. Indeed, it must apply in every case where there is a designated tribunal of fact whose decision on such matters is final, subject only to the rule that the judgment may be set aside if it proceeds on a material error in law, and, in particular, if there is no evidence on which the finding can be arrived at, because no judge, even if the sole judge of fact, has jurisdiction to find facts for which there is no evidence. That rule may well apply to an affirmative finding of dedication. To quote LORD ATKINSON again ([1914] A.C. at p. 368), in reference to para. 181 of TAYLOR ON EVIDENCE (9th Edn.):

"The statement of the law contained in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi even against the Crown. That is a wholly different thing from saying that this presumption is a *præsumptio juris*, which, if un rebutted, must be acted upon by exclusive judges of fact. This rule relied upon by the respondents as to the un rebutted presumption of dedication, is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon, but it is, in my opinion, no more than that. An order made by such judges, in effect refusing to act upon it in favour of the person on whom the burden of proving dedication lies, cannot, therefore, I think, be treated as a nullity, void at law, and made without jurisdiction. The practice of over a century in trials of such questions before juries establishes this."

I need not observe that where an appellate court proceeds by way of re-hearing of the evidence, it becomes in turn judge of the facts, as, for instance, where the Court of Appeal is hearing an appeal from a trial judge in this division of the High Court on a case of this type. The principles which I have derived as applicable to an appeal to this court from a county court judge are in truth only a particular application of the general rule that there is no jurisdiction in this court to entertain an appeal on fact from the decision of such a judge, and in no case that I can conceive could this court order judgment to be entered holding a right of way to be established where that had been negatived by the county court judge. But this court in a case of this type, even if it does not set aside the judgment, may send the decision back to the county court judge for re-consideration, not, however, on the facts, but only if it seems to the court that he has proceeded in some material respects on erroneous views of the law.

I think this order should be made in the present appeal. I do not so think merely because in certain respects I do not feel disposed to take the same view as he did of certain pieces of evidence, e.g., he may have misread the important plan of 1795. I do not understand why the lease to the lifeboat house or the mining leases or the use of the tract to Penrhyn du Point to lay a tramway are inconsistent

with the rights of way claimed, which were different and more limited than the rights of way necessary for the enjoyment of mines: again it seems doubtful if the judge has fully appreciated the entries in the minute of the local council as to repairs of the roadway. I do not, however, desire to discuss the facts or the evidence which are matters for the county court judge. But I do find certain matters of law on which the judge appears to have misdirected himself and these seem of sufficient moment to make me think the judge should re-consider the case in the light of the law stated by this court.

The first of these matters is contained in the second of the questions which the judge put to himself as quoted above—(ii) whether during living memory there was a person in possession of the land who was at all material times in a position to make an effective dedication. His answer to that question culminates in the conclusion,

“such intention (i.e., intention to dedicate) can be inferred only against a person in possession of the land who was at all material times in a position to make an effective dedication.”

In so doing, he proceeded, I think, on what he had already stated that

“both the facts set out in the Act of Parliament and in the documents of title raise the presumption that the land was in strict settlement up to 1908 from the second decade of the nineteenth century.”

But it is now admitted that on the true construction of the various settlements (the court having been relieved from the task of construing them by this admission) there was some period between 1820 and 1856 in which there was an owner capable of dedicating; now the question whether if dedication can otherwise be presumed there was anyone capable of dedicating within living memory is a false issue, involving an error in law. If user is established over the period of living memory, that raises a *prima facie* presumption of dedication, the date of which may be in a period beyond living memory. Such a date is not necessarily limited to the scope of living memory. On this matter, I am relieved from the need of discussing it further by the reasoning contained in the judgment of ROMER, J., in *Stoney v. Eastbourne Rural District Council* (5) which was approved in the Court of Appeal. I will quote a short passage ([1927] 1 Ch. at p. 878):

“As pointed out by BUCKLEY, J., in *Attorney-General v. Esher Linoleum Co.* (6) it is dedication and not user that constitutes a highway. User is merely the evidence that proves the dedication. Where the only user shown is user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act. And this seems to be in accordance with numerous authorities. . . .”

The judge seems to have confused user, which is only evidence of dedication, with dedication itself. As to the first question, I do not see why as a matter of law the date of 1846 should be taken as a crucial date if user has been established within living memory so as to raise a *prima facie* presumption of dedication which, as already explained, may go back to an indefinite date in the past. Nor do I understand why as a matter of law the construction of the tramroad and the grant of the leases should be considered to constitute acts of interruption or go to negative dedication. But I pass to question (iv):

“Whether the rule as to the *terminus ad quem* was broken by these two passages which terminated at the cliff side or was it subject to what LORD WRENBURY called the right of public navigation in *Behrens v. Richards* (1).”

The judge's answer is that

"although a public right may be acquired by long user over private property, it must have a public terminus."

I am not clear as to what he means by a public terminus. The judge then decides "that the rule of terminus ad quem is fatal to the claim set up by the defendants in this case." He then asks:

"Does the passage in LORD WRENBURY's judgment apply, and is the rule subject to what he calls the right of public navigation?"

And he decides that it does not.

I think, with all deference to the judge, that he has taken a view on this question which is not, perhaps, very clearly enunciated, but so far as I can judge is narrower than the law, which, in modern times, has tended to a more liberal view of what may be sufficient in regard to a terminus to constitute a right of way. It is no longer the law (if it ever was) that a highway must end in another public highway: (*Moser v. Ambleside Urban Council* (7)). Thus a public right of way may lead only to a point of natural beauty (*Eyre v. New Forest Highway Board* (8) approved in *Moser v. Ambleside* (7)), or to a church, or to the sea or to a river (per PHILLIMORE, J., in *Tyne Improvement Commissioners v. Imrie and others* (9), (81 L.T. at p. 179)). I think *Moser v. Ambleside* (7) is now an authority for the proposition that a right of way may be proved even though it does not lead to a public place. I may refer again to *Moser v. Ambleside* (7) and the language of ATKIN, L.J., where he says (89 J.P. at p. 120):

"I think you can have a highway leading to a place of popular resort, even though when you have got to the place of popular resort you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise."

The right of way claimed in the present case is only over the land of the plaintiff which ends at the sea, and I think on the authorities cited such a right of way may be good in law. It seems that the judge has decided that the sea (which is a highway) cannot in law be a terminus ad quem of a public right of way because the sea can only be reached at high water from what is claimed as the end of the way, and because the public have no right of crossing the foreshore (which is at these places presumably vested in the Crown, and is not alleged to be the property of the plaintiff). I do not think it necessary to express any decided opinion here on the difficult question of the extent of the rights of the public over the foreshore. It was decided in *Blundell v. Catterall* (10), followed by this court in *Brinckman v. Matley* (11), that the public have no right to use the foreshore for purposes of bathing, and there is certainly no right in the public to pass and re-pass over the foreshore for all purposes. On the other hand, if (as the defendants claim) there is a public way down to the sea which has been used in connection with fishing and navigation, it may be contended that the public have a further and an ancillary right to go from the end of the way over the foreshore as the tide recedes in order to fish or to land or embark goods, fish or passengers. In *Brinckman v. Matley* (11) BUCKLEY, J., thus expresses his opinion, and I find nothing inconsistent with these words in the Court of Appeal. And in *Behrens v. Richards* (1) ([1905] 2 Ch. at p. 623) the same judge seems to recognise that there might be both in fact and in law a public right of access to the foreshore for fishing. Such a right, if it exists, would make more obvious the conclusion that the end of the way where, at the verge of the plaintiff's land, it abuts on the sea at high-water is a terminus ad quem, but I do not think that it is necessary to discuss this question here because it seems to me sufficient in law that the way claimed is a way ending at the sea, which has been recognised in the cases cited above as a good terminus of a public way; on any other view, the sea could never be such a terminus.

I think that because these questions of law are so fundamental in the case it should be sent back to the judge to re-consider. I desire respectfully to agree with what BUCKLEY, J., said in *Behrens v. Richards* (1) to the effect that in a case of

this kind an injunction should not be granted as a matter of course. The result is that the case will be remitted to the judge for him to re-consider it on the material already before him, but with regard to the principles of law which this court thinks should guide him. This does not mean that either party will be entitled to call further evidence. It is unfortunate in any event that such differences should be pursued so far, since I cannot find that the plaintiff has been in any way prejudiced by what has been done or that the public have been in any way abusing what they conceive to be their rights.

SLESSER, L.J.—On June 7, 1933, the defendants broke open certain locked gates which the plaintiff, who is owner in fee simple of land called Penrhyn Du, had caused to be placed across two footpaths. In consequence of this act, the plaintiff claimed damages for trespass and an injunction to restrain the defendants from continuing their trespass. The defendants endeavoured to justify their trespass by pleading that there were of right common and public highways over the plaintiff's land for all persons to go and return on foot at their free will and pleasure, and that the plaintiff had wrongfully obstructed the highways by gates, wires, and fences. Alternatively, the defendants pleaded that there was a lawful and valid custom for the public or inhabitants of the parish of Llanengan, in which the alleged highways are, to use the ways claimed. The latter plea has been negatived and is not now the subject of appeal.

The ways claimed were over defined ways, the one for embarking or landing at Porth Bach Cove, the other for embarking or landing on the rock at or adjacent to Penrhyn Du Point, which is also on the sea. By further particulars the defendants designate the highways as going over a certain gate marked A. from a highway and through another gate to or near to the cove known as Porth Bach, and the other over a gate marked B. also from a highway, by a way parallel to or approximately parallel to the high-water mark of ordinary tides to or near to a lifeboat-station shown on the map, both as indicated on the map annexed to the pleadings. The learned judge has found as a fact that five different classes of people had during the last sixty years or more used the ways, namely: (i) Sailors in vessels riding in the Tudwal Roads, who rowed to and landed upon Penrhyn Du or Porth Bach for the purposes of buying ashore potatoes and other things. (ii) Tenants of grazing land at the Tudwal Islands who used to embark and land at both points (though there was evidence that some also embarked and landed at Abersoch and Pwllheli), for the purpose of landing or shipping sheep. (iii) Mariners yachting off the coast, who rowed to and landed chiefly at Porth Bach. (iv) Summer visitors to Abersoch, who used the path for the purposes of bathing and paddling and fishing at both points. (v) Some local fishermen who caught lobsters and placed their catch in a lobster pot at Porth Bach and then carried them along the path to the gate A. He says that there was no wide difference between the evidence called for the defendants and the plaintiff and cites in particular two witnesses one of whom had known mariners use both points for landing in bad weather for forty-seven years and the other who said that he had known the locality for thirty years, and testified that he had known the five classes of people above mentioned use the paths.

In the present case it is not suggested that there is any direct evidence of dedication, and, if dedication is to be found, it must be a matter of inference, for, if the acts of user went on for a great length of time, it may be presumed that the owner had been made aware of them: per DENMAN, C.J., in *Davies v. Stephens* (12). Such an inferred knowledge of the owner's intention is, of course, primarily a question of fact, and the weight to be attached to the evidence of user depends upon a number of circumstances of which the length of such user is important. Having set out the instances of user which I have cited, the learned judge appears to come to a conclusion against the inference of dedication, primarily on the ground that, as far back as living memory, up to 1908, there was no person in possession of the freehold capable of dedicating it away to the user of the public. He says:

"Long user of a way such as has been shown in this case is inferential evidence from which a jury can conclude such dedication, but this again is subject to its limitations. Such intention can be inferred only against a person in possession of the land who was at all material times in a position to make an effective dedication."

I regard this finding as meaning that, but for the incapacity to make an effective dedication, the learned judge might have inferred dedication from the long user, but that, finding dedication impossible, he does not decide it.

I pass, therefore, at once to the objection of the learned judge that there was at the material times no person capable of making an effective dedication. This view is based upon the fact that by common agreement from 1856 to 1933 the property was in strict settlement and the occupier had never got a sufficient interest to make a dedication. If the learned judge, on uncontradicted user within living memory, were to assume dedication, I see no reason why that dedication should be assumed necessarily to be after 1856; rather would I rely upon the opinion of SIR MONTAGUE SMITH in the Privy Council in *Turner v. Walsh* (13) (6 App. Cas. at p. 642):

"The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses."

In such a case it is not necessary to inquire who the individual was from whom the dedication first proceeded: per COLERIDGE, J., in *R. v. Petrie* (14). And, as CROMPTON, J., said (4 E. & B. at p. 749):

"When such user is proved, the onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that that dedication was impossible, and that no one capable of dedicating existed."

In my view, the learned judge is in error in arbitrarily limiting his consideration of the possibility of dedicating so as to be within the time of the strict settlement and then in arguing therefrom, notwithstanding the evidence of long continued user, which it was open to him to have accepted, that there could be no inferred dedication because of the strict settlement.

The second ground on which the learned judge refuses to consider the effect of the evidence derived from long continued user is that there were acts of interruption in the user, not in fact, but to be inferred from grants of leases inconsistent with the hypothesis of dedication. These were, firstly, a series of mining leases dating from 1846, and secondly, a lease granted by Lord Penrhyn to the National Lifeboat Institution in 1894. These affect the upper or Penrhyn Du way. As to the lower or Porth Bach way, the learned judge says that a fence put across the way in 1908 constituted an interruption of the way. As to the upper way, I have said that, in my view, there is no reason to assume that the dedication can only be referred back to 1856. I equally think that it cannot be referred necessarily back to 1846, the date of the first alleged interruption, by a mining lease, nor is there to be derived therefrom any evidence of interruption. It is true that in 1846 the then landlord, the Marquis of Anglesey, granted a lease to a Mr. William Roberts of the mines at Penrhyn Du, which I will assume, though there is no direct evidence of it, comprised the lands over which the upper way to Penrhyn Du Point is now claimed. The lease grants ingress and egress with horses, carts and carriages and otherwise to take, draw, and carry away the minerals and all other materials and necessary carriages to and from the said mines and works, and every or any of them from time to time when and as often as need shall require.

It also appears that in 1846 there was in existence a tramway constructed for the purpose of working copper and lead mines on the headland, and the learned judge appears to have assumed that this tramway was constructed in 1846 under

the lease. I can find no reason for coming to this conclusion. The lease appears to assume the existence of mines at Penrhyn Du in 1846, and, according to PENNANT'S TOURS IN WALES, written in 1773, at that time there had been considerable adventures for lead ore, and of late years attempts had been made to drain the mines by means of a fire engine. According to *Beaufort (Duke) v. Bates* (15): "A tenant cannot where a right of way is granted make or use a tramway or roadway": see also *Bidder v. North Staffs Rail. Co.* (16). And if any presumption is to be made, the language of the lease would point rather to the mines and tramway then existing, but, however this may be, I differ from the learned judge in finding anything inconsistent in the grant of a carriage or tramway to the lessees of the mines and the inferred dedication of the lesser right of a pathway to the public. The same observation applies to the lease of the Lifeboat Institution in 1894. Such a lease granted to the institution a parcel of ground on which to build a boat-house and slip-way together with a right of way thereto over and along the road leading to Abersoch. Now, it is not disputed that the road to Abersoch beyond the gate A. eastwards is a public highway, and it is interesting to note that in that lease no distinction is made between the parts of the road to Abersoch which are one side and those which are on the other side of the gate B. The physical road, whatever its legal condition may be, ends above the lifeboat house and appears as one continuous way cut out of the rock.

As regards the lower way and the fence placed upon the lower road, in 1908, the evidence is that this was there placed for the purpose of preventing the straying of cattle. The placing of a bar across the way is not conclusive as it may be referred to the need of keeping cattle from straying. I do not think it is possible to look upon the erection of the fence in 1908 in the circumstances in which it was erected, particularly as it did not prevent a deviation through a gate C., as conclusive evidence to rebut the presumption which might otherwise be raised by the user: see *Dawes v. Hawkins* (17). In the case of this lower path, a map dating from the time of the Napoleonic wars shows this way as a road. The map was one prepared expressly for the purpose of military defence, and, therefore, unlike a tithe map, is one in which roads would be very important. The map is dated 1795, though it is fair to say that it does not show the upper or Penrhyn Du road, though if this road was made subsequently for the purpose of mining, that is perhaps not surprising. In my view, the learned judge was wrong in thinking that there was any necessary evidence of interruption to justify or rebut the presumption from user which he might otherwise have drawn.

I would summarise the law on this matter by quoting a passage from the judgment of ROMER, J., as he then was, in *Stoney v. Eastbourne Rural District Council* (5) ([1927] 1 Ch. at p. 378), which was approved in the Court of Appeal. The passage is as follows:

"As was pointed out by BUCKLEY, J., in *Attorney-General v. Esher Linoleum Co.* (6), it is dedication and not user that constitutes a highway. User is merely the evidence that proves the dedication. Where the only user shown is over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act. And this seems to be in accordance with numerous authorities of which only one need be mentioned. In *Winterbottom v. Lord Derby* (18) evidence was given of acts of user of a way extending over nearly seventy years; but during the whole period the land crossed by the way had been in lease; the jury were, however, directed that from long continued user going back as far as living memory could go they were at liberty to presume a dedication of a way to the public at a time anterior to the land being leased. And the Court of Exchequer held that this was a proper direction."

I emphasise the words "at liberty."

I have yet to deal with the further difficulty of the learned judge that these rights of way have no termini, which he conceives to be fatal to the claim. He says that the alleged footpaths terminate in the edge of the cliffs; but as I read the claim and particulars, it is the highways to or near to the cove known as Porth Bach and to or near to the lifeboat house. These are claims to the high-water mark and no further, they do not, in my view, include any claim over the foreshore. In *Davies v. Stephens* (12) LORD DENMAN left the case to the jury where the way claimed was a footpath from a public parish road down to the sea. I do not read BUCKLEY, J., in *Behrens v. Richards* (1) ([1905] 2 Ch. at p. 621) to be hostile to the view that there may in appropriate cases be such a terminus. The well-known cases of *Blundell v. Catterall* (10) and *Brinckman v. Matley* (11) do not seem to me to affect the argument that there may be a terminus of a way at high-water mark because the sea is a highway. They were primarily concerned with the right to the foreshore.

Another way in which the case can be put, which has not, I think, been considered sufficiently by the learned judge, is that on his finding of user by summer visitors from Abersoch, in the language of ATKIN, L.J., in *Moser v. Ambleside Urban District Council* (7) (89 J.P. at p. 120):

"I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway."

The Master of the Rolls at p. 119 of the same case says that he finds it difficult to accept that you must find a right of way from one public place to another public place and that you cannot have a right of way to what is a cul de sac unless it be in a town. He says:

"It seems to me that there may be a number of cases in which the public have a need to go to a particular point, and there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the terminus ad quem to which the right of access is granted."

Finally, therefore, I am in agreement with my Lord, that this case should be remitted to the learned county court judge on the terms stated by him. It is for him, upon the principles stated in the judgment of this court, to ascertain as a fact whether, on the evidence of long continued user, he would presume a dedication of a highway. It is because, in my opinion, his judgment has been affected by considerations, some of which I think are erroneous, and because he has failed to consider the evidence as to user in respect of periods of time which he should not have excluded from his consideration that I cannot accept his present finding of fact as conclusive in law. At the same time, I would emphasise that the presumption of dedication from user is a presumption of fact, and it does not necessarily follow that the learned judge is bound to find dedication, even if there is no contradictory evidence. In the language of LORD ATKINSON in *Folkestone Corp'n. v. Brockman* (3) ([1914] A.C. at p. 368):

"Uninterrupted user of a road justifies a presumption in favour of the original animus dedicandi even against the Crown. That is a wholly different thing from saying that this presumption is a *presumptio juris* which if un rebutted must be acted upon by exclusive judges of facts."

And, in the words of LORD KINNEAR ([1914] A.C. at p. 355):

"It becomes a question for judges of fact whether the user which may have been proved is to be accounted for by presuming dedication, or whether some other conjecture may not be more probable."

TALBOT, J.—In this case the plaintiff sues the defendants for trespass to his land. The defendants pleaded that the places where they are alleged to have trespassed are public highways, or alternatively are ways which they are entitled

to use under a custom for the benefit of the inhabitants of the parish in which they are situate. The alternative plea based on an alleged custom is now abandoned.

There is no dispute as to the plaintiff's title, nor that what the plaintiffs have done upon his land, unless it can be justified as alleged, gives him a good cause of action. The only issue therefore is whether the places in question are public highways; and it is of course for the defendants to prove that they are. Apart from prescription or statute, dedication by the owner of the land for public use is the only mode by which a highway can be created; and where that is relied upon, both dedication and user must be proved; dedication to prove the will of the owner that the public shall use it, and user to prove acceptance by the public of the concession: see *Cubitt v. Maxse* (19), and, particularly, the judgment of BRETT, J. (L.R. 8 C.P. at pp. 714-5). But also in the great majority of cases, as in the case before us, user by the public is the only evidence of dedication which can be obtained. This is the ground of the statement by LORD BLACKBURN in *Mann v. Brodie* (20) (10 App. Cas. at p. 386):

"It is therefore, I may say, in England, never practically necessary to rely on prescription to establish a public way."

The learned judge who tried the case without a jury was not satisfied that the defendants had proved such user as to establish dedication. The first, and, in my view, the fundamental, question is whether this court has any right to interfere with this finding. If it stands as a decision of fact, there is an end of the case. The law as to proof of dedication by user is, in my opinion, clear, and is declared by authority which binds this court. It is stated summarily by PARKER, B., in *Poole v. Huskinson* (4) (11 M. & W. at p. 830) in words which have been again and again approved:

"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, there must be an animus dedicandi, of which the user by the public is evidence and no more."

This is quoted by LORD BLACKBURN in *Mann v. Brodie* (20) (10 App. Cas. at p. 386) as a correct statement of the law of England; and he adds:

"But it has also been held that where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner, whoever he was."

What is the effect of this? If user is evidence from which dedication may be inferred, but is not conclusive evidence of it, it must be for the jury or other tribunal of fact to say in each case whether in their opinion it is sufficient. That the question whether there has been dedication is a question of fact is obvious; if an authority were needed, it is to be found in the first words of LORD DUNEDIN's judgment in *Rowley v. Tottenham Urban District Council* (21) ([1914] A.C. at p. 99).

A very important case on this matter is *Folkestone Corpn. v. Brockman* (3). The first paragraph of the headnote correctly represents the effect of LORD ATKINSON's judgment and of the decision. I will read a passage which shows among other things that the contention which the House of Lords rejected in that case closely resembled the argument for the defendants in the present case. If I did not misunderstand him, counsel for the defendants argued that the evidence as to user for sixty years or more was such that in the absence of anything to contradict or countervail it, the judge was, not merely entitled, but was in law bound, to find that the ways in question had been, before those acts of the defendants which are complained of, dedicated as highways. This argument will, in my opinion, be seen by anyone who reads the judgments in *Folkestone Corpn. v. Brockman* (3) to

be directly contrary to that authority. It may, perhaps, be that there are passages in some earlier cases which might seem to support the argument, but it will be seen, I think, that at any rate in the great majority of instances this is a misunderstanding, because the court was considering what the jury or other tribunal of fact was entitled on the evidence to find, and was not suggesting that they were obliged to find it. The question in the *Folkestone Case* (3) was whether a particular street had been dedicated as a public highway. The justices having declined to find that it had, an appeal was dismissed by the King's Bench Division, but the Court of Appeal, by a majority, reversed the judgment of the Divisional Court and set aside the justices' decision. The House of Lords held that neither the Divisional Court nor the Court of Appeal had any right to interfere with the decision of the justices, the tribunal appointed to determine the question of fact, and accordingly reversed the judgment of the Court of Appeal and restored the order of the King's Bench Division. LORD ATKINSON said ([1914] A.C. at p. 361) (4):

"It would appear, I think, from the double negative form in which the alleged error of the justices is thus stated, that the line of reasoning adopted by counsel for the respondents in their argument before your Lordships was in the Court of Appeal only too successful. It was, as I understood it, to this effect. . . ."

[His Lordship then read the passage at p. 361 cited by LORD WRIGHT, ante.]

That is LORD ATKINSON's summary of the argument addressed to the House in the *Folkestone Case* (3). He goes on in his own words:

"What the justices have really and in fact done is not to find a negative without any evidence to support it, but they have refused, on the evidence laid before them, to find the affirmative proposition contended for by the respondents that the owner, the Earl of Radnor, had intended to dedicate, and had dedicated, this footway to the public. The existence of this intention, which is crucial in such matters, being an inference of fact, the justices were clearly within their right in so refusing, unless it be the law that in such cases where open, long-continued, and uninterrupted evidence of user is clear, un rebutted, and unexplained, the tribunal whose members are the exclusive judges of issues of fact are bound in law to draw this affirmative inference, and consequently that in every case where the question of the dedication to the public of a highway is tried before a judge and jury, and strong evidence is given of user by the public, while no evidence rebutting the so-called *presumptio juris* thereupon arising is produced, the litigant relying upon dedication must necessarily be entitled to have a verdict directed for him. During the argument, in order to test the soundness of this line of reasoning, I asked to be referred to any case where in a trial before a judge and jury a verdict was directed in such circumstances. No such authority was produced. I believe it would have been produced had it existed. I think it does not exist."

Then he (LORD ATKINSON) deals with the special position of the justices in a passage which I need not read, and goes on:

"I am unable, therefore, to discover on what principle their decision can be set aside as contrary to law because they have refused to find in a way in which a jury in a similar case would not have been directed to find or be bound to find. I propose, therefore, to test the soundness of the reasoning upon which the Court of Appeal have apparently acted by reference to the procedure followed on the trial of questions such as this before a judge and a jury, and as the point is of general importance one may be excused for dealing at some length with a few of the best-known authorities."

Then he quotes the passage from *Poole v. Huskinson* (4) that I have already read, and also a passage from LORD BLACKBURN commenting upon it.

There is another short passage in the same judgment of LORD ATKINSON ([1914] A.C. at p. 367):

"Your Lordships have not been referred to any case, and I, though I have searched somewhat diligently, have not been able to find any case, in which there was even a suggestion that, when the evidence of user is of the strongest kind and is not rebutted, the judge is entitled to direct the jury to find a verdict in favour of dedication. The crucial matter being the existence in the mind of the owner of an intention to dedicate, the inference of that fact, if drawn at all, must be drawn by the judges of fact. The respective functions of the judge and jury in such cases are, in my view, this. It is for the judge in each case to determine, as a matter of law, whether there is any evidence from which the inference of an intention to dedicate can reasonably be drawn; it is for the jury to determine whether it shall be drawn. And if, by adopting such a rule or formula as that contended for, a judge takes upon himself to decide upon the question whether the alleged presumption is rebutted or no, and forces this conclusion of his own upon the tribunal which is to determine issues of fact, either by directing them to find in a certain way, or by setting aside their decision if they find in the contrary way, he, in my view, usurps an authority which in no way belongs to him. The rule of law as to the action of justices in such cases as this is, I think, this, that if it does not appear on the face of their proceeding that they have, as it is said, misdirected themselves, and there was evidence before them upon which reasonable men might act to sustain their findings of fact, their decisions cannot be disturbed. An order made without any evidence to support it is in truth, in my view, made without jurisdiction, and is therefore invalid at law, but a refusal to find an affirmative in favour of the person on whom the burden of proof lies cannot be so treated. It does not come within either the letter or spirit of the above-mentioned rule."

The other judgments are all to the same effect. LORD KINNEAR refers to the judgment of PARKE, B., in *Poole v. Huskinson* (4), and to the comment made upon it by LORD BLACKBURN. His judgment, I think, follows exactly in substance the judgment of LORD ATKINSON. I do not think I need read it, although, if I may say so, it is very forcibly put. LORD DUNEDIN deals with the matter at somewhat greater length. He says that when that case came before the Court of Appeal, two of the judges in the Court of Appeal took the view that there was no evidence upon which the findings of the justices could be supported, but FLETCHER-MOULTON, L.J., dissented. LORD DUNEDIN said ([1914] A.C. at p. 374):

"My Lords, I am not going to recite the judgments of the majority, but I hope I do them no injustice when I say that they seem to me to be rested on this view. They fasten upon certain of the series of separate conclusions in fact which the justices set out in the case,"

then he quotes those conclusions and goes on:

"These findings, say they, amount to a finding of user by the public. User by the public raises a presumption of dedication, and in the other facts found by the justices . . . there is nothing sufficient to rebut the presumption. With deference to the learned judges, I do not think that is the proper way to approach the question, and its defect, to my mind, consists in regarding 'user' as an inflexible term, which, if found to apply, can lead to only one legal result. User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as a matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surround-

ings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication."

LORD LOREBURN seems to have had some doubt as to the effect of the justices' findings, but the decision of the majority is of course the decision of the House and it binds this court.

Many other authorities might be cited. It will be enough to add one. In *Attorney-General v. Manchester Corpn.* (22) ([1931] 1 Ch. at p. 268) MAUGHAM, J., says this:

"There is no doubt as to the legal position in relation to the acquirement of a public right of way. The House of Lords in *Folkestone Corpn. v. Brockman* (3) clearly laid down that notwithstanding a long continuous user of a road by foot passengers, indeed, for upwards of eighty years without interruption, it was yet necessary to establish that there was an intention to dedicate, an *animus dedicandi*, and that the user by the public was evidence of such *animus* and no more. Their Lordships accepted the dictum of PARKE, B., in *Poole v. Huskinson* (4),"

and then he goes on to read the passage which has already been quoted.

I think I have said enough to show that it would be impossible for this court without infringing principles of law which have been, now at any rate, established beyond doubt to say that the county court judge has come to a conclusion of fact on the question whether these ways are highways to which he had no right to come, but I think, as our attention has been called to *Behrens v. Richards* (1), it is right to say a word as to the remarkable likeness of the facts there to the facts of the case before us and to refer to one or two passages in LORD WRENBURY'S (then BUCKLEY, J.) judgment. For example, he says ([1905] 2 Ch. at p. 619):

"To those who are conversant with the Cornish coast or with many other parts of the coast in this country it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for many, many years. From this fact alone it is difficult in surroundings such as there are in this case to infer an intention to dedicate";

and at [1905] 2 Ch. at p. 620:

"The parish roads (as is common in many parts of Cornwall) are in this neighbourhood joined by rough cart-tracks coming up from the irregular contour of the broken coast-line, which serve to give access to the foreshore or the lands adjoining the foreshore; and these rough cart-tracks in turn degenerate into mere rough foot-tracks crossing the moorland and ending sometimes in the roughest of paths by which the adventurous may scramble down the face of the cliff to the sea. From the mere fact that the landowner has never raised objection to anyone who was so minded making use of tracks such as these no inference of dedication can, I think, be drawn."

There are, of course, special circumstances in each case, and moreover a decision of fact in one case cannot bind a judge who has to decide a similar question of fact in another; but I think a reading of *Behrens v. Richards* (1) will show that even if we had power to review the decision of fact of the learned judge in this case, as, in my opinion, we have not, it would be very difficult indeed to say that it is inconsistent with the evidence. I need scarcely add that the restriction on the power of this court to interfere with decisions of county courts on questions of fact is imposed by express legislation and is not merely derived from the common law. If, therefore, the learned judge had simply decided as a matter of fact that there is no evidence of user as of right sufficient to satisfy him that there has been dedication of the ways alleged by the defendants, that would dispose of the case. But he went on to state other grounds for saying that the defendants' case cannot be supported. These are certainly, with all respect to him, not satisfactorily stated, and indeed probably involve errors of law. If his decision depends on these alone,

we ought no doubt to set aside his judgment and order a new trial. I do not feel sure that he has not really decided for the plaintiff on a ground of fact with which we have no power to interfere, and if that were so we ought not to put the parties to the expense of a further hearing, because in addition to the grounds which are sufficient and conclusive he has given others which are erroneous. But the other members of the court are of opinion, and I do not dissent, that his judgment may have been materially influenced by erroneous views of the law, and if so it is right (if the appellants wish it) to give him a further opportunity of considering his decision on the materials already before him and in the light of the opinion of this court.

Appeal allowed: action remitted.

Solicitors: *Taylor, Jelf & Co., for Harwood & Evers, Stourbridge; Evan Davies & Co., for Evan R. Davies & Davies, Pwllheli.*

[*Reported by V. R. ARONSON, Esq., Barrister-at-Law.*]

PATERSON STEAMSHIPS, LTD. v. CANADIAN CO-OPERATIVE WHEAT PRODUCERS, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Tomlin, Lord Macmillan, Lord Wright and Sir Lancelot Sanderson), July 6, 9, 10, 26, 1934]

[*Reported* [1934] A.C. 538; 103 L.J.P.C. 166; 151 L.T. 549; 51 T.L.R. 5, P.C.]

Privy Council—Canada—Shipping—Unseaworthiness—Faulty loading of cargo—Consequent decision of master not to take proper course—Consequent stranding of ship—Cause of stranding—Exemption from liability for “faults or errors in navigation or management of ship”—Applicability in absence of due diligence to make ship seaworthy—Exemption of shipowners from liability “arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees”—Liability of shipowners—Canadian Water Carriage of Goods Act, 1910 (9 & 10 Edw. 7, c. 61, R.S.C.), s. 6, s. 7. Shipping—Limitation of liability—“Actual fault or privity” of shipowners or “fault or neglect of their agents, servants or employees”—“Faults or errors in navigation or management of ship”—Faulty loading of cargo—Consequent stranding—Unseaworthiness—Liability for lack of due diligence to make ship seaworthy—Canadian Water Carriage of Goods Act, 1910 (R.S.C. 9 & 10 Edw. 7, c. 61), s. 6, s. 7.

Under a bill of lading incorporating the Canadian Water Carriage of Goods Act, 1910, shipowners loaded a grain cargo in bulk without precautions to keep it from shifting. For fear that the cargo might shift and so cause shipwreck the master did not take the proper course in a gale, so the ship stranded and some cargo was lost. The trial judge and the Quebec Appeal Court (one judge dissenting) found that the ship was unseaworthy because of the way the cargo was loaded, and that this unseaworthiness was the cause of the loss. On appeal against the affirmation of an award of damages to the cargo-owners, the shipowners contended that (i) as the dissenting judge in the court of appeal considered, the stowage of the grain did not render the ship unseaworthy and the loss was due to errors in navigation, (ii) they were within the exemption from liability for “faults or errors in navigation or management of the ship” conferred by s. 6 of the Canadian Water Carriage of Goods Act, 1910, (iii) they

were within the exemption from liability of "the ship, the owner, charterer, agent or master . . . for loss arising from dangers of the sea or other navigable waters . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees" conferred by s. 7 of the Act.

Held: the shipowners were liable in damages for the loss because (i) the findings as to unseaworthiness and as to the cause of the loss were findings of fact: *Elder Dempster & Co. Ltd. and others v. Paterson, Zochonis & Co., Ltd.* (1), [1924] A.C. 522, distinguished.

(ii) in the present case there was no error in law which could vitiate these findings, and no ground for interfering with them; the words "faults or errors in navigation or management of the ship" in s. 6 were not wide enough to cover matters involving simply failure to take care of the cargo: *Gosse Millard, Ltd. v. Canadian Government Merchant Marine, Ltd.* (2) [1929] A.C. 223, followed.

(iii) s. 6 did not protect a shipowner unless he had exercised due diligence to make the ship seaworthy: *McFadden Bros. v. Blue Star Line, Ltd.* (3), [1905] 1 K.B. 697, and the *Carib Prince* (4) (1897), 170 U.S.Rep. 665, applied.

(iv) the findings of fact clearly implied a finding that the owners had not exercised such diligence.

(v) the exception of "dangers of the sea or other navigable waters" in s. 7 would not by itself exempt a shipowner in respect of a loss caused by negligence or unseaworthiness, unless the negligence was excused by s. 6 or the unseaworthiness was a latent defect within the scope of s. 6, neither of which was the case here.

(vi) the second "or" [i.e., the one in italics] in the following passage from s. 7—"loss arising without *their* actual fault or privity *or* without the fault"—must be read as "and": decision of the trial judge to this effect in *Gosse Millard, Ltd. v. Canadian Government Merchant Marine, Ltd.* (2), [1927] 2 K.B. at p. 435, approved.

(vii) the word "their" in the passage from s. 7 above set out (which is there printed in italics) relates back to the words "the ship, owner, charterer, agent or master," and this part of s. 7, therefore, operated to relieve the shipowners from liability for loss due to unseaworthiness only if the unseaworthiness arose "without the actual fault or privity" of the persons above enumerated and "without the fault or neglect of" those persons' "agents, servants or employees."

(viii) the findings set out above necessarily involved some fault or failure within the final words of s. 7, and the shipowners were therefore not entitled to the benefit of the general words of exception at the end of the section.

Per Curiam: sections 6 and 7 reduce the operative obligation to provide a seaworthy ship to an obligation to use due diligence to make the ship seaworthy.

Quære whether in the case of a loss by fire does not put a heavier burden on the shipowner than s. 502 of the Merchant Shipping Act, 1894.

Quære whether the relief from liability for loss conferred by the concluding words ["or for loss arising . . ."] of s. 7 is limited to cases where the loss is caused also by some one of the excepted perils specified in the earlier part of the section.

Observations on the common law obligations attaching to a carrier of goods by sea or water.

Notes. For the English law on these topics, see the Carriage of Goods by Sea Act, 1924 (23 HALSBURY'S STATUTES (2nd Edn.) 884).

As to the shipowners' liability for unseaworthiness, and for improper stowage of cargo, see 30 HALSBURY'S LAWS (2nd Edn.) 471-472, para. 628, and 451-454, para. 611 text and notes (m), (n), (o) respectively; and for cases on the subjects see 41 DIGEST 428-435, 2693-2732. As to the reluctance of the Privy Council to interfere with findings of fact in which the courts below concur, see 9 HALSBURY'S LAWS

(3rd Edn.) 393, para. 921, and for cases on the subject see 16 Digest 162-164, 650-679.

Cases referred to:

- (1) *Elder Dempster & Co., Ltd. and others v. Paterson, Zochonis & Co., Ltd.* [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp.M.L.C. 351; 29 Com. Cas. 340, H.L.; 41 Digest 478, 3118
- (2) *Gosse Millard, Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1927] 2 K.B. 432; 43 T.L.R. 544; 32 Com. Cas. 291, C.A.; on appeal, [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; 45 T.L.R. 63; 34 Com. Cas. 94; 17 Asp.M.L.C. 549, H.L.; Digest Supp.
- (3) *McFadden Bros. v. Blue Star Line*, [1905] 1 K.B. 697; 74 L.J.K.B. 423; 93 L.T. 52; 53 W.R. 576; 21 T.L.R. 345; 10 Asp.M.L.C. 55; 10 Com. Cas. 123; 41 Digest 445, 2796.
- (4) *The Carib Prince* (1897), 170 U.S.Rep. 665.
- (5) *Robins v. National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; 43 T.L.R. 248; 71 Sol. Jo. 158, P.C.; Digest Supp.
- (6) *Corpn. of the Royal Exchange Assurance (of London) and another v. Kingsley Navigation Co., Ltd.*, [1923] A.C. 235; [1923] 1 W.W.R. 737; [1923] 1 D.L.R. 1048; 128 L.T. 673; 16 Asp.M.L.C. 44, P.C.; 41 Digest 480, 1.
- (7) *Notara and another v. Henderson and others* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Exch.; 41 Digest 292, 1519.
- (8) *F. O. Bradley & Sons, Ltd. v. Federal Steam Navigation Co., Ltd.* (1927), 137 L.T. 266; 17 Asp.M.L.C. 265; 27 Lloyd, L.R. 395, H.L.; 41 Digest 442, 2777.
- (9) *Kish and another v. Taylor, Sons & Co.*, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 28 T.L.R. 425; 56 Sol. Jo. 518; 12 Asp.M.L.C. 217; 17 Com. Cas. 355, H.L.; 41 Digest 485, 3170.
- (10) *W. Angliss & Co. (Australia) Proprietary, Ltd. v. P. & O. Steam Navigation Co., Ltd.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 43 T.L.R. 675; 17 Asp.M.L.C. 311; 32 Com. Cas. 388; 41 Digest 474, 3054.
- (11) *Wilson & Co. v. Owners of the Cargo of the Xantho* (1887), 12 App. Cas. 503; 56 L.J.P. 116; 57 L.T. 701; 36 W.R. 353; 3 T.L.R. 766; 6 Asp.M.L.C. 207, H.L.; 41 Digest 414, 2573.
- (12) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1914] 1 K.B. 419; 83 L.J.K.B. 861; 109 L.T. 433; 29 T.L.R. 739; 13 Com. Cas. 328; 12 Asp.M.L.C. 381, C.A.; affirmed, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283, H.L.; 41 Digest 418, 2616.

Appeal from a decision of the Court of King's Bench for the province of Quebec (Appeal side) dismissing the defendant shipowners' appeal from the judgment of the Superior Court of the District of Montreal, delivered on May 31, 1932, by PHILIPPE DEMERS, J.

The plaintiff cargo-owners' claim in the action was in respect of loss of and damage to a cargo of wheat and barley occasioned by the stranding of the defendants' steamship *Sarniadoc* in shallow water near Main Duck Island at the eastern end of Lake Ontario. After the stranding of the *Sarniadoc* a portion of her cargo was salvaged and the cargo-owners' original claim in the action amounted to the sum of \$83,029.03. The learned trial judge gave judgment in favour of the cargo-owners for the sum of \$76,911.44 with interest from Jan. 14, 1931, and costs. This judgment was affirmed on March 29, 1933, by the Court of King's Bench for the Province of Quebec (TELLIER, C.J., and DORION, RIVARD, LETOURNEAU, JJ.; BOND, J., dissenting).

The facts are fully stated in their Lordships' judgment.

The shipowners appealed.

A. T. Miller, K.C., G. St. Clair Pilcher and Lynch Staunton (of the Canadian Bar) for the shipowners.

D. N. Pritt, K.C., and C. Russel McKenzie, K.C. (of the Canadian Bar) for the cargo-owners.

Their Lordships took time for consideration.

July 26. The judgment of their Lordships was delivered by

LORD WRIGHT.—The appellants were sued as the owners of the steamship *Sarniadoc*, which on Nov. 29, 1929, stranded at Main Duck Island at the eastern end of Lake Ontario and became practically a total loss: the respondents sued as owners of a parcel of wheat and barley, being part cargo of the *Sarniadoc* when she stranded, and in the action claimed damages in respect of the loss of the grain consequent on the stranding. The cargo-owners have succeeded before the trial judge and before the Court of King's Bench (in Appeal) for the Province of Quebec, BOND, J., dissenting. The shipowners now appeal. No question of amount need here be considered.

The cargo-owners' parcel had been transhipped at Port Colborne and was being carried under the terms of a bill of lading which contained the clause

"This shipment is subject to all the terms and conditions and all the exemptions from liability contained in the Water Carriage of Goods Act,"

that is the Canadian Act of 1910 so entitled; it will accordingly be necessary to consider the provisions of that Act in relation to the facts of the case.

The *Sarniadoc* was only partially loaded, her actual draft being about 14 ft., as compared with a fully loaded draft of 15 ft. 6 in. She had two holds, which cannot have been full of grain. She was bound to Montreal, where it was intended to keep the grain in the holds over the winter. She came out of the Welland Canal at Port Dalhousie and entered Lake Ontario at 2.15 p.m. on Nov. 29, 1929. The master was at first apprehensive of the weather, and thought it was more prudent to take a northerly course in the direction of Toronto, where she might have remained with the cargo over the winter. But about 4.10 p.m., thinking the weather more favourable, he decided to proceed on an easterly course down the Lake. At night the weather got worse and the wind increased to a westerly to west-north-westerly gale. The temperature fell to zero, with heavy snow. When passing Peter Point Light, about 3 a.m. on Nov. 30, 1929, the master did not succeed in getting a satisfactory bearing, but he proceeded till about 6 a.m., when he reduced speed, being uncertain of his position. He decided, he says in his evidence, to make for Main Duck Island in order to shelter under it, instead of turning at the appropriate position northwards in order to make Kingston, which was on the course for Montreal. At about 7.10 a.m. the trees of the Island were suddenly seen about three-quarters of a mile distant. The master at once put his ship about to beat off the lee shore, but, owing to the force of the wind and sea, the vessel's head fell off, and she stranded on the reef at the northerly end of the island, where she remained fast and broke her back.

At a wreck inquiry held at Toronto on Jan. 9, 1930, the Dominion Wreck Commissioner, sitting with two Nautical Assessors, found that the master was in default, and that the stranding was caused by his default; it was found that from the outset proper and ordinary judgment was not exercised.

At the trial, the master, in his evidence, was not prepared to say that the ship was seaworthy, and when challenged to explain why he kept on an easterly course instead of turning on a northerly course to Kingston, gave answers which were susceptible of the meaning that he did not do so because he knew the cargo might be liable to shift, and he was accordingly afraid to turn the ship on a course which would put her in the trough of the sea, though he also said that he decided to seek shelter because of bad weather conditions and poor visibility.

The circumstances of the loss appear to be somewhat peculiar, but their Lordships have come to the conclusion that for the purposes of this appeal they must accept the concurrent findings of fact arrived at by the trial judge and by the majority of the Court of Appeal. These findings may be summarised as being (1) that the ship was unseaworthy in that the grain cargo was loaded in bulk and

without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy; and (2) that this unseaworthiness was the cause of the loss, in the sense that the master had been apprehensive that his cargo, stored as it was, would shift if he were to put the vessel on the proper course, which would have involved putting her in the trough of the sea, and for that reason did not do so, whereas if he had felt able to take that course he would have cleared the shoal on which he stranded. The finding of the court below on this point was that there was in a sense bad navigation, but that the navigation was justified by the master's legitimate fears. RIVARD, J., thus sums up the position:

"Car il ne semble pas douteux que l'échouement du *Sarniadoc* fut le résultat d'une manœuvre erronée en soi, mais que le maître dut adopter, parce que la marche normale du vaisseau l'aurait mis au creux de la lame, avec danger de désarrimage des grains. Le naufrage et une perte totale auraient pu résulter d'un désarrimage dans ces conditions; la manœuvre adoptée pour éviter ce désastre a causé l'échouement. Erreur de navigation, mais justifiée, chez le maître, par la crainte d'un désarrimage possible et qui en effet devait être prévenu."

The view of the case which found favour with BOND, J., who dissented in the Court of Appeal, was that the stowage of the grain did not render the vessel unseaworthy, but that the loss was due to errors in navigation which, in his view, seem to have mainly consisted in the action of the master in proceeding down the Lake in heavy weather with snowstorms without verifying his position by means of accurate bearings or soundings, until he suddenly found himself about three-quarters of a mile off Main Duck Island; the action he then took was not, in the view of the judge,

"influenced to any appreciable extent by a consideration of the likelihood of the cargo shifting."

On this view of the facts which seems to represent the case principally relied on by the shipowners, BOND, J., held that the shipowners were entitled to succeed under the Water Carriage of Goods Act. However, the trial judge and the majority of the Court of Appeal, having found that the loss was caused by unseaworthiness, held that the provisions of the Act rendered the shipowners liable.

Their Lordships regard these findings of the courts below as findings of fact. It is true that in some cases a finding that a ship was unseaworthy may be a mixed finding of fact and law; thus in *Elder Dempster & Co., Ltd. and others v. Paterson, Zochonis & Co., Ltd.* (1), where the facts were not in dispute, it depended on construction of law whether these facts amounted to bad stowage, or to that type of unseaworthiness which does not endanger the ship, but involves damage to the cargo in her. In the present case, however, the question was whether the loading of the grain without any precaution to guard against shifting, particularly where the holds were not fully loaded, endangered the safety of the vessel and made her unfit for the adventure as a ship. That was a question of fact. Equally it was a question of fact whether due diligence had been exercised to make the vessel seaworthy: the answer did not depend on the construction of any legal regulation; it was agreed that the standard of the duty which applied in the case of the *Sarniadoc*, which was registered in Great Britain, was to be found in s. 452 (1) of the Merchant Shipping Act, 1894; all that is required by that section is that all necessary and reasonable precautions should be taken in order to prevent the grain cargo from shifting: what was necessary and reasonable in all the circumstances of the case, including the practice, alleged by the shipowners to prevail in the Canadian Lakes grain trade, to do nothing but level off the grain in the hold, could only be determined as an issue of fact. Equally was it a question of fact whether the unseaworthiness found to exist did or did not cause the casualty. It cannot properly be said that the causation which the judge found to have operated was too remote in law

This Board has said, in a judgment delivered by LORD DUNEDIN in *Robins v. National Trust Co., Ltd. and others* (5), on an appeal from the Supreme Court of Ontario, that it is not a cast-iron rule that the Board will not

“examine the evidence in order to interfere with the concurrent findings of two courts on a pure question of fact.”

The rule is one of conduct which the Board has laid down for itself, and is not a rule based on any statutory provision. Their Lordships in the present case can discover no error in law which could vitiate the findings, still less anything that could be said to involve a miscarriage of justice. The loss of this vessel is somewhat difficult to explain, even allowing for the storm and the bad visibility. A plausible suggestion that she was lost because of deficient engine power—that is, another form of unseaworthiness—has been unanimously rejected by all the judges below, and was not even argued before their Lordships. There remain the rival findings of BOND, J., on the one side and of the other judges on the other. Their Lordships can see no ground whatever in all the circumstances of this case for interfering with the concurrent findings of both the courts which have considered the matter.

To determine how these findings affect the obligations of the parties, it is necessary to examine the terms of the Water Carriage of Goods Act, 1910, which is incorporated in the contract under which the grain was being conveyed. The terms of the Act have been the subject of argument before this Board, and must now be considered. Except for a decision of this Board in *Corpn. of the Royal Exchange Assurance (of London) and another v. Kingsley Navigation Co., Ltd.* (6), there is apparently no authority on its construction: at least their Lordships have not been referred to any, and they have not themselves been able to find any. The Act, however, has a certain kinship with similar legislation in other countries on the same subject-matter, in particular, with the United States Harter Act, 1893, and the later Acts, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. These Acts differ in general scheme and framework from the Canadian Act, but in certain respects decisions under them may be helpful in construing the Canadian Act. And all these Acts agree in this respect, that they superimpose statutory restrictions on the freedom possessed by the shipowner at common law to restrict his liability as carrier, and at the same time give him the benefit of statutory provisions in his favour. These Acts accordingly cannot be understood or construed except in the light of the shipowners' common law liability and the usual methods of limiting that liability previously in vogue.

It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer; that is, he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognised that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If, then, goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of WILLES, J. (in *Notara and another v. Henderson and others* (7)),

"the exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care."

WILLES, J., is there referring to what may be called the specific excepted perils. The position is thus summed up by LORD SUMNER in *F. O. Bradley & Sons, Ltd. v. Federal Steam Navigation Co., Ltd.* (8):

"The bill of lading described the goods as 'shipped in apparent good order and condition' . . . it was common ground that the ship had to deliver what she received, as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

However, negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not per se for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the user of these general exceptive clauses.

The Canadian Act can now be considered, so far as material, in the light of these simple rules, simple in themselves, though in application involving many difficult refinements. Section 4 consists of prohibitions; the section recognises and enforces the fundamental obligations which have just been explained, and then goes on to enact that any clause, covenant or agreement which weakens or relieves against them is illegal and void unless it is in accordance with the other provisions of the Act.

It is, for the present purposes, in ss. 6 and 7 that these provisions are to be found.

Section 6 deals with the question of negligence and latent defect: it is limited so far as concerns negligence to "faults or errors in navigation or management of the ship": the meaning of these words (or of analogous words) in the Carriage of Goods by Sea Act, 1924, was discussed in *Gosse Millard, Ltd. v. Canadian Government Merchant Marine, Ltd.* (2), where they were held not to be wide enough to cover matters involving simply a failure to take care of the cargo. What is important to note in s. 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law, seaworthiness of the ship in a contract for sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of (*Kish and another v. Taylor, Sons & Co.* (9); but the obligation to provide a seaworthy ship is absolute, and is not limited to due diligence to make it so. The matter which s. 6 deals with, as the condition on which its privileges may be relied on, is not seaworthiness, but due diligence to make the ship seaworthy: if, however, that condition is not fulfilled, the shipowner cannot, under s. 6, excuse himself from liability for loss due to negligence in the respects specified in the section. What is meant in the British Carriage of Goods by Sea Act, 1924, by due diligence to make the ship seaworthy was discussed in *W. Angliss & Co. (Australia) Proprietary, Ltd. v. P. & O. Steam Navigation Co.* (10); it is not limited to personal diligence on the part of the owner. The Act does not in terms say that there shall not be implied in any contract of sea carriage the absolute undertaking to provide a seaworthy ship, but it would,

for practical purposes, seem to effect the same result, subject to the condition by the last words of the section "or from latent defect." The view that the whole section is subject to the condition of due diligence to make the vessel fit is supported by *McFadden Bros. v. Blue Star Line, Ltd.* (3), and by the case in the Supreme Court of the United States, the *Carib Prince* (4), which dealt with analogous provisions in the Harter Act.

It follows that on this construction of the section the findings of fact of BOND, J., would entitle the shipowners to succeed, as, indeed, the judge held. It is true that though he finds the ship was seaworthy he does not seem expressly to find that the owners had exercised due diligence to make her so, which is the essential finding under the section, and theoretically might be a different matter; but no doubt that finding was implied. The fault or neglect he finds to have caused the loss was a fault in navigation.

Apart from the case of latent defect, s. 6 has said nothing about unseaworthiness causing the loss, nor does it cover any case of negligence not falling within its precise and limited terms. It is, then, to s. 7 that resort must be had in order to determine the legal effect of the findings of fact of the courts below, that is, that the cargo was lost owing to the ship being unseaworthy. Even if the court do not find whether or not due diligence was exercised to make her seaworthy, that finding is clearly implied: the bad stowage, on its face, must have involved the fault or neglect of the owners or of their responsible servants or agents. There is no question of latent defect.

The words of s. 7 which are material to this case are:

"The ship, the owner, charterer, agent or master, shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees."

Their Lordships disregard the intervening words which deal with matters such as inherent vice of the goods or delays or deviation, the last-named exception being somewhat difficult to construe.

The first words of the section contain a limited number of specific perils which are thus sanctioned by the Act. It is, however, clear that these exceptions will not per se protect the shipowner in respect of a loss caused by negligence or by unseaworthiness, and up to this point the shipowner will not be relieved from liability, unless the negligence is excused by s. 6 or the unseaworthiness is a latent defect also within s. 6. These exceptions do not cover the whole scope of the general obligations of the carrier, at common law or as set out in s. 4. Thus, in the present case, the stranding was plainly a peril or danger of the sea, and in that sense the loss of the cargo was due to a danger of the sea. But it was also caused by unseaworthiness of such a character that it could not be described as a latent defect. On the principles already stated, the statutory exception of dangers of the sea does not in this case relieve the shipowner from liability: if he is to escape liability he can only find protection in the final sentence of s. 7, which must next be construed.

In form the sentence is purely negative:

"The owners, &c., are not to be liable for loss arising without their actual fault or privity, or without, &c."

It is clear that the second "or" here must be read as "and": this was so held in *Gosse Millard's Case* (2) by the trial judge ([1927] 2 K.B. at p. 485), a ruling not questioned in the House of Lords. To avoid liability, the fault or neglect must not be that of either the shipowner or of any of the responsible persons who are enumerated. The negative form is appropriate because the words are intended to exclude what would otherwise be a liability for the loss. It may be questioned whether the shipowner can invoke these general words, unless the case is first brought within the specific exceptions set out in the earlier part of the section, and

thereupon issues of negligence or unseaworthiness have fallen to be dealt with; it is not here necessary to decide this question, though the mode in which the analogous case of contractual exceptions has been dealt with, seems to suggest that the question should be answered in the affirmative: see LORD MACNAGHTEN in *Wilson & Co. v. Owners of the Cargo of the Xantho* (11) (12 App. Cas. at p. 515). If these general words were to be read irrespective of the particular exceptions which precede them in the section it is difficult to see why these particular exceptions are stated at all; the general words would suffice to cover by themselves every case in which the shipowner could claim exemption from liability under s. 7 for any loss due to the excepted perils.

What, then, is the precise effect of these words? The phrase "actual fault or privity" seems to be taken from s. 502 of the Merchant Shipping Act, 1894, which relates to "fire." It has been held under that section that if the shipowner proves absence of actual fault or privity, he is exempted from loss, even if due to unseaworthiness (*Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (12)); that decision was applied in the construction of the same words in s. 7 by this board in *Corpn. of the Royal Exchange Assurance (of London) and another v. Kingsley Navigation Co., Ltd.* (6), where the loss was by fire; as the fire was the result of unseaworthiness, the shipowners, not having established absence of actual fault or privity, were held to be liable. The meaning of the words was thus explained by HAMILTON, L.J. (as he then was) in *Lennard's Case* (12) ([1914] 1 K.B. at p. 436):

"Actual fault negatives that liability, which arises solely under the rule of respondeat superior."

However, as a matter of grammar the word "their" in s. 7 relates back to the enumeration of persons at the beginning of the section and thus includes the actual fault or privity of the owner, charterer, agent or master, which is a much wider category than that under s. 502 of the Merchant Shipping Act; this may raise a question in the case of a loss by fire whether s. 7 does not in this respect, and also by its reference next following to agents, servants and employees, put a heavier burden on the shipowner than s. 502 of the Merchant Shipping Act, so as to be pro tanto inconsistent with that section. No such question, however, arises in this case. The general exception at the end of s. 7 is obviously not limited to unseaworthiness, but goes to all cases apart from those covered in s. 6, in which due care on the part of the enumerated persons is material to the due performance of the contract.

Now the general words go beyond the category of owner, &c., and deal with "the fault or neglect of their agents, servants or employees." However, as regards unseaworthiness, since the words "actual fault or privity" on the authorities quoted are to be construed as applying even to unseaworthiness, it seems that the words which follow must also receive the same effect, with the result that if, but only if, the shipowner is able to exclude the actual fault or privity or the fault or neglect of the various persons enumerated, he will be able to relieve himself from liability for loss due, among other things, even to unseaworthiness, though the extent of that relief may be limited to cases where the loss is caused also by some one of the excepted perils specified in the earlier part of the section. The operative obligation to provide a seaworthy ship is thus under the Act reduced, even when unseaworthiness causes the loss, to an obligation which may be compendiously described as an obligation to use due diligence to make the ship seaworthy.

In the present case, it is clear that the ship was, according to the findings of the courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of s. 7. Such a finding, if not express, is obviously to be implied. Hence the shipowners cannot avail themselves of the exception of dangers of the sea, though these dangers caused the loss, because they cannot show in respect of the unseaworthiness which was also a cause of the loss, and indeed the real cause of the loss, that it existed under

conditions entitling them to the benefit of the general words of exception at the end of the section.

The appeal in their Lordships' judgment should be dismissed with costs.

They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *W. A. Crump & Son; Middleton, Lewis, & Clarke.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. v. LIVERPOOL JUSTICES. Ex Parte LIVERPOOL CORPN.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and MacKinnon, JJ.), April 27, 30, 1934]

[*Reported* [1934] 2 K.B. 277; 103 L.J.K.B. 625; 151 L.T. 327; 98 J.P. 341; 50 T.L.R. 425; 32 L.G.R. 289]

Licensing—Special removal—Need of occupation of entire premises by licensee at time of application—Need of consent of owner to application—Licensing (Consolidation) Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. 24), s. 24 (2).

It is not essential, in order to render an order for the special removal of a licence valid, that the applicant should be in occupation of the whole of the licensed premises at the time when the application is made. Nor in the case of an application for such an order, is the consent of the owner of the premises necessary.

Notes. Section 24 (2) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 24 (3) (a) of the Licensing Act, 1953, which is in the same terms so far as is material for the present case.

Referred to: *R. v. Weymouth Licensing Justices, Ex parte Sleep*, [1942] 1 All E.R. 317.

As to removal of licences, see 19 HALSBURY'S LAWS (2nd Edn.) 29, 30; and for cases see 30 DIGEST (Repl.) 39, 40. For Licensing Act, 1953, s. 24, see 33 HALSBURY'S STATUTES (2nd Edn.) 174.

Case referred to:

- (1) *R. v. Yorkshire (West Riding) Justices, Ex parte Shaw*, [1898] 1 Q.B. 503; 67 L.J.Q.B. 279; 78 L.T. 47; 62 J.P. 197; 46 W.R. 334; 14 T.L.R. 89; 42 Sol. Jo. 135, D.C.; 30 Digest (Repl.) 12, 48.

Rule nisi for certiorari.

On May 7, 1858, a lease of certain land and buildings in Dale Street, Liverpool, for a term of seventy-five years was granted by the Liverpool Corporation to one Norris. At the time of the lease the premises comprised therein were not licensed premises, but on April 2, 1868, a licence was obtained by Norris in respect of the premises. In 1893 the residue of the above term was acquired by the predecessors in title of Peter Walker & Son, Ltd. ("the brewery company"). In 1903 certain adjacent freehold property comprising about 30 square yards was purchased by the brewery company, who built thereon an extension of the licensed premises, which became known as the Junction Hotel. The licence was from time to time renewed, and in 1933 the holder was James Suett. In February, 1933, Suett made an application, under s. 24 of the Licensing (Consolidation) Act, 1910, for an order for a special removal of the licence on the ground that the premises in respect of which the licence had been granted were about to be pulled down by the Mersey Tunnel Committee. The committee had obtained powers for the compulsory acquisition

of land for the purposes of the Mersey Tunnel, but at the time of Suett's application the compulsory powers had come to an end by effluxion of time, and an application for special removal, which was made by Suett, failed before the justices on April 11, 1933, on the ground that there was no evidence that the premises were about to be pulled down immediately. On July 18, 1933, the Mersey Tunnel Act, under which the committee's powers for the compulsory acquisition of land were renewed, became law. An appeal by Suett to quarter sessions against the refusal of the justices to make an order for special removal was dismissed. The lease of the leasehold portion of the premises having expired on May 6, 1933, the Liverpool Corporation on July 25 gave the brewery company notice to quit on Aug. 12. The company did not vacate the premises, and on Oct. 6, 1933, the corporation obtained an order for possession. On Oct. 21, 1933, Suett gave notice of a fresh application under s. 24 of the Act of 1910 for an order for special removal to premises in West Derby Road called the Tuebrook Hotel. On Oct. 24, 1933, he and the brewery company gave up possession of the leasehold portion of 160, Dale Street. On Nov. 7, 1933, the justices heard his further application and granted it. On Dec. 21, 1933, a rule nisi for certiorari calling on the justices to show cause why their order of Nov. 7, 1933, should not be removed into the High Court to be quashed was granted at the instance of the Liverpool Corporation. The grounds urged in support of the rule were (i) that the licensee was not in occupation of the whole of the licensed premises at the time when the application was made; (ii) that the order was made without the approval of the corporation.

Montgomery, K.C., and *Hartley Shawcross* showed cause for the brewery company.

J. D. Cassels, K.C., and *Maxwell Fyfe, K.C.*, showed cause for the licensee.

J. E. Singleton, K.C., and *F. A. Sellers* in support of the rule.

By the Licensing (Consolidation) Act, 1910 :

Section 24 (2) : "A removal of a justices' licence may . . . be authorised by the licensing justices at their discretion, either on an application for the purpose made on any ground (in this Act referred to as an ordinary removal), or on an application made on the special ground—(a) that the premises in respect of which the licence has been granted are or are about to be pulled down or occupied under any Act for the improvement of highways, or for any other public purpose; or (b) that the premises in respect of which the licence has been granted have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity (in this Act referred to as a special removal)."

LORD HEWART, C.J., recited the facts substantially as stated above and continued : It is important to remember not only that this was an order for special removal under s. 24 (2) of the Licensing (Consolidation) Act, 1910, but also that the language of that section differs in very material particulars from the corresponding words in s. 14 of the Alehouse Act, 1828. It was under the Act of 1828 that *R. v. Yorkshire (West Riding) Justices, Ex parte Shaw* (1) was decided. Section 14 of that Act provided :

" . . . If any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose . . . it shall be lawful for the justices assembled . . . at a special session . . . to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose . . . and who shall open and keep as an inn some other fit and convenient house, a licence to sell excisable liquors by retail, to be drunk or consumed therein. . . ."

No such words as "house, being kept as an inn by any person duly licensed as aforesaid" appear in s. 24 (2) of the Act of 1910.

It seems to be tolerably clear from the wording of both paras. (a) and (b) of sub-s. (2) of that section that at the time when the application is made the premises in respect of which the licence has been granted may be premises in which it is physically impossible to carry on the business of a licensed victualler. As was urged in argument, it is quite obvious that the words in that subsection "are pulled down" mean "have already been pulled down." It is no less obvious that, where the premises

"have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity"

there must be, at the time when the application is made, no premises in which the licensee can carry on the business of a licensee. That being so, it appears to me that in the present case the licensee was entitled to say that he was the holder of a licence in respect of premises which were about to be pulled down under an Act of the kind mentioned in the statute. Therefore I do not think it is material, though at first blush it may have seemed to be so, that the lease of the leasehold part of the premises expired on May 6, 1933, that is to say, some months before his application was heard and the removal order made.

Reliance has been placed, in the argument in support of the rule, upon the allegation that it is necessary that an applicant under s. 24 (2) should be in actual occupation of the premises at the time when the application is made. No such provision is to be found in the subsection, and, indeed, it is difficult to see how a person can, except in a highly artificial sense, be said to be in occupation of premises which have been pulled down or destroyed by fire. As a matter of fact, in the present case, at the time when notice of the application was given, namely, on Oct. 21, 1933, the licensee was in occupation of the premises. Let it be granted that he was in occupation in somewhat peculiar circumstances, but in fact the premises were then existing, partly freehold, partly leasehold, and he was in occupation of the whole. It does not seem to me, therefore, that it is true to say that the justices usurped a jurisdiction which they had not or that they purported, by an erroneous interpretation of the law, to give themselves a jurisdiction which they had not.

The first ground on which the rule was obtained is that the order complained of was granted without the consent of the Liverpool Corporation, who became entitled to the greater part of the premises on May 6, 1933. That, no doubt, is true, but in the case of a special removal it is not necessary, as it is in the case of an ordinary removal, that the registered owner of the premises should make no objection. Undoubtedly, under s. 26 (4) and (5) of the Act of 1910, it is fatal to an application for an ordinary removal that the registered owner should object, but we are not dealing here with an ordinary removal, and a special removal differs greatly from an ordinary removal. As was pointed out in the argument, it is not something which arises voluntarily, as does an ordinary removal, and, secondly, while an order for ordinary removal is not valid unless it is confirmed by the confirming authority, no such ingredient exists in the case of a special removal. It seems to me that there has been a certain confusion between the procedure applicable in the case of an ordinary removal, to which objection on the part of the owner would be fatal, and that applicable in the case of a special removal, which does not require the consent of the registered owner. It may be added that in this case it does not appear that the Liverpool Corporation were the registered owners of these premises, and they could not be the registered owners of that part of which the fee simple was in the brewery company.

The second ground in the rule is simply the allegation that the justices were wrong in law. The third ground alleges that the Liverpool Corporation have been wrongfully deprived of their right to have the licence transferred to their nominee or assign, or to apply for a special or ordinary removal to other premises belonging to them. The answer is that the Liverpool Corporation had no such right, and, therefore, could not be deprived of it. They had not put themselves, nor could

they put themselves, in a position to have the licence transferred to their nominee or to apply for a special or ordinary removal order. A further ground alleges that the Liverpool Corporation were by this order wrongfully deprived of their right to refuse consent to an ordinary removal, if applied for by the holder of the licence. We think that point does not arise, because here there is no question of an ordinary removal. Then there follow the grounds (d) and (e) with reference to what is described as a preliminary point of law, that is, the point of law already dealt with, whether the licensee was in the circumstances a person entitled to a special removal order. It is said that the justices, by erroneously deciding that he was, purported to give themselves a jurisdiction which they did not lawfully possess and so exceeded their jurisdiction in making the order.

The words which impress me in s. 24 (2) (a) are: "The premises in respect of which the licence has been granted." There is no ground at all for the allegation that the premises with which we are here concerned were not premises in respect of which a licence had been granted or for the allegation that the applicant, being undoubtedly the person to whom the licence in respect of those premises had been granted, was not in a position to apply under the subsection for an order for special removal. Whether he was entitled to the order was a matter for the licensing justices in the exercise of their discretion, and it may be that, if the lease had contained a covenant that upon its determination the lessee should hand back the premises to the lessors as licensed premises, the justices would not have exercised their discretion in the way in which they did. As there was no such covenant, and as the premises were unlicensed at the time when the lease was granted, I think that the justices, in the very peculiar circumstances of this case, acted within their discretion in making this order for special removal. I think, therefore, that this rule ought to be discharged.

AVORY, J.—I agree that the rule should be discharged. In my opinion, the only question calling for decision in this case is whether in the circumstances James Suett on Nov. 7, 1933, was entitled to apply for the special removal of the licence. If he was, then, under s. 24 (2) of the Act, the justices had a discretion to grant his application, and it is not suggested that the conditions precedent to the exercise of that discretion under s. 27 were not fully fulfilled, or that the discretion was not judicially exercised. The only grounds suggested in this rule for the disqualification of Suett are, first, that he was not in occupation of the whole of the licensed premises at the time when the application was made, and, secondly, that the order was made without the approval of the Liverpool Corporation.

With regard to the first point, that the licensee was not in occupation at the material time of the whole of the licensed premises, there is no provision in the statute which requires a licensee to be in occupation of the whole of the licensed premises. The only provision is that he shall be the licence-holder: see the statutory form for the special removal of a justices' licence, Form No. 4, made by the Secretary of State under the powers conferred by the statute: see *PATERSON'S LICENSING ACTS*, 1934, 44th Edn., p. 1283. That form is in these terms:

"The licensing justices . . . hereby authorise the special removal of the justices' licence hitherto held by A. B. in respect of the licensed premises situate at . . . and authorise him to hold"

the licence at the other premises. There is no question here that James Suett was the person who hitherto had held a justices' licence in respect of the licensed premises. Further, upon this question of occupation, Suett was in fact in lawful occupation of the freehold portion of the licensed premises which might have been enlarged and themselves licensed.

With regard to the second ground, that the order for special removal was made without the consent of the Liverpool Corporation, the short answer which my Lord has already given is that s. 24 does not require the consent of the owner in the case of a special removal, as distinguished from an ordinary removal which, under s. 26, does require that consent.

If Suett was entitled to apply for this order, it appears to me that the alleged grievance set out in the grounds upon which the rule was obtained—that the corporation were deprived of their right to have the licence transferred or removed—is irrelevant. In fact, however, it is without foundation, for the Liverpool Corporation never were in a position to have the licence transferred to their nominee, nor were they in a position to apply for the special or ordinary removal of the licence so long as James Suett remained the holder of the licence and he and the owners of the freehold portion of the licensed premises remained in occupation thereof. The corporation is not in the circumstances specially aggrieved so as to obtain this writ *ex debito justitiæ*, and, if they are not, then this court has a discretion in granting the writ, and I see no ground for interfering with the discretion exercised by the licensing justices in this case.

The only case which has been relied on in support of the rule (*R. v. Yorkshire (West Riding) Justices, Ex parte Shaw* (1)) affords no authority in the present circumstances, as has been pointed out by my Lord. The words in the statute under which that case was decided expressly required that the person applying for the removal should be the person who at the time of the application was keeping the premises as an inn. No such words occur in the present statute of 1910, and that case, therefore, affords no authority. I agree for these reasons that the rule should be discharged.

MACKINNON, J.—I agree.

Rule discharged.

Solicitors: *Godden, Holme, & Ward*, for *Edwin Berry & Co.*, Liverpool; *F. Venn & Co.*, for Town Clerk, Liverpool.

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

JOHNSON v. LEICESTER CORPORATION

[COURT OF APPEAL (Scrutton, Slesser and Maugham, L.JJ.), February 7, 8, 1934]

[*Reported* [1934] 1 K.B. 638; 103 L.J.K.B. 541; 151 L.T. 8; 98 J.P. 165; 50 T.L.R. 214; 78 Sol. Jo. 122; 32 L.G.R. 147]

Housing—Demolition order—Orders in respect of two houses—Undertaking by owner to make one house, fit for habitation, of the two—Power of local authority to accept—Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 19 (2).

Two houses, situated back to back, could not be rendered fit for human habitation if dealt with as separate entities and the local authority made two demolition orders under s. 19 (3) of the Housing Act, 1930, one in respect of each house. The owner of both houses then offered to undertake to render the building fit for human habitation by combining the houses and so making one house of the two, but the local authority took the view that they had no power to accept such an undertaking.

Held: there was nothing in the Housing Acts to prevent the authority accepting the undertaking.

Per Curiam: An undertaking to carry out works, whether made to a local authority under s. 19 (2), or, on an appeal, made to the county court under s. 22 (1) (d), should be in writing and not merely verbal.

Notes. Sections 19 and 22 of the Housing Act, 1930, were repealed and replaced by the Housing Act, 1936, ss. 11 and 15. The 1936 Act is now repealed by the Housing Act, 1957. For provisions corresponding to ss. 11 and 15 of the 1936 Act, see now, the Housing Act, 1957, ss. 11, 16, 20, 36–38.

As to demolition orders, see 26 HALSBURY'S LAWS (2nd Edn.) 554 et seq., and for cases see DIGEST SUPPS., tit. Public Health, Case No. 481a et seq. For Housing Act, 1936, see 11 HALSBURY'S STATUTES (2nd Edn.) 444.

Appeal from an order of His Honour Judge HAYDON at Leicester County Court, quashing demolition orders made by Leicester Corporation in respect of two dwelling-houses numbered Nos. 89 and 89½, Archdeacon Lane, Leicester.

The two houses were situated back to back. There was no through ventilation. Each of the two houses consisted of two rooms only. There was only one sanitary convenience for the two, and this was at a distance from them of 25 ft., and in an open yard. They were each let, one at the rent of 5s. 6d. and the other at 4s. 1½d. per week, inclusive of rates. It was agreed on both sides that, on any reasonable standard, each of these two dwellings was not, and could not, be rendered fit for human habitation as a separate dwelling. Neither house afforded any space for the addition of ordinary requirements, and each was open to serious objection. The corporation proceeded to make orders for the demolition of the two houses, under s. 19 (1) of the Housing Act, 1930. The committee which dealt with these matters rejected the scheme put forward by the owner of the two houses, for the combination of the two houses into one. On appeal by the owner to the county court judge, the corporation raised a point of law upon the construction of s. 19, namely, that inasmuch as it was admitted that each of the two houses, by itself, was not, and could not, be made fit for human habitation, the court must confirm the demolition orders, and had no further jurisdiction in the matter. The county court judge held that s. 19 did not exclude the possibility of any works which would make the condemned structure useful for residential purposes in connection or in combination with some other structure. He accepted the offer made by the owner, which he held was one which the corporation should have accepted. He, therefore, quashed the demolition orders.

By s. 19 of the Housing Act, 1930 :

“(1) Where a local authority upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house which is occupied or is of a type suitable for occupation, by persons of the working classes, is unfit for human habitation, and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person who is an owner thereof, and, so far as it is reasonably practicable to ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration.

“(2) The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will, in the opinion of the authority, render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking.

“(3) If no such undertaking as is mentioned in the last preceding subsection is accepted by the authority, or if, in a case where they have accepted such an undertaking, any work to which the undertaking relates is not carried out within the specified period . . . the authority shall forthwith make a demolition order requiring that the house shall be vacated within a period to be specified in the order . . . and shall serve the order on the owner.”

By s. 22 :

“(2) (i) The [county court] judge may make such order either confirming or quashing, or varying the notice, demand or order as he thinks fit, and he may,

if he thinks fit, accept from an appellant any such undertaking as might have been accepted by the local authority, and any undertaking so accepted by the judge shall have the like effect as if it had been given to and accepted by the authority under this part of this Act. . . ."

The corporation appealed.

Henry O'Hagan for the corporation.

H. A. Hill and *T. W. Naylor* for the respondent owner.

SCRUTTON, L.J.—This is a short, but interesting, point under the Housing Act, 1930.

The power of the Court of Appeal to deal with a case like the present one is derived from s. 22. In the first place the local authority considers the matter and comes to a conclusion. There is an appeal from their conclusion, whatever it is, to the county court judge, who can deal with the matter both on questions of law and on questions of fact. Section 22 (2) (i) provides that the judge "may, if he thinks fit, accept from an appellant"—in this case the owner—"any such undertaking as might have been accepted by the local authority." There is an appeal from the decision of the county court judge to the Court of Appeal on any point of law. There is no appeal to the Court of Appeal on any question of fact; the decision of the county court judge is final as to fact, unless, indeed, there was no evidence on which he could come to the conclusion of fact. It is further provided that no appeal shall lie from any decision of the Court of Appeal; so that we are the final court, but have only power to deal with questions of law. Consequently, the notices of appeal in these two cases relating to the two houses to which I am going to refer, are in these terms:

"And further take notice that the ground of this appeal is that the learned judge accepted an undertaking from the appellant which he was not entitled in law to accept."

The question, therefore, really is not what the county court judge might accept, but what the local authority might under the statute accept.

These two appeals, which come before the court together, relate to two houses, Nos. 89 and 89½, Archdeacon Lane, Leicester. We start with this, that both parties agree that both the houses as they stand are unfit for human habitation. Looking at the plan it would appear that if one went to Archdeacon Lane, one would think that there was one house only. When one came to investigate the matter more closely one would find that that one house was divided down the middle into what anybody used to rent restrictions cases is accustomed to call dwelling-houses. The actual building, which is so divided, has four rooms in it, two living rooms on the ground floor and two bedrooms on the top floor; it has two staircases in the middle, and two front doors, and there is an open yard at the back of the building in which there are sanitary conveniences, apparently used by both houses. As I have said, it is agreed that, treating that building as containing two dwelling-houses, each with one living room, one bedroom and one staircase, each of those houses is unfit for human habitation and cannot be made fit for human habitation as a house by a reasonable expenditure.

The corporation, after hearing the offer I am going to mention, made demolition orders, one order relating to each house. Before those orders were made, the owner of both houses (because each house was in the same ownership and there is no evidence that anybody had been rash enough to lend any money on mortgage on either of the houses) submitted this scheme. He said: I agree that each house by itself is unfit for habitation, but I can make the combined houses into one house fit for habitation by an expenditure of £100 odd, and the combined house which I shall produce by this offer will be worth £200. I shall turn the two houses into one house by the very simple expedient of doing away with one staircase and fitting up the second living room as a kitchen and leaving a combined house with a living room, a kitchen and two bedrooms, and I will build on to that combined house

sanitary accommodation instead of leaving the sanitary accommodation at the end of the yard, common to the two houses. The local authority declined to accept that undertaking, as I gather on the ground that it was not within their powers under the Act to accept such a proposal to convert two houses into one composite house fit for human habitation. Thereupon the owner appealed to the county court judge, who could deal both with questions of fact and questions of law. The county court judge made certain findings of fact. He found:

"If the two houses are thrown into one, and the plans and specifications produced to me are complied with, the value of the composite house will be £200. The cost of complying with the plans and specification will be £106 14s. 6d. The sum just mentioned is a reasonable expense. Upon compliance with the plans and specifications, the composite house will be (a) of a type suitable for occupation by the working classes; and (b) fit for human habitation. In connection with these findings I have had regard to the matters mentioned in s. 62 (3) of the Act,"

which are that in certain respects the original houses being pre-byelaw houses, the composite house will not comply with the existing byelaws. Having made those findings of fact, the learned judge came to the conclusion that the Acts did not prevent such an offer being accepted by the local authority, or by himself. He, therefore, accepted the offer and he records it at the end of his judgment in this way:

"I accept the undertaking of the appellant to comply with the plans and specifications which have been produced on his behalf with the small addition of a skylight over the staircase. In my opinion this is an offer which the corporation should have accepted, but they would listen to none. I shall, therefore, quash the demolition orders."

When one comes to look at the offer which, by virtue of s. 22 (2) (i) of the Act of 1930, the county court judge may accept, s. 19 (2) begins in this way:

"The authority may, if after consultation with any owner or mortgagee they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking."

Counsel who appeared before the county court judge were so engrossed with debating the question whether one house could be made of two houses and what the effect of the one re-constituted house was under the Act, that they entirely forgot to read with care s. 19 (2) of the Act, and, consequently, the county court judge was not asked to do what I have no doubt he would have done very promptly, namely, specify a period in which the works had to be carried out. In consequence, it is quite clear that an undertaking without any specified period being mentioned for carrying out the works was not one which either the corporation or the county court judge, on appeal from the corporation, could accept. However, that was not the point which the parties were fighting about; what they were fighting about is quite independent of the particular omission in the undertaking which has been accepted.

What the court proposes to do is to pronounce an opinion upon the point which the parties were really fighting about, namely, whether a proposal to turn two houses into one can be brought under the Housing Acts; and, having expressed that opinion, we propose to remit the matter to the county court judge in order that he may consider any specified period suggested, and if he agrees with it, insert it, or, if not, give his decision as to what the specified period shall be, which, I suppose, must be one that is taken to be included in an undertaking given by the owner. I think (and the court makes this remark with a view to similar proceedings under the Act) it is not convenient that the undertaking should be left in the

way in which it was left in this case, an oral offer by counsel on behalf of the owner embodied in the judgment of the county court judge. There should, in our opinion, be a written undertaking submitted for acceptance in all future cases. That applies not only to offers made to the county court judge, but also to the original offer made to the corporation.

As to the question of the rights of the owner as against the local authority and the powers of the local authority and of the county court judge acting on appeal from the local authority, the Housing Act contains in Part II provisions with respect to the repair or demolition of insanitary houses. They begin with the case where the local authority think that the house which they are considering can be repaired at a reasonable expense so as to be rendered fit for human habitation. That is s. 17. When the local authority take this view, they serve a notice on the owner requiring him within a reasonable time, not being less than twenty-one days, as specified in the notice, to execute the works specified in the notice, and stating that in the opinion of the authority those works will render the house fit for human habitation. There may be an appeal against that order, which is an order requiring certain works to be done, with a power under s. 18 for the local authority, if the owner has not executed the works, to execute the works themselves. That, of course, involves the finding that the expense is a reasonable expense. If the expense is not a reasonable expense the local authority have to carry out the works of repair. That is the case where repair will render the house fit for human habitation.

There is then a second case. Supposing that the state of the house is such that no repairs at a reasonable expense will render it fit for human habitation, s. 19 applies. Under that section the local authority will not require the owner to execute repairs, but will serve upon the person having control of the house or the owner a demolition order. With the demolition order, there will be a notice under sub-s. (1) of s. 19, being

"notice of time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration."

By s. 19 (2):

"The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking."

In this case the corporation from the start took the view that no amount of repairs would allow Nos. 89 and 89½ to continue as separate houses, and they, accordingly, gave notice for demolition unless the owner could satisfy them by making some offer. The owner of the two houses thereupon came to the authority and said: I agree that the condition of Nos. 89 and 89½ as separate houses is hopeless; but I propose to turn them into one house by executing certain repairs, of which I give you notice together with the specification which, at an expense of £106, will create a house worth £200 suitable for occupation by members of the working classes, and therefore, of course, fit for human habitation. The corporation took the view: We cannot accept that under the Act. The proposal will produce a house fit for human habitation, but we cannot turn two houses into one. That view was appealed against to the county court judge. He took the view that under the Act the authority could accept such an offer, and, therefore, he made the order accepting the undertaking, which, in his opinion, was one which the local authority might have accepted.

Thereupon the local authority apply to us on the short legal point: Had we the power under the Act to accept such an offer? I have read the Acts very carefully, and I can find nothing in them which prohibits the authority from saying: Here are two insanitary houses, but they can be made fit for human habitation by combining them in one house, which will give accommodation fit for human habitation and fit for members of the working classes. The result of my consideration of the Act does not amount to more than that. I can find nothing in the Act which prohibits this undertaking being accepted. It will result in a better-class house being provided for members of the working classes at a reasonable expense. Whether those who drafted the Act had this in their minds I doubt. It very often happens that those who draft Acts do not appreciate the full effect of the words which they use. The corporation are endeavouring to find in this Act some prohibition of a process which would result in better housing being provided for the working classes. I have been quite unable to find such a prohibition of a process which appears to be justified by the language of s. 19 (1) and (2).

There are certain matters which I do not propose to decide. I am not deciding what would be the position if there were two separate owners of the two houses concerned. I will wait till that position arises and see what are the facts. It is dangerous to lay down propositions of law without being sure what are the facts about which one is talking. It has been suggested that there may be difficulties under the Rent Restrictions Acts. I will go so far as to say that, having looked at the necessary provisions in this Act and in the Rent Restrictions Acts, I do not at present see any difficulty; but I do not know the facts in this case about the tenants, or what sort of tenancy they have; and I decline, again, to express an opinion on a matter which has not arisen at present before I know the facts. Counsel for the corporation has also suggested a rather complicated difficulty with regard to the question of the contribution which the corporation can get if two houses are turned into one house. I do not deal with that question here, I will deal with it when it arises; but on the question about which the parties were fighting in the court below, whether a process of two insanitary houses being turned into one sanitary house suitable for occupation by the working classes, is permissible, I am of opinion that the corporation had power to accept the owner's undertaking, and that the county court judge had power on appeal to accept the undertaking which the corporation might have accepted.

Unfortunately, the parties in their zeal in fighting about two houses becoming one, omitted to look at the terms of s. 19 (2), and to get a specified period inserted for the works being executed. That involves a question of fact, and we have no jurisdiction to decide questions of fact. We, therefore, remit the matter to the county court judge, having expressed our opinion on the point which it was intended to raise by the appeal, in order that he may consider and insert in the undertaking, if he thinks it satisfactory, the specified period in which the works are to be carried out.

SLESSER, L.J.—I am of the same opinion. In order to arrive at a conclusion in this case, I think it is necessary to examine a little critically the provisions of ss. 17, 18, and 19 of Part II of the Housing Act, 1930. Under s. 17, where the local authority is satisfied by means of various communications which they may receive, namely, official representations, reports of officers or other information, that a dwelling-house suitable for occupation by persons of the working classes is unfit for human habitation, they must do certain things. What they must do depends primarily upon this. They have to satisfy themselves whether the house is capable at a reasonable expense of being rendered fit for human habitation. If they decide that it is so capable, they take one proceeding; if they decide that it is not so capable, they take another. I would observe at the outset that, in considering whether the house is capable at a reasonable expense of being rendered fit for human habitation, the reasonableness of the expense must be considered objectively. They have to consider the general position of the house, the cost of labour and building material, the situation of the town and the like, and the

reasonable expense, not at that stage, at any rate, what the owner thinks to be reasonable, because he has not yet been called into the consultation. They have to make that decision one might say *ex parte* and unaided by the views of the owner. If they come to the conclusion that the house is capable at a reasonable expense of being rendered fit, they serve a notice upon the owner or person responsible, requiring him within a reasonable time to execute the works, and s. 18 provides that, if within a certain time he does not so execute the works, they may execute them.

It has been argued by counsel for the corporation with regard to the requirement that the owner shall repair at a reasonable expense and with regard to the powers of the authority to do it on his failure so to repair, that that requirement and those powers are limited to the specific house under consideration. For myself, I do not propose in this case to express a concluded opinion on that point. I think that there is force in the argument that ss. 17 and 18 are dealing with one specific house which the authority have considered in relation to whether it can be repaired at a reasonable expense, and that possibly their consideration is limited to the house and the curtilage of that house as defined by the Act. Counsel has called our attention to sections dealing with the recovery of the expense being a charge on the premises, as is provided in sub-s. (6) of s. 18, which, he says, lead to that construction. I express no final view upon that subject, because it does not seem to be a matter which has to be considered in the present case.

I have said that the procedure of the local authority would vary according to whether they were satisfied that the house was, or was not, capable of being rendered fit at a reasonable expense. In this case, the local authority came to the conclusion, applying properly what I have indicated is the objective test of reasonable expense, that it was not so capable. That being so, their further operations did not fall under s. 17, or s. 18, but fell under the alternative procedure provided by s. 19. Under that section the first duty of the local authority, on being satisfied that the house is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, is to serve upon the owner or person having control of the house what I may call a notice to treat, that is, a notice that they will consider within a specified time any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit. Subsection (2) says that the authority may, if they think fit so to do, accept an undertaking that he (the owner or mortgagee) will, within a specified period, carry out such works as will, in the opinion of the authority, render the house fit for human habitation. That is the subsection which we are here considering. An undertaking was given. It is true, as my Lord has pointed out, that that undertaking was in an unsatisfactory form, being given orally by counsel without a specified period being mentioned; but for the purpose of what I am now saying, I will assume that it was a proper undertaking. Where I differ from counsel for the corporation is that, although s. 17 and s. 18 are dealing with cases where the expense of rendering the house fit for human habitation is reasonable in the objective sense, I cannot see that there is any limitation as to what sort of an undertaking an individual may give under s. 19 (2). *Ex hypothesi* before s. 19 comes into operation at all, the local authority have already satisfied themselves that the repairs cannot be carried out at a reasonable expense, as mentioned in s. 17, because, if it is a house which can be repaired at a reasonable expense, then it is one which they are satisfied could come within ss. 17 and 18; but that does not mean that the owner under s. 19 (2) cannot give any undertaking which he thinks fit to give. Although the problem here is not one of reasonable expense, it seems to me that counsel's argument is wrong, when he says that s. 19, as regards an undertaking given by the owner, is in any way limited or controlled by the machinery of ss. 17 and 18. In my view, the owner is entitled under s. 19 (2) to give any undertaking which he thinks fit. Applying that view to the particular problem of this case, whatever may be the limitations of s. 17 and s. 18, I cannot see why the owner may not give an undertaking to make the house fit for human habitation in a way which would involve the use of land outside the curtilage of the house, the enlargement of the

house so as to include other areas or in any other way in which he thinks fit, and, so far as he likes, regardless of expense. He is the judge of what undertaking he will give, and it is for him to offer the undertaking freely as he thinks fit.

If that is right, I ask myself, why should not this owner, in respect of No. 89, Archdeacon Lane, offer an undertaking to render that particular house fit for human habitation by adding to it No. 89½, the skylight, the lavatories, and the other matters which appear in the schedule? I can see nothing in s. 19 (2) which would prevent him doing that. Then I ask myself: Why should he not similarly give an undertaking with regard to No. 89½, Archdeacon Lane, that he will render that house fit for human habitation by adding to it No. 89, the skylight, the lavatories and other matters? Again, I can see nothing in the Act to prevent him doing both of those things. Therefore, it seems to me that the answer must be that the undertaking with regard to No. 89 or with regard to No. 89½, each undertaking with regard to each being an offer to add to that particular impeached house the other house, is one which he can properly give, the undertaking being at large under s. 19 (2).

There only remains the question which was raised and in which I propose to follow my Lord, namely, the question of the Rent Restrictions Acts. I do not think it is necessary to consider that at this point in this case. If the undertaking is impossible of achievement, that is a matter which will have to be considered under s. 19 (3) which provides that, where the undertaking is accepted and is not carried out for one reason or other, the authority shall have still further powers reserved to it. It does not arise at this point in this case; nor do I think that the arguments *ad misericordiam*, with regard to compensation, which may or may not be given on demolition to the occupants of houses, can help us here to construe s. 19. It may be that this is a case of *casus omissus*; I do not know. I only express the view that s. 19 (2) seems to me, as my Lord has pointed out, to give the owner the right to offer such undertaking as he thinks fit to render the house fit for human habitation.

MAUGHAM, L.J.—I agree, and intend only to add a very few words on the question of the true construction of s. 19 (2) of the Act of 1930. In the first place, I would observe that s. 19 (1) does not require, and is not directed to requiring, any works to be done by the owner of the property in question; it simply requires the local authority, in a case where, according to the opinion formed by the authority, the house cannot be repaired at a reasonable cost, to give notice to the owner of the time and place at which the condition of the house, and any offer with respect to the carrying out of the works, and of the future user of the house, is to be considered. Under sub-s. (2) the authority is given power, after consultation with the owner or mortgagee, to accept an undertaking, and the main point argued by counsel for the corporation is as to the ambit of the possible undertaking, which he has suggested can only be an undertaking to carry out within a specified period specific works on a house as defined in s. 185 of the Housing Act, 1925. "Dwelling-house" is there defined as including

"any yard, garden, out-house, and appurtenances belonging thereto or usually enjoyed therewith."

The argument has been that the only undertaking that can be given by the owner or mortgagee is to do something described in the Act as "works" on that limited property comprised in the definition of the word "dwelling-house."

I would call attention to the fact that there is no doubt about the object of this Act. It arises from a well-known and unfortunate circumstance, that the housing of persons of the working classes was very unsatisfactory and that the number of suitable houses was very much smaller than was desirable in the interests of the country. The fact is referred to in the title of the Act. In those circumstances it seems to me that what has been called a benevolent construction should be put on the terms of the Act, and there is no reason why the court, unless it is compelled to do so, should give a construction to a particular section which tends, or may

tend, to defeat the purpose of the Act, since it would require a house to be demolished which might be saved. I ask myself why the court should construe s. 19 (2) as precluding the authority from accepting from the owner or mortgagee an undertaking to do works such as would render the house completely fit for human habitation, even if such works are not works within what may be described as the curtilage of the dwelling-house, according to the definition. The first subsection, as I have pointed out, requires no work to be done. Therefore, there can be no ground for saying that the works mentioned in the second subsection are the same as those which are contemplated by the first subsection, because that subsection does not contemplate any. It may be complained by the authority that a house is of an insanitary character by reason of one of the defects which are mentioned in the definition of sanitary defects as contained in s. 62 of the Act of 1930. For example, lack of air space, ventilation, darkness, or dampness, might render the house, in particular circumstances, quite unfit for human habitation. To remedy those defects it might be reasonable for works to be done outside the house. The case of dampness is a very obvious one. It might be that water was leaking in from a lake, or a reservoir, and the works required to make the house fit for human habitation would be works which the owner might be perfectly able and ready to do on land not within what I have for convenience called the curtilage. Accordingly, for my part I must decline to give such a restricted scope to the undertaking which the authority may accept under s. 19 (2) as the court has been invited to give it. In other respects I have nothing to add to what has already been said.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for the Town Clerk, Leicester; *Robinson & Bradley*, for *Harding & Burnett*, Leicester.

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re POTTS. Ex Parte ETABLISSEMENTS CALLOT AND DE SCHRIJVER v. LEONARD TUBBS & CO. AND THE OFFICIAL RECEIVER

[CHANCERY DIVISION (Farwell, J.), January 22, 1934]

[*Reported* [1934] Ch. 356; 103 L.J.Ch. 115; 150 L.T. 456; 50 T.L.R. 193; 78 Sol. Jo. 103; [1933] B. & C.R. 217]

Bankruptcy—Meeting of creditors—Subsequent meeting—Admission of proof—Power of chairman to reject proof admitted at first meeting—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), Sched. I, r. 14.

Rule 14 of Sched. I to the Bankruptcy Act, 1914, provides: "The chairman of a meeting [of creditors] shall have power to admit or reject a proof for the purposes of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained."

A receiving order having been made against a debtor on July 5, 1933, the first meeting of creditors was held on Aug. 9, 1933. At that meeting the debtor's solicitors submitted a proof for their professional charges against the debtor. There was no objection then to that proof, and it was admitted by the

chairman for the purpose of voting. At a subsequent meeting, held on Nov. 29, 1933, the petitioning creditors raised the objection that the debtor's solicitors' charges contained in their proof were incurred after they had been aware of the act of bankruptcy and that the proof should not be admitted for the purpose of voting. The chairman overruled the objection and admitted the proof. On a motion whereby the petitioning creditors appealed against the chairman's decision, it was contended by the debtor's solicitors that, the proof having been admitted at the first meeting, the chairman was bound by the decision at that meeting.

Held: on the true construction of r. 14, the chairman was not bound by the decision at the former meeting, but at the subsequent meeting might either admit or reject the proof if objection were then taken to it.

Notes. As to creditors' meetings, see 2 HALSBURY'S LAWS (3rd Edn.) 325 et seq., and for cases see 5 DIGEST 1059 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Woods, Ex parte Ditton* (1880), 13 Ch.D. 318; 42 L.T. 161; 28 W.R. 402, C.A.; 4 Digest 14, 44.
- (2) *Re Van Laun, Ex parte Chatterton*, [1907] 2 K.B. 23; 76 L.J.K.B. 644; 97 L.T. 69; 23 T.L.R. 384; 51 Sol. Jo. 344; 14 Mans. 91, C.A.; 4 Digest 326, 3058.

Motion by petitioning creditors against the debtor's solicitors, Leonard Tubbs and Co., and the official receiver, for an order that the decision of the official receiver when, acting as chairman of a creditors' meeting on Nov. 29, 1933, he admitted the proof of the solicitors for the debt of £389 19s. 8d. for the purpose of voting at the meeting of creditors should be reversed.

A receiving order was made against the debtor on the petition of the applicants on July 5, 1933. The bankruptcy petition was presented on April 25, 1933, the act of bankruptcy alleged and proved being that on Feb. 17, 1933, the debtor had failed to comply with the bankruptcy notice. The debtor appealed against this order, but his appeal was dismissed and the receiving order stood. On Aug. 9, 1933, the first meeting of creditors was held. The official receiver was the chairman of that meeting, and among the proofs lodged in time was the one in question in this motion. That proof was admitted for the purpose of voting at that meeting, the proof of the applicants being also admitted. On Oct. 25, 1933, there was a second meeting of creditors, at which the debtor put forward proposals for composition by a payment of 5s. in the £. At that meeting the proof of the applicants and the proof of the solicitors were admitted for voting. The proposal, not meeting with the approval of the majority at the meeting, was defeated. On Nov. 29, 1933, a further meeting of creditors was held for the purpose of considering a further proposal put forward by the debtor for composition on payment of 5s. 3d. in the £. The proof of the applicants and that of the solicitors were admitted for voting. On that occasion the proposal was accepted by the majority of the creditors present and the resolution was passed. The majority consisted of twenty-two creditors and the minority of eighteen, the money value of the majority being the sum of £88. Among the creditors who objected to the composition and desired a bankruptcy were the applicants, and at the meeting the applicants challenged the right of the solicitors to vote, and they suggested that the solicitors' proof had not been rightly admitted, the objection being that there was nothing to show that the debt that was said to be due had not been incurred after knowledge of the act of bankruptcy. The official receiver decided that the proof ought to be admitted for the purpose of voting, but made a note to the effect that an objection had been taken. The meeting proceeded and the resolution was duly passed.

The debt in respect of which the proof was admitted by the official receiver was a bill of costs which was incurred by the debtor. The solicitors had acted for the debtor for some time before any act of bankruptcy, and they were acting for him

on Jan. 9, 1933, that being the date on which he had called a meeting of creditors. FARWELL, J., held that the costs constituting the amount of the debt in the proof had all been incurred before Jan. 9, 1933.

Sir Walter Greaves-Lord, K.C., and *G. F. Kingham* for the respondents, the solicitors.—The chairman's decision at the first meeting of the creditors is final, and as he admitted the proof, then it could not be rejected afterwards. Furthermore, as only twenty-one days is allowed by s. 108 (8) of the Bankruptcy Act, 1914, for appealing against the chairman's decision, this motion is out of time and should be dismissed, for the time began to run from the date of the first meeting, namely, Aug. 9, 1933. [They referred to *Re Woods, Ex parte Ditton* (1).]

W. N. Stable for the applicants, the petitioning creditors. The rule merely refers to the chairman of "a meeting." That means "any meeting." If the rule meant "first meeting" it would have said so. [He referred to *Re Van Laun, Ex parte Chatterton* (2).]

FARWELL, J. [stated the facts and continued:] The question arises in this way. Under the rules of Sched. I to the Bankruptcy Act, 1914, the first meeting of creditors has to be summoned for a day not later than fourteen days after the date of the receiving order, unless the court, for some special reason, deems it expedient that it should be summoned for a later day. Rule 6 provides:

"Meetings subsequent to the first meeting shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or if he has not proved, at the address given in the debtor's statement of affairs, or at such other address as may be known to the person summoning the meeting."

Rule 7 provides:

"The official receiver, or some person nominated by him, shall be the chairman at the first meeting. The chairman at subsequent meetings shall be such person as the meeting by resolution appoint."

In practice, according to the evidence of the official receiver, the official receiver or the assistant official receiver presides at all these meetings. It is not essential, but it is the practice.

Rule 8 provides:

"A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting."

Rule 9 provides:

"A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained."

[His Lordship read r. 14, and continued:] It is said on behalf of the respondents that that rule means that at the first meeting of creditors the question whether a particular proof is to be admitted for voting or not must be decided once and for all—that is to say, once there has been a decision by the chairman of the first meeting that a proof is to be admitted for the purpose of voting, that creditor is entitled in respect of that proof thereafter to vote at any other meeting, and the chairman of any subsequent meeting has no power to reject a proof which has already been admitted for voting at an earlier meeting. The relevance of that contention is this. An appeal under the rule must be within twenty-one days of the decision. If the respondents are right in saying that the rejection or admission of a proof is to be made once and for all, since in this case the respondents' proof was admitted for the purpose of voting at the first meeting, namely, that on Aug. 9, 1933, this motion is out of time. On behalf of the applicants it is said that on the true construction of r. 14 the chairman at each meeting has power to determine whether a proof shall be admitted or rejected for the purpose of voting.

It has been suggested that if I adopt this latter construction many difficulties and inconveniences will arise, because, it is said, the chairman of each meeting will have to review the decisions of the chairman of the earlier meetings. I doubt very much whether there is any substance in that suggestion. What in fact does happen, and will happen, if the applicants' contention is well founded, is that the chairman of a subsequent meeting will accept *prima facie* the proofs which have already been admitted for the purpose of voting, but, if an objection is taken that any particular proof ought not to be admitted at that meeting, he must determine the question. On the other hand, a decision against the contention of the applicants might have unfortunate results, because it is possible that at the first meeting a proof might be admitted for voting in respect of an alleged debt which before the second or any subsequent meeting was held proved not to be a debt at all. In such a case if the respondents' contention be right, notwithstanding the fact that the particular person whose proof had been admitted on the first occasion was not a creditor, he would still be entitled to vote at all meetings of creditors.

It is not, however, a question of what is convenient, or what will lead to the most happy results that must determine this question. It is wholly a question of construction of r. 14, and, reading the language of r. 14, I do not think that there is any real doubt but that the meaning of the rule is that the chairman of each meeting has the power to admit or reject a proof for the purpose of voting.

It is very material to see what the language of r. 14 is: "The chairman of a meeting shall have power to admit or reject a proof." It is not: "The chairman of the meeting," or "The chairman of the *first* meeting"; but it is "The chairman of a meeting"; and when the earlier rules are looked at, it will be found in the first rule what is spoken of is "the first meeting," while in the later rules there are the words "a meeting" of the creditors. It is said that, giving that construction to the rule, I am reading into it something which is not there. I do not accept that view. I cannot myself think that the language of the rule is capable of any other meaning than that which I have put upon it. In my judgment, in those cases in which there is more than one meeting it is the duty of the chairman of the subsequent meetings to admit or reject proofs, but by that I am not suggesting that it is the duty of the chairman to review again in detail all the proofs that have been already admitted. If he thinks fit, he is entitled to say: "These proofs have been admitted; I am going to admit them again unless anybody takes objection." Then it is open to any person to take objection, and in that case the chairman must determine whether the objection is a good one or not. That the chairman has the power at each meeting to determine whether a particular proof is to be admitted or rejected, is, I think, plain on the language of the rule. That being so, the preliminary objection to this motion fails.

That brings me to the merits of this motion. At the meeting the objection taken to the proof was that there was nothing to show that some portion of the debt had not been incurred after the act of bankruptcy came to the knowledge of the creditors, but at the Bar the objection was put on different grounds. Counsel for the applicants has argued that, although the solicitors, the respondents, have put in a proof for this sum of £389 19s. 8d., since they have not delivered a bill of costs to the official receiver, there is nothing to show that the amount claimed is in fact due to them; it is said that the bill is subject to taxation, and that on taxation a large part of the bill may be disallowed; and that consequently the official receiver ought not to admit, for the purpose of voting, a proof put in by a solicitor without at any rate having seen the bill of costs and satisfied himself that the bill is a proper one.

It is not without significance that under the rules it is provided that a proof intended to be used at the first meeting of creditors shall be lodged with the official receiver at a time not before twelve o'clock noon on the day but one before the meeting, or not later than twelve o'clock on the day before the day appointed for such meeting. The period allowed to the official receiver for determining whether a proof shall be admitted or rejected is not a long one, and clearly would make it

impossible for him to obtain the taxation of a bill before the meeting if the bill had not already been taxed. Further, it is a little difficult to see how the official receiver is going to determine for himself, without taxation, whether a bill is one which should be reduced or not. I should be sorry, by any decision of mine, to throw such a burden upon an official receiver as would undoubtedly fall upon him if I were to come to the conclusion that for the purpose of determining whether a proof should be admitted for voting or not it is his duty to peruse a solicitor's bill of costs and to determine, *prima facie*, how far that bill of costs is one which ought to be paid in full or not. It must not be forgotten that a proof of this kind is a sworn document; it is sworn to by the creditor, and in this case it was sworn to by the solicitors. They swore to the amount of the debt that they claimed, and the debtor made no objection to the amount of the proof. On the evidence before me I can see no ground for thinking that the official receiver was wrong in admitting the proof. By that I do not want it to be thought that I am deciding that the official receiver should always, without regard to any other matter, admit the proof of a solicitor, without any bill of costs or any inquiry. It is a matter in each case for the official receiver to consider whether or not a proof should be admitted, but I am not going to say in this case that the official receiver has acted in any way wrongly because he has accepted the oath of the creditor, the solicitor, and has admitted the proof for the amount of the debt sworn to.

Then it is said, even if that be so, when an objection has been taken by some person to the proof, that the official receiver is bound, before determining whether the objection is properly taken or not, to insist upon having a bill of costs delivered, and possibly having that bill of costs taxed—which might involve very considerable delay. I cannot accede to that suggestion.

In my judgment, the true position is this. It is for the official receiver in the first instance to determine whether the proof should be admitted or rejected. If objection be taken to it, it is for him to determine whether that objection ought to be sustained or not. It is always open to the objector to come to the court; but if the objector comes to the court, his objection, in my judgment, should be supported by some evidence that the official receiver has come to a wrong conclusion in the matter. Here there is no evidence at all before me. The only ground upon which the objection was taken at the meeting was that there was nothing to show whether or not the bill contained items incurred after the act of bankruptcy had come to the knowledge of the solicitors. At the Bar it was said that, a bill not having been delivered, there was no possibility of the official receiver coming to any definite conclusion on the matter, and that, therefore, he was bound to sustain the objection. Neither of those grounds in my judgment justifies me in reversing the decision of the official receiver.

Reference was made to a decision in *Re Van Laun, Ex parte Chatterton* (2) in support of the applicants' contention. That was a decision that a trustee in bankruptcy is entitled, if he thinks it necessary, to have a bill of cost taxed. How that assists me in determining in this case whether or not the official receiver's decision ought to be reversed, I wholly fail to understand. In my judgment, I ought to assume that the official receiver has rightly acted in admitting or rejecting a proof, unless and until some reason based on some evidence convinces me that he has decided wrongly. In the present case there is no such evidence and I see no reason to suppose the official receiver has acted wrongly in the matter. It is not, in my judgment, the duty of the official receiver in every case, whether an objection is taken or not, before admitting the proof of a solicitor for voting purposes, to insist on the delivery of a bill of costs. If he is satisfied that the case is one in which he ought to accept the oath of the solicitor, there is no reason why he should not do so, and unless it is shown that in so doing he has acted wrongly, that decision ought to stand.

Accordingly, the result of this motion is, that although on the preliminary objection the respondents fail, the applicant has taken nothing by his motion and it must be dismissed with costs. There is one thing I want to make clear. In the

remarks I have been making about the duty of the official receiver with regard to a bill of costs, I am making no possible reference to the duty of a trustee in bankruptcy after adjudication. That is an absolutely different matter. I do not want anything I have said to be supposed to refer to that in any way at all.

Solicitors: *Cohen & Cohen; Leonard Tubbs & Co.*

[Reported by J. H. G. BULLER, Esq., *Barrister-at-Law.*]

Re PIRACY JURE GENTIUM

[PRIVY COUNCIL (Lord Sankey, L.C., Lord Atkin, Lord Tomlin, Lord Macmillan and Lord Wright), July 2, 3, 5, 26, 1934]

[Reported [1934] A.C. 586; 103 L.J.P.C. 153; 152 L.T. 73; 51 T.L.R. 12; 78 Sol. Jo. 585; 18 Asp.M.L.C. 528]

Criminal Law—Piracy jure gentium—Actual robbery not necessary to support conviction—Frustrated attempt to rob.

Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium.

Notes. As to piracy, see 10 HALSBURY'S LAWS (3rd Edn.) 653-656, and for cases see 15 DIGEST (Repl.) 870-872.

Cases referred to:

- (1) *R. v. Dawson* (1696), 13 State Tr. 451; 15 Digest (Repl.) 870, 8379.
- (2) *The Ambrose Light* (1885), Scott's Cases, 25 Federal Reports 408.
- (3) *The Huascar* (1877), Parl. Papers, Peru, No. 1.
- (4) *United States v. Smith* (1820), 5 Wheaton, Sup. Ct. R., 153.
- (5) *United States v. The Malek Adhel* (1844), 2 How. 211.
- (6) *The Serhassan Pirates* (1845), 2 Robinson's Reports 354.
- (7) *The Magellan Pirates* (1853), 1 Ecc. & Ad. 81; 22 L.T.O.S. 319; 18 Jur. 18; 164 E.R. 47; 15 Digest (Repl.) 870, 8380.

Reference, under Judicial Committee Act, 1833, to the Judicial Committee to determine points of law submitted to them.

Certain Chinese nationals who had attacked a cargo junk on the high seas were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them Guilty subject to the following question of law:

"Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred,"

which was referred to the Full Court of Hong Kong. That court having answered the question in the negative the accused were acquitted. Following on that decision, which was final, the following question was referred to the Judicial Committee:

"Whether actual robbery is an essential element of the crime of piracy jure gentium, or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium."

The Attorney-General (Sir Thomas Inskip, K.C.) and *Wilfrid Lewis* contended that an attempt to rob on the high seas constituted piracy jure gentium.

Sir Leslie Scott, K.C., and *Kenelm Preedy*, for the Secretary of State for the Colonies, contended that in order to constitute piracy jure gentium there must be actual robbery on the high seas.

July 26. The opinion of their Lordships was read by

LORD SANKEY, L.C.—On Jan. 4, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding, the steamship *Hang Sang* approached and subsequently also the steamship *Shui Chow*. The officers in command of these merchant vessels intervened and through their agency, the pursuers were eventually taken in charge by the commander of H.M.S. *Somme*, which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The Full Court of Hong Kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy and in the result the accused were acquitted. The decision of the Hong Kong court was final and the present proceedings are in no sense an appeal from that court, whose judgment stands.

Upon Nov. 10, 1933, His Majesty in Council made the following order:

"The question whether actual robbery is an essential element of the crime of piracy jure gentium or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations upon the matter. The answer is as follows:

"Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium."

In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal courts, and last, but not least, opinions of jurisconsults or textbook writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere. GROTIUS (1583-1645), *DE JURE BELLI ET PACIS*, vol. 2, cap 20, s. 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases and opinions of juriconsults or textbook writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them, but it will be convenient to begin the present discussion by referring to the Act of Henry 8, c. 15, in the year 1536, which was entitled "An Act for the punishment of pirates and robbers of the sea." Before that Act, the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that court administered the civil law. The civilians, however, had found themselves handicapped by some of their canons of procedure, as for example, that a man could not be found Guilty unless he either confessed or was proved Guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law and after referring to "all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, etc." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, etc., shall be tried according to the common law under the King's Commission to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. It has been thought, for example, that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a misdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy because piracy is a felony as distinguished from a misdemeanour. This mistaken idea proceeds upon a misapprehension of the Act. In COKE'S INSTITUTES (1552-1634), Part III, Edn. 1809, after a discussion on felonies, robberies, murders and confederacies committed in or upon the sea, it is stated (p. 112) that the statute did not alter the offence of piracy or make the offence felony, but

"leaveth the offence as it was before this Act, namely, felony only by the civil law, but giveth a mean of triall by the common law and inflicteth such pains of death as if they had been attainted of any felony done upon the land. But yet the offence is not altered, for in the indictment upon this statute the offence must be alleged upon the sea; so as this act inflicteth punishment for that which is a felony by the civil law and no felony whereof the common law taketh knowledge."

The conception of piracy according to the civil law is expounded by MOLLOY (1646-1690), *DE JURE MARITIMO ET NAVALI, OR A TREATISE OF AFFAIRS MARITIME AND OF COMMERCE*. That book was first published in 1676 and the ninth edition in 1769. Chapter 4 is headed "Of Piracy." The author defines a pirate as

"a sea thief or hostis humani generis who to enrich himself either by surprise or open face sets upon merchants or other traders by sea."

He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus he says:

"So likewise if a ship shall be assaulted by pirates and in the attempt the pirates shall be overcome if the captors bring them to the next port and the judge openly rejects the trial, or the captain cannot wait for the judge without certain peril and loss, justice may be done on them by the law of nature, and the same may be there executed by the captors."

Again, in para. 14 he puts the case where "a pirate at sea assaults a ship but by force is prevented from entering her" and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist, CASAREGIS, who wrote in 1670, and says:

"Proprie pirata ille dicetur qui sine patentibus alicujus principis expropria tantum et privata auctoritate per mare discurrit depredante causa."

But in certain trials for piracy held in England under the Act of Henry 8, a narrower definition of piracy seems to have been adopted.

Thus in 1696 the trial of Joseph Dawson (1) took place. The prisoners were indicted for

"feloniously and piratically taking and carrying away from persons unknown a certain ship called the *Gunsway* . . . upon the high seas ten leagues from the Cape St. John near Surat in the East Indies."

The court was comprised of SIR CHARLES HEDGES, then judge in the High Court of Admiralty, LORD CHIEF JUSTICE HOLT, LORD CHIEF JUSTICE TREBY, LORD CHIEF BARON WARD, and a number of other judges. SIR CHARLES HEDGES gave the charge to the grand jury. In it he said:

"Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without legal authority, this is robbery and piracy."

Dawson's Case (1) was described as the sheet anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read *secundum subjectam materiam*, and must be held to refer to the facts under dispute. In *Dawson's Case* (1) the prisoners had undoubtedly committed robbery in their piratical expeditions. The only function of the Chief Judge was to charge the grand jury, and in fact to say to them:

"Gentlemen, if you find the prisoners have done these things then you ought to return a true bill against them."

The same criticism applies to certain charges given to grand juries by SIR LEOLINE JENKINS (1623-85), judge of the Admiralty Court (1685): see the *LIFE OF LEOLINE JENKINS*, vol. I, p. 94. It cannot be suggested that these learned judges were purporting to give an exhaustive definition of piracy, and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was, therefore, liable to the penalty of death.

"That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done on the high seas. As every crime can be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority and the offender were secured and confined by the master of the vessel to be taken home for trial, this state of things would not authorise seizure and trial by any nation that chose to interfere or within whose limits the offender might afterwards be found":

see DANA'S *WHEATON* 193, note 83, quoted in MOORE'S *DIGEST OF INTERNATIONAL LAW* (Washington 1906), art. Piracy, p. 953.

But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallised in the seventeenth century, but is a living and expanding code. In his treatise on international law, the English textbook writer HALL (1835-94) says at p. 25 of his preface to the third edition (1889):

"looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has

extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been gradually enlarged within the memory of living man."

Again, another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which SIR CHARLES HEDGES in 1696 could have had no possible idea.

A definition of piracy which appears to limit the term to robbery on the high seas, was put forward by that eminent authority HALE (1609-76), in his *PLEAS OF THE CROWN*, Edn. 1737, c. 27, p. 305, where he states, "it is out of the question that piracy by the statute is robbery." It is not surprising that subsequent definitions proceed on these lines. HAWKINS' (1673-1746) *PLEAS OF THE CROWN* (1716), 7th Edn., 1795, vol. I, defines a pirate rather differently, at p. 267,

"a pirate is one who to enrich himself either by surprise or open force sets upon merchants or others trading by the sea to spoil them of their goods or treasure."

This does not necessarily import robbing. BLACKSTONE (1726-80), 20th Edn., book IV, p. 76, states,

"the offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."

EAST'S *PLEAS OF THE CROWN* (1803), vol. II, p. 796, defines the offence of piracy by common law as

"the commission of those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there."

This definition would exclude an attempt at piracy, because an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish textbook writers, including HUME (1757-1838), *SCOTTISH CRIMINAL LAW* (1797) and ALISON (1792-1867), *SCOTTISH CRIMINAL LAW* (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that, as was to be expected, they followed in some cases almost verbatim the early concept, and the criticism upon them is: (i) that it is obvious that their definitions were not exhaustive; (ii) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen; (iii) that they may have overlooked the explanation of the statute of Henry 8 as given by COKE and quoted above, and have thought of piracy as felony according to common law whereas it was felony by civil law.

In ARCHBOLD'S *CRIMINAL PLEADING* (28th Edn., 1931) will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*. When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel without any commission from any State, could attack and kill everybody on board another vessel sailing under a national flag without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognised in the *DIGEST OF CRIMINAL LAW*, by the distinguished writer SIR JAMES FITZJAMES STEPHEN (1829-94), 7th Edn., 1926, at p. 102. At the end of the article on piracy it is stated that

"it is doubtful whether persons cruising in armed vessels with intent to commit piracy are pirates or not,"

but in a significant footnote, it is added that

"the doubt expressed at the end of the article is founded on the absence of any expressed authority for the affirmative of the proposition and on the absurdity of the negative."

MURRAY'S OXFORD DICTIONARY (1909) defines a pirate as "one who robs and plunders on the sea, navigable rivers, &c., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all KENT (1826). In his Comm. I, 183, he calls piracy

"a robbery or a forcible depredation on the high seas without lawful authority and done animo furandi in the spirit and intention of universal hostility."

WHEATON writing in 1836, ELEMENTS, Part II, c. 2, para. 15, defines piracy as being the offence of

"depredating on the seas without being authorised by any foreign State or without commissions from different sovereigns at war with each other."

This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them: see the American case of *The Ambrose Light* (2) (1885). Another instance is *The Huascar* (3). In 1877 a revolutionary outbreak occurred at Callao in Peru and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiral justly considered the *Huascar* was a pirate, and attacked her. In MOORE'S DIGEST OF INTERNATIONAL LAW (1906) (*ubi sup.*), vol. II, p. 953, a pirate is defined as

"one who, without legal authority from any State, takes a ship with intention to appropriate what belongs to it. A pirate is a sea-brigand, he has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples. ORTOLAN (1802-73), a French jurist, and professor at the University of Paris, says, DIP. DE LA MER, Book II, c. XI,

"Les pirates sont ceux, qui courent les mers de leur propre autorité, pour y commettre des actes de déprédation pillant à main armée les navires de toutes les nations."

BLUNTSCHLI (1808-81), a Swiss jurist and a professor at Munich and Heidelberg, published, in 1868, LE DROIT INTERNATIONAL CODIFIÉ, which, in art. 348, lays down:

"Les navires sont considérés comme pirates qui sans autorisation d'une puissance belligérante cherchent à s'emparer des personnes à faire du butin (navires et marchandises) ou à anéantir dans un but criminel les biens d'autrui."

CALVO (1824-1906), an Argentine jurist and Argentine Minister at Berlin, para. 1134, defines piracy:

"Tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commise à main armée en pleine mer contre la personne ou les biens d'un étranger soit en temps de paix soit en temps de guerre."

An American case strongly relied upon by those who contend that robbery is an essential ingredient of piracy, is that of the *United States v. Smith* (4). STORY,

J., delivered the opinion of the court and there states (5 Wheaton, Sup. Ct. R. at p. 161),

"whatever may be the diversity of definitions in other respects, all writers agree in holding that robbery or forcible depredation upon the sea *animo furandi* is piracy."

He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned judge was considering a case where the prisoners charged had possessed themselves of the vessel, the *Irresistible*, and had plundered and robbed a Spanish vessel. There was no doubt about the robbery and though the definition is unimpeachable as far as it goes, it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from pages 163-180 of the report it tabulates the opinions of most of the writers on international law up to that time. But with all deference to so great an authority, the remark must be applied to STORY, J., in 1820 that has already been applied to SIR CHARLES HEDGES in 1696, which is that international law has not become a crystallised code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States v. The Malek Adhel* (5), it was said (2 How. at p. 232):

"If he wilfully sinks or destroys an innocent merchant ship without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression in the sense of the law of nations and of the Act of Congress as if he did it solely and exclusively for the sake of plunder *lucri causa*. The law looks at it as an act of hostility and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate and of one who is emphatically *hostis humani generis*."

Having thus referred to the two cases, *Dawson's Case* (1) (1696) and *United States v. Smith* (4) (1820), which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in *The Serhassan Pirates* (6), decided in the English High Court of Admiralty by that distinguished judge, DR. LUSHINGTON (1782-1873), in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. 4, c. 49, was given to persons who captured pirates, and the learned judge said (it is not necessary to detail all the facts of the case for the purpose of the present opinion),

"the question which we have to determine is whether or not an attack which was made upon the British pinnace and two other boats constituted an act of piracy on the part of the Prahns so as to bring the persons who were upon board within the legal denomination of pirates."

He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case; what happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (7), where DR. LUSHINGTON said:

"It has never, so far as I am able to find, been necessary to inquire whether parties so convicted of these crimes (i.e., robbery and murder) had intended to rob on the high seas or to murder on the high seas indiscriminately."

Finally, there is the American case of the *Ambrose Light* (2), where it was decided by a Federal Court that an armed ship must have the authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it. It is true that the vessel in question

was subsequently released on the ground that the Secretary of State had by implication recognised a state of war, but the value of the case lies in the decision of the court.

Their Lordships have dealt with two decisions by DR. LUSHINGTON. It may here be not inappropriate to refer to another great English Admiralty judge and juriconsult, SIR ROBERT PHILLIMORE (1810-85). In his *INTERNATIONAL LAW*, 3rd Edn., vol. I, 1879, he states:

"Piracy is an assault upon vessels navigated on the high seas committed animo furandi whether robbery or forcible depredation be effected or not and whether or not it be accompanied by murder or personal injury."

Lastly, HALL, to whose work on international law reference has already been made, states, on p. 314 of the 8th Edn., 1924:

"the various acts which are recognised or alleged to be piratical may be classed as follows: robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without or by way of revolt of the crew and conversion of the vessel and cargo to their own use."

Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by KENNY (1847-1930), *OUTLINES OF CRIMINAL LAW*, at p. 316, where he says: "Piracy is armed violence at sea which is not a lawful act of war," although even this would include a shooting affray between two passengers on a liner which could not be held to be piracy. It would, however, correctly include those acts which, as far as their Lordships know, have always been held to be piracy, that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. HALL (ubi sup.) put such a case in the passage just cited; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in *THE RESEARCH INTO INTERNATIONAL LAW* by the Harvard Law School, published at Cambridge, Mass., in 1932. In it nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pp. 749 to 1013.

In 1926 the subject of piracy engaged the attention of the League of Nations, who scheduled it as one of a number of subjects, the regulation of which by international agreement seemed to be desirable and realisable at the present moment. Consequently, they appointed a sub-committee of their Committee of Experts for the progressive codification of international law and requested the committee to prepare a report upon the question. An account of the proceedings is contained in the League of Nations document, C 196, M 70, 1927 V. The sub-committee was presided over by the Japanese jurist MR. MATSUDA, the Japanese ambassador in Rome, and in their report at p. 116 they state:

"According to international law, piracy consists in sailing the seas for private ends without authorisation from the government of any State with the object of committing depredations upon property or acts of violence against persons."

The report was submitted to a number of nations, and an analysis of their replies will be found at p. 273 of the League of Nations document. A number of States recognised the possibility and desirability of an international convention on the question. The replies of Spain, p. 154; of Greece, p. 168; and especially of Roumania, p. 208; deal at some length with the definition of piracy. Roumania adds, p. 208:

"MR. MATSUDA maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification 'for private ends.' In our view, the act of taking for private ends does not necessarily mean that the attack is inspired by the desire for gain. It is quite possible to attack without authorisation

from any State and for private ends not with a desire for gain but for vengeance or for anarchistic or other ends."

The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy. They remember the words of M. PORTALIS, one of Napoleon's commissioners, who said:

"We have guarded against the dangerous ambition of wishing to regulate and foresee everything. . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the detail of all questions which may arise upon each particular topic":

quoted by HALSBURY, L.C., in HALSBURY'S LAWS OF ENGLAND, Introduction, p. ccxi. A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older juriconsults were expressing their opinions. All that their Lordships propose to do is to answer the question put to them, and having examined all the various cases, all the various statutes, and all the opinions of the various juriconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning, namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.

Solicitor: *The Treasury Solicitor.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

PRUDENTIAL ASSURANCE CO. v. INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Finlay, J.), July 10, 1934]

[Reported [1935] 1 K.B. 101; 104 L.J.K.B. 195; 152 L.T. 214]

Stamp Duty—Two instruments in one document—Need of separate stamping—Assurance policy—Mistake in stating age—Adjustment of policy by endorsing memorandum thereon stating correct age and larger amount payable—Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 3 (2), s. 91.

In the proposal for an industrial life assurance the assured wrongly stated her age to be fifty-one next birthday and that age was entered on the industrial policy of life assurance which was issued to her for £12 8s. payable on death. Thereafter she informed the assurance company that she had made a mistake and that her real age was forty-nine next birthday. The company then endorsed on the policy a memorandum stating the fact that the age had been incorrectly stated, and that the sum assured had been adjusted to £13 12s. in accordance with the company's tables.

Held: the policy and the endorsed memorandum were separate instruments each liable for stamp duty, the policy being liable to stamp duty on £12 8s. and the memorandum being liable to stamp duty on £1 4s., namely, the amount by which the adjusted amount of £13 12s. exceeded the original amount of £12 8s.

Notes. As to the contract of industrial assurance, see 17 HALSBURY'S LAWS (2nd Edn.) 528 et seq., and as to the stamping of a document containing several instruments or relating to several matters, see *ibid.*, vol. 28, 441, and cases there cited. For Industrial Assurance Act, 1923, see 10 HALSBURY'S STATUTES (2nd Edn.) 594, and for Stamp Act, 1891, see *ibid.*, vol. 21, 610.

Case referred to:

- (1) *Royal Exchange Assurance v. Hope*, [1928] Ch. 179; 97 L.J.Ch. 153; 138 L.T. 446; 44 T.L.R. 160; 72 Sol. Jo. 68, C.A.; Digest Supp.

Case Stated by the Inland Revenue Commissioners pursuant to s. 13 of the Stamp Act, 1891.

The opinion of the court was desired as to the stamp duty chargeable upon certain policies of the Prudential Assurance Co., Ltd., and upon the memoranda in writing endorsed thereon and signed by the general manager of the company, which policies with the endorsed memoranda had recently been presented to the commissioners pursuant to the provisions of s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty chargeable thereon.

The policies referred to were three in number and were taken out respectively by Amy Frances Franklin, by Samuel Bainbridge, and by Edward Alfred Barrington Glasspoole. Each of them had a memorandum endorsed, signed by the general manager of the company. The first of the three policies, namely, that taken out by Amy Frances Franklin, was dated Dec. 1, 1913, and was a policy of assurance on the life of Amy Frances Franklin, in which the sum assured, subject to the conditions endorsed thereon, was expressed to be £12 8s. if the policy should have been in force for ten years. It was stamped with the duty of 3d. which was the duty with which a policy of life assurance was chargeable under the Stamp Act, 1891, where the sum assured exceeded £10, but did not exceed £25. It was made in pursuance of a declaration or proposal in writing signed by the assured and dated Nov. 21, 1913. This proposal was referred to in the first recital to the policy. The answer to Question 5 of the proposal form contained a statement that the age of the proposer, i.e., the assured, next birthday, was fifty-one years, and also a statement of the proposed weekly premium and of the amount proposed to be assured, and these amounts were relatively in accordance with tables appearing

in the prospectus of the industrial branch of the company which was issued in 1912. The amounts of the weekly premium and the amounts proposed to be assured as stated in the proposal form corresponded with the amounts stated in the policy. Subsequently, the assured informed the company that she had incorrectly stated her age in the said proposal form as fifty-one next birthday, and that her age should have been stated at forty-nine next birthday. Accordingly, the company, in order to adjust the terms of the policy in manner hereinafter appearing, asked the assured to forward her policy to the company so that a memorandum signed by the company's general manager might be endorsed thereon. The assured forwarded her policy to the company accordingly, and on Dec. 28, 1933, the following endorsement was made on the policy and signed by the general manager of the company:

"Notice having been received by the company that the age of the person whose life is assured by the within Policy No. 86001478 has been incorrectly stated at fifty-one years instead of forty-nine years, the sum within assured is adjusted to £13 12s. in accordance with the tables of the company. Dated this 28th day of December, 1933. (Sgd.) J. Burn, General Manager."

The amount of £13 12s. appearing in the memorandum was in accordance with the tables appearing in the prospectus of the company issued in 1912.

The same kind of mistake was made in each of the two other policies, and a similar adjustment was made in each.

The commissioners were of opinion that the policies and the endorsed memoranda were separate instruments, each liable to stamp duty, and that the respective policies were each sufficiently stamped with the duties with which they were in fact stamped, as heretofore stated, the stamp duty under the head of charge "Policy of Life Insurance" having, in their opinion, been correctly computed by reference to the amount insured as stated in the policy. The commissioners were further of opinion that each of the endorsed memoranda was liable to ad valorem duty under the head of charge "Policy of Life Insurance" in Sched. I to the Stamp Act, 1891. As regards the memorandum endorsed on the Franklin policy, the commissioners were of opinion that it was liable to the ad valorem duty of 1d., being the duty applicable to a policy of life insurance "where the sum insured does not exceed £10" by reference to the increase of insurance as stated in the policy and the endorsed memorandum respectively from £12 8s. to £13 12s., namely, an increase of £1 4s. They were similarly of opinion as regards each of the memoranda on the other policies.

The company contended: (i) That the policies and the endorsed memoranda were not separate instruments as claimed by the commissioners. (ii) That in respect of the endorsement on the Franklin policy no additional duty was chargeable as the total sum insured did not in any event exceed £25, and the policy was already stamped with the duty of 3d. applicable to a policy of life insurance where the sum insured exceeds £10 but does not exceed £25. (iii) That in respect of the other policies no additional duty was chargeable for similar reasons. Being dissatisfied with the assessments made, and having paid the duty in accordance with the assessment of the commissioners, the company required the commissioners to sign and state a case. The commissioners signed and stated this case accordingly.

The questions for the opinion of the court were: (i) Whether the respective policies and endorsed memoranda are liable to duty as assessed by the commissioners. (ii) If not, to what duty are they liable?

W. P. Spens, K.C., and T. Donovan for the appellants.

The Solicitor-General (Sir Donald Somervell, K.C.) and J. H. Stamp for the commissioners.

FINLAY, J.—This, like all cases, or nearly all cases, under the Stamp Act, is troublesome, but I have arrived at the conclusion, after listening to a very clear argument, that the view of the Crown is right. I think the case is not entirely

free from difficulty, but I think that it depends upon a rigorous adherence to what must never be forgotten, namely, that under the Stamp Act one stamps instruments, not transactions or anything of that sort. What one has to do is to look at the particular instrument which is brought in for stamping and arrive at a conclusion as to what it is.

It is not necessary to go in great detail through the facts, but, shortly put, what happened was this. There were three cases in which persons had entered into contracts of industrial assurance with the Prudential Assurance Company, who are the appellants. These assurances are frequently made with persons of humble position in life, and it not unnaturally happens in that honest mistakes are made. Here, in each case, a mistake was made as to the age of the person who was the proposer. A slight complication—I mention it, though I think nothing turns on it—arises with regard to the third case, by reason of the circumstance that there a gentleman, who was insured for £50, was under a special provision to get double that amount if he died as the result of a violent accident. I repeat that, in my opinion, nothing turns upon that, but it is proper to mention it.

These three policies having been entered into, the amount payable depends on the provisions of tables based on the age of the assured. The result is that if a person, who is really forty-nine, by a perfectly honest mistake says that he or she is fifty-one, the policy will be wrong in the sense that the computation will not have been correctly made, because a basic fact, namely, the age, has been wrongly stated. I will take the case of Mrs. Franklin. One starts with a policy, no doubt in the ordinary form, and one gets the sum assured as being, if the policy is in force for six calendar months, £11 16s.; if for five years and less than ten years, £12 4s.; if for ten years, £12 8s. That was issued under a mistaken view as to the age of the lady. The mistake was discovered, and thereupon this was endorsed upon the policy:

"Notice having been received by the company that the age of the person whose life is assured by the within policy . . . has been incorrectly stated at fifty-one years instead of forty-nine years, the sum within assured is adjusted to £13 12s. in accordance with the tables of the company."

The question is: What from the point of view of stamping is the effect of that? I am not going through the other cases in detail, but it is proper to mention that in one of them the effect of the adjustment which fell to be made was to put the sum assured above £25; and it was conceded on behalf of the company that in that case stamp duty was attracted, because the stamp is different, if the amount is above £25, from what it is if it is below £25.

The contention, however, of the Crown, and the view which was accepted by the commissioners, was that there was here a new policy of assurance. To take the first case, the view of the Crown is that, whereas there was a policy of assurance for £12 8s., there is now a policy of assurance for £13 12s. The contention on behalf of the company was that that is wrong, and that there were not two policies, but merely one policy and an adjustment to bring that policy into accord with what it always would have been if the facts had been understood.

My attention was called to the Stamp Act upon which the matter turns. Section 91 is:

"For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance."

By s. 3 (2) of the Act:

"If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable."

The case for the Crown is that here there is more than one instrument written upon the same piece of paper. If I rightly followed the argument of counsel for

the appellants, he agreed that, if this had been done by the method of the issue of a fresh policy, a fresh stamp would have been exigible. At all events, that is the view which I should certainly take. On the other hand, he said that it might have been done by a method which would not have attracted a stamp. I think it is quite likely that is so. That shows the importance of adhering to the principle with which I began, of stamping the document as it is.

Counsel called my attention to s. 20 (4) of the Industrial Assurance Act, 1923, which, with the utmost deference, while it bears on the case, I think, has nothing to do with the point which I have to consider. It is this :

"If a proposal form for an industrial assurance policy is filled in wholly or partly by a person employed by the society or company, the society or company shall not, except where a fraudulent statement in some material particular has been made by the proposer, be entitled to question the validity of the policy founded on the proposal on the ground of any misstatement contained in the proposal form : Provided that—(a) if the proposal form contains a misstatement as to the age of the person whose life is proposed to be assured, the society or company may so adjust the terms of the policy, or of any policy which may be issued in substitution or in lieu thereof, as to make them correspond with the terms which would have been applicable if the correct age of the person had been originally inserted in the proposal. . . ."

That is, of course, a special provision with regard to industrial assurance, but I cannot see that it has any bearing upon the question of stamping. The society or company is to adjust the terms of the policy, and it depends entirely upon the method of adjustment whether a fresh stamp is or is not attracted.

Then my attention was called to *Royal Exchange Assurance v. Hope* (1). The point which arose in that case was widely different from the sort of matter which I have to consider. It was, the policy having been assigned, whether an extension of the policy obtained by the assignor enured for the benefit of the assignee, and it was held that it did. Effect was given to the extension by an endorsement on the policy, and, apparently, no question of stamp arose, for it is mentioned in the judgment of the Master of the Rolls that there was no fresh stamp, as there must have been if a new policy had been effected. The basis of the view of the Master of the Rolls there was that there was no new policy or contract of assurance. Test the first of the present cases in this way. On the death of the assured the company will be liable to pay £13 12s. If it is asked, what is the evidence of that, I should say that that liability to pay £13 12s. is evidenced by this writing on the back of the policy, and by nothing else. That seems to me to be the substance of the thing. If what I have said is right, it seems to me to be decisive of this question, and to show that here there are upon the same piece of paper two instruments. Accordingly, it follows that, in my view, the Crown are right in their contention, and that the instruments have been correctly stamped. Therefore, the appeal fails.

Solicitors : *Herbert H. Mosely* ; *Solicitor of Inland Revenue*.

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

R. v. HOLDING. R. v. LONG

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Branson, JJ.),
October 29, 1934]

[Reported 104 L.J.K.B. 28; 152 L.T. 216; 98 J.P. 459; 78
Sol. Jo. 841; 25 Cr. App. Rep. 28; 32 L.G.R. 512; 30 Cox,
C.C. 201]

Criminal Law—Vagrancy—Incorrigible rogue—Sentence—Duty of quarter sessions—Circumstances of conviction at petty sessions to be examined—Appropriate sentence to be considered—Maximum term not always appropriate—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 10.

When a prisoner is committed to quarter sessions for sentence as an incorrigible rogue it is the duty of that court, under s. 10 of the Vagrancy Act, 1824, first to examine into the circumstances of the conviction at petty sessions, and then, after giving the prisoner an opportunity of cross-examining any witnesses called for the Crown and of addressing the court, to consider what sentence is appropriate in the particular circumstances.

Observations on maximum terms of imprisonment passed on incorrigible rogues.

Notes. Referred to: *R. v. Billington* (1942), 28 Cr. App. Rep. 180.

As to incorrigible rogues, see 10 HALSBURY'S LAWS (3rd Edn.) 701, 702, and for cases see 14 DIGEST (Repl.) 142, 143, 552, 553, and 15 DIGEST (Repl.) 929. For *Vagrancy Act, 1824*, see 18 HALSBURY'S STATUTES (2nd Edn.) 202.

Case referred to:

(1) *R. v. Cope* (1925), 94 L.J.K.B. 662; 132 L.T. 800; 89 J.P. 100; 41 T.L.R. 418; 27 Cox, C.C. 778; 18 Cr. App. Rep. 181, C.C.A.; Digest Supp.

R. v. HOLDING

Appeal against sentence.

The appellant, having been convicted as an incorrigible rogue at Highgate Petty Sessions, was committed for sentence to Middlesex Quarter Sessions, and there sentenced to twelve months' imprisonment with hard labour. When he appeared at quarter sessions, a police officer was called on behalf of the Crown, and he gave a list of the appellant's previous convictions, making some reference to his previous history. The court then intimated that they had heard sufficient evidence, and, without giving the appellant any opportunity of cross-examining the officer or of addressing the court, proceeded to pass sentence.

By the Vagrancy Act, 1824, s. 10:

"... When an incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned . . . and . . . kept to hard labour for any time not exceeding one year from the time of making such order. . . ."

R. E. Seaton, for the appellant, submitted that the provisions of the above section had not been complied with, and referred to *R. v. Cope* (1).

J. F. Eastwood, for the Crown, did not seek to support the sentence.

The judgment of the court was delivered by

LORD HEWART, C.J.—This appellant was convicted at Highgate Petty Sessions as an incorrigible rogue, and was committed for sentence to Middlesex Quarter Sessions. He was there sentenced to twelve months' imprisonment with hard labour, and now appeals against that sentence.

There are two very unfortunate incidents in this case. The first is that the

court below appear entirely to have ignored their duty under s. 10 of the Vagrancy Act, 1824, of examining into the circumstances of the case. There is nothing here which can be called an examination into the circumstances of the case. To judge from this case, and so many others which have come before this court, there is an impression abroad that, when a prisoner is sent to quarter sessions to be dealt with as an incorrigible rogue, the only duty of that court is to pass the maximum sentence of twelve months' imprisonment with hard labour. Their first duty is to examine into the circumstances of the case, and their second is to consider what is the appropriate sentence. Here, not only were the provisions of the statute passed over, but the appellant was not given any opportunity of cross-examining the police officer or of addressing the court. The attitude of the court appears to be expressed in one sentence used by the chairman after the officer had given evidence of previous convictions: "That is sufficient for our purpose." In these circumstances we have no alternative but to quash this sentence.

Sentence quashed.

Solicitors: *Registrar of the Court of Criminal Appeal; Wontner & Sons.*

R. v. LONG

Appeal against sentence.

The appellant was convicted at Wealdstone Petty Sessions as an incorrigible rogue, and was committed to Middlesex Quarter Sessions to be dealt with as such. He was sentenced to twelve months' imprisonment with hard labour.

The facts were similar to those in the previous case, except that the appellant was given an opportunity of cross-examination and of addressing the court.

The appellant, in person.

J. F. Eastwood for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—This case is in most respects similar to the last. No examination was made into the circumstances of the case, as provided by s. 10 of the Vagrancy Act, 1824, and the chairman in passing sentence used these words:

"You have been convicted in the court below and sent here for sentence, and we have to see if there is any reason why imprisonment should not be inflicted upon you, and there is none. Therefore, you will go to prison with such hard labour as you can properly perform for twelve calendar months."

It is really high time that this practice was brought to an end. In cases of this kind it is the duty of the court of quarter sessions to examine into the circumstances of the case, and it is not at all a matter of course that, if there is to be imprisonment, it must be imprisonment for the maximum term. Here the court below seems to have failed to perform its duty. We are bound to allow the appeal, quash the sentence, and release the appellant.

Sentence quashed.

Solicitors: *Wontner & Sons.*

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

Re SANDIFORD. ITALO CORPORATION, LTD. v.
SANDIFORD (No. 1)

[CHANCERY DIVISION (Farwell, J.), May 11, 15, June 22, 1934]

[Reported [1934] Ch. 707; 103 L.J.Ch. 301; 151 L.T. 559]

Solicitor—London agent—Account rendered to country solicitors including fees stated to have been paid to counsel—Fees, in fact, not paid—Death insolvent of London agent—Recovery of amount of fees by country solicitors.

The London agent of country solicitors rendered to the country solicitors an account for professional work done which included an amount paid for counsel's fees. In fact, those fees had not been paid. The London solicitor died insolvent.

Held: as the fees were represented in the account as having been paid, the money was not paid to the London agent impressed with a trust to pay those fees, but it was money had and received by the London agent to the use of the country solicitors, and, therefore, they were entitled to prove in the administration of the estate of the London agent for the sum in question.

Notes. As to the relations between London agent and country solicitor, see 31 HALSBURY'S LAWS (2nd Edn.) 290–292, and for cases see 42 DIGEST 390–393.

Summons in an administration action.

The facts are fully set out in FARWELL, J.'s judgment.

W. N. Stable for the applicants, the country solicitors.

Roger Turnbull for the respondent, the administratrix of the London agent's estate.

FARWELL, J.—This is a summons taken out in an administration action in which the estate of Henry Gilbert Sandiford is being administered. It raises a somewhat curious question and one not wholly free from difficulty.

The late Mr. Sandiford was a solicitor, and he carried on business under the name of Calder, Woods and Sandiford in London. The applicants are Wansbroughs, Robinson, Tayler and Taylor, solicitors in Bristol, for whom Mr. Sandiford in his firm name acted as London agent. On Nov. 7, 1932, the applicants sent to Mr. Sandiford a cheque for £671 19s. 1d. That sum represented the balance due to Mr. Sandiford upon an account which was sent to them by him, and included in that account as due to Mr. Sandiford was a sum of £399 19s. in respect of counsels' fees. That cheque was received by Mr. Sandiford and was paid into the client's account of his firm.

Mr. Sandiford died on Nov. 19, 1933, and subsequently there were administration proceedings. The estate proved to be insolvent and an administration order was duly made. This summons is taken out by the applicants claiming to recover from the estate the sum of £399 19s., which represents the total amount of counsels' fees already mentioned. Alternatively, the applicants ask for a declaration that they are entitled to prove against the estate of the late Mr. Sandiford for a sum of £377 17s. 2d., being the sum of £399 19s. less certain sums which admittedly must be set off against that amount. In every case it appeared from the account that the fees to counsel had been paid; in truth and in fact, those fees had not been paid.

It is said that the country clients were not misled in the matter because, although the account shows that the fees had been paid, they appreciated that it was not necessarily correct in that respect and that the fees might not be paid till the money was received by Mr. Sandiford, but, however that may be, there can be no doubt that the account purported to show a balance due to Mr. Sandiford on the footing that the fees had actually been paid. The position, therefore, is that Mr.

Sandiford received this cheque for £671 odd, which was the balance of the total amount including the fees said to be paid to counsel, which, in fact, were never paid by him. The question is: Are the country solicitors entitled to recover the actual sum of £399 19s. or must they prove in the administration for the amount due, or, as is suggested by the respondent, is no remedy open to them?

The country solicitors adopted the honourable course of paying counsel themselves. That was a commendable act on their part, but it cannot affect the position. The fact that they have chosen to pay those fees can give them no better right against the estate of the dead man than they would otherwise have had.

The respondent to this summons is the administratrix of the deceased man, and it is her duty to protect the estate so far as possible for the benefit of the creditors, and, therefore, she has put forward the contention that the country solicitors have no right either to recover the sum of £399 19s. or to prove against the estate.

The way the case is put on behalf of the applicants in the first instance is this. It is said that this £399 19s. was money which was paid to Mr. Sandiford for the express purpose of paying counsels' fees, and that, therefore, it was money which came into his hands impressed with a trust, namely, to pay the fees to counsel, and that, as that money can now be traced and has not been used for the only purpose for which it could properly be used, namely, the payment of counsel, the country solicitors are entitled to recover the actual amount. In my judgment it is not possible in this case to say that the sum of £399 19s. was money paid to Mr. Sandiford impressed with a trust. I cannot disregard the fact that the account shows on the face of it that these fees had already been paid and it seems to me impossible to hold that when the country solicitors drew a cheque for the balance of this whole account they were paying over £399 out of that total as money which was impressed with a trust at all. In my judgment, this sum was only one of the items in the account, which was made up of various sums which appeared to be due to Mr. Sandiford as against sums which had been received or otherwise accounted for by him. On the face of it I am unable to come to the conclusion that this sum of £399 was a sum which was paid over to the dead man with a trust to use it in any particular way. If these counsels' fees had in fact been paid before the account was rendered no question of any trust could have arisen, and the mere fact that the country solicitors may not have known for certain whether they had been paid or not cannot alter the position. This was an item which Mr. Sandiford was claiming as due to him and which was paid on the footing that it was due to him and not subject to a trust at all. If that be so then it must follow that the application, so far as it asks for the repayment of the total sum of £399 19s., is misconceived and must fail.

That, however, does not conclude the matter because there is the alternative claim that the applicants are entitled to prove for this sum, subject to the reduction, which I have mentioned. This is, of course, a totally different claim from the first. If this money was not impressed with a trust, it was paid to Mr. Sandiford as money due to him, whereas in truth and in fact the money was not due to him because he had not paid counsels' fees. It seems to me, therefore, that the country solicitors, if Mr. Sandiford had now been alive, would have been entitled to sue him, not to recover the £399 19s. as trust money in his hands, but to recover that amount on the footing that it was money had and received by Mr. Sandiford for their use, and if they could have proved their case they would have been entitled to judgment for the amount. If that be so, it must follow that they have a right now to prove in the administration for that sum, not on the footing that it is trust money, but on the footing that it is money which was paid to Mr. Sandiford as money due to him from the country solicitors, whereas in truth and in fact that money was not due at all.

In my judgment, it follows that the applicants are entitled to prove in the administration for the amount of £377 17s. 2d., and I propose to make a declaration to the effect that the applicants are not entitled to payment of the £399 19s., but

that they are entitled to claim against the estate for the sum of £377 17s. 2d. As both sides in this summons have partly failed and partly succeeded there will be no order as to costs.

Solicitors: *Watson, Sons & Room*, for *Wansbroughs, Robinson, Tayler, & Taylor*, Bristol; *Edwin Coe & Calder Woods*.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

NEWSON v. NEWSON. TAGART v. TAGART AND WHITE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), March 12, April 16, 1934]

[Reported 151 L.T. 159; 50 T.L.R. 399]

Variation of Settlements—Power of appointment—Introduction of new power—Benefit of second spouse and issue of second marriage—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 25.

The Divorce Court may, in the exercise of its statutory power to vary settlements, introduce a new power of appointment, not contained in the settlement, for the benefit of an after-taken spouse and the issue of a future marriage, but this should be done only if the court is satisfied that the variation as a whole is clearly for the benefit of the existing child or children of the marriage.

Scollick v. Scollick (1), [1927] P. 205, followed; *Prinsep v. Prinsep* (2), [1930] P. 35, considered.

The extinction of a guilty spouse's interest under the settlement and the consequent acceleration of an existing child's interest is not by itself enough to justify the creation of such a new power.

Notes. Section 192 of the Judicature (Consolidation) Act, 1925, is now s. 25 of the Matrimonial Causes Act, 1950.

As to variation of settlements so as to give a power to appoint to children of a second marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 456, para. 1024, text and notes (m) and (o).

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to:

- (1) *Scollick v. Scollick*, [1927] P. 205; 96 L.J.P. 96; 137 L.T. 485; 71 Sol. Jo. 584; 27 Digest (Repl.) 642, 6048.
- (2) *Prinsep v. Prinsep*, [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; 46 T.L.R. 29, C.A.; 27 Digest (Repl.) 643, 6059.
- (3) *Crisp v. Crisp* (1872), L.R. 2 P. & D. 426; 42 L.J.P. & M. 13; 27 L.T. 428; 21 W.R. 79; 27 Digest (Repl.) 643, 6061.
- (4) *Hartopp v. Hartopp and Akhurst*, [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168; 27 Digest (Repl.) 651, 6134.
- (5) *Whitton v. Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest (Repl.) 643, 6063.
- (6) *Blood v. Blood*, [1902] P. 78, 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, 6111.

- (7) *Webster v. Webster and Williamson*, [1926] P. 198; 95 L.J.P. 97; 135 L.T. 670; 27 Digest 642, 6047.
- (8) *Hodgson Roberts v. Hodgson Roberts and Whitaker*, [1906] P. 142; 75 L.J.P. 48; 94 L.T. 621; 22 T.L.R. 395; 27 Digest (Repl.) 652, 6138.
- (9) *Alston v. Alston*, [1929] P. 311; 98 L.J.P. 155; 141 L.T. 542; 45 T.L.R. 642; 73 Sol. Jo. 544; 27 Digest (Repl.) 655, 6168.
- (10) *Colclough v. Colclough and Fisher*, [1933] P. 143; 102 L.J.P. 87; 149 L.T. 287; 49 T.L.R. 434; 77 Sol. Jo. 338; 27 Digest (Repl.) 655, 6169.
- (11) *Alexander v. Alexander* (1929), 45 T.L.R. 193; 73 Sol. Jo. 127; 27 Digest (Repl.) 655, 6167.
- (12) *Atkins v. Atkins and Urquhart*, [1913] P. 211; 83 L.J.P. 18; 109 L.T. 640; 27 Digest (Repl.) 642, 6046.

NEWSON v. NEWSON

Motion to confirm the registrar's report on a petition for variation of settlements.

Section 192 of the Judicature Act, 1925 [now s. 25 of the Matrimonial Causes Act, 1950], consolidating equivalent provisions in the Matrimonial Causes Acts, 1859 and 1878, enacts:

"The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage, or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage."

On the wife's petition for dissolution of marriage a decree nisi was pronounced on Jan. 16, 1933, and made absolute on July 24, 1933. The petitioner was granted the custody of the only child of the marriage, a boy aged six. The petitioner filed a petition for variation of settlements on Aug. 4, 1933. In his report the registrar said that at the hearing only the petitioner and the trustee were represented. There were two ante-nuptial settlements dated May 29, 1919, the husband's settlement and the wife's settlement. By the former the respondent covenanted to bring into settlement funds producing £250 per annum within six months of the death of his mother out of a reversion expectant on his death, and the trustees were to pay the net income to the respondent during his life and after his death to the petitioner for her life for her separate use without power of anticipation during any coverture. After the death of the surviving spouse capital and income of the trust funds were to be held on trust for such of the children or the remoter issue of the marriage as the respondent and the petitioner should jointly or as the survivor of them should appoint, and, in default of any such appointment, in trust for the children of the marriage who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry under it, and if more than one in equal shares. If no child of the marriage attained a vested interest the fund should be held in trust for the respondent absolutely. The trustees were given a power of advancement for the respondent and his family, at the written request of the respondent and the petitioner, during joint lives, or of the respondent if he should survive the petitioner, to the extent of one-sixth of the trust property. Under the wife's settlement (which was in Scottish form) the petitioner brought into settlement all property then belonging or to which she should become entitled during the marriage, which was to be held on trust so that the income should be paid to the petitioner for her life for her separate use, and not be assignable by her and be without power of anticipation, and on her death to the respondent on similar terms, and on the death of the survivor the capital was to be held on behalf of the children of the marriage in such way and subject to such restrictions, including restriction to a life rent as the respondent and the petitioner jointly or the

petitioner alone, if surviving, should appoint, and failing such appointment among the children of the marriage in equal shares. In the event of there being no issue taking a vested interest in the capital there was a trust over to the petitioner, if alive, or to such persons as she might appoint, and failing such appointment to the heirs in mobilibus of her mother.

The petitioner's mother covenanted during her life to pay the petitioner £200 a year free of tax. The mothers of both the petitioner and the respondent were still alive. In the event of the petitioner predeceasing her mother, her interest in funds amounting to about £20,400 failed, and the question had been raised whether, if the petitioner survived her mother, any of the funds would be caught by the wife's settlement, as her interest had not vested prior to the dissolution of the marriage.

The registrar further reported that both the petitioner and the respondent had agreed to make certain arrangements for the benefit of the child in consideration of the petitioner's being permitted to appoint to an after-taken husband and the issue of a future marriage part of the trust property in the wife's settlement. He thought that in view of the concurrent advantages offered to the child such a power should be created, and submitted as follows: (1) That all the rights, powers, and interests of the respondent in the wife's settlement be extinguished as if he were dead and the petitioner had survived him. (2) That the power under the wife's settlement to restrict the interests of the child of the marriage to a life rent be extinguished. (3) That all the rights, powers, and interests of the petitioner in the husband's settlement be extinguished as if she were dead, and the respondent had survived her. (4) That the trustees of the petitioner's settlement pay one-fifth of the income of her fund when in possession to the child of the marriage or for the child's benefit. (5) That power be given to the petitioner to appoint to an after-taken husband and the issue of a future marriage not more than a moiety of the funds of her settlement subject to (i) confirmation that certain funds are subject to the wife's settlement, and (ii) the petitioner's mother covenanting to provide for the maintenance and education of the child until attaining the age of twenty-one years. The foregoing submissions were also subject to the respondent executing a deed forgoing in favour of the child one-fifth of the income from his fund, when in possession, up to £250 per annum.

Noel Middleton for the child.—The petitioner, who is thirty-six, is just about to marry. If she lives to the age of seventy the child will get nothing under the settlement till he is forty. Under the proposed variation he would be maintained and educated until he came of age by his grandmother, and when his father's reversion, amounting to about £20,000, falls into possession, the child will receive not less than £200 a year, and probably more if the yield from certain investments is not reduced. It is proposed that the petitioner's power of appointment to her after-taken husband should be limited to an interest not exceeding his life. Taking into account all the proposed arrangements for the benefit of the child, the advantages offered seem to outweigh the disadvantages. If there are no children by the petitioner's second marriage the existing child will be entitled eventually to the whole of the fund. A number of cases have been decided under s. 5 of the Matrimonial Causes Act, 1859, reproduced in s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. *Crisp v. Crisp* (3) was the strictest case for the proposition that the court had no power to vary a marriage settlement so as to deprive a child of an interest in it. In *Hartopp v. Hartopp and Akhurst* (4) SIR GORELL BARNES clearly dissented from that proposition but said ([1899] P. at p. 72) that the guiding principle should be: Where the breaking up of the family life has been caused by the fault of the respondent, the court in exercising its powers of variation, ought to place the petitioner and the children in a position as nearly as circumstances would permit the same as if the family had not been broken up. In *Whitton v. Whitton* (5) SIR F. JEUNE, P., recognised the principle of variation in favour of a second husband or the children of a second marriage subject to a quid pro quo for existing children, and in *Blood v. Blood* (6) STIRLING,

L.J., expressly said there was jurisdiction to exercise the power of disturbing vested interests in that manner. The pith of the matter is to be found in the judgment of SIR GORELL BARNES in that case ([1902] P. at p. 83), the court will vary a settlement in whatever manner is "found to be practically necessary or expedient." In *Webster v. Webster and Williamson* (7) HILL, J., refused to create a new power such as is sought here, but in *Scollick v. Scollick* (1), being satisfied of the quid pro quo, the same judge inserted a power not previously existing to appoint to the children of a subsequent marriage. The matter was considered in *Hodgson Roberts v. Hodgson Roberts and Whitaker* (8); *Alston v. Alston* (9); *Colclough v. Colclough and Fisher* (10). If certain statements of principle by the Court of Appeal in *Prinsep v. Prinsep* (2) are taken on their face value they may seem to disapprove the introduction of a new power into a settlement. But, in fact, the exercise of the power of the court under the section has been gradually extended, and in the present case there is a good quid pro quo, subject to antecedent conditions.

The Hon. Victor Russell for the petitioner (the wife) and trustees. In *Alexander v. Alexander* (11) the proposed variation was rejected as prejudicial to an existing child. In *Atkins v. Atkins and Urquhart* (12) SIR S. EVANS, P., gave effect to the principle that the court could create a new power in a suitable case.

SIR BOYD MERRIMAN, P.—This motion raises an extremely interesting point which is not free from difficulty. I am indebted to counsel for their very full and helpful arguments, and as I have come to a definite conclusion it is unnecessary to reserve my judgment. Two questions arise: (1) Has the court power to order such a variation as is asked for here?; and (2) If it has, is it right to do so in this case, having regard to the fact that there was issue of the dissolved marriage one child, an infant six years old, whose interest will be affected by the proposed variation?

I have been referred very fully to all the reported authorities since *Crisp v. Crisp* (3) bearing on the jurisdiction of the court. I think the matter may be summarised in this way. First, in *Prinsep v. Prinsep* (2) the Court of Appeal approved the principle enunciated by MR. JUSTICE HILL in the court below, that, *prima facie*, settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and children. Secondly, in *Blood v. Blood* (6), STIRLING, L.J., approved the statement of SIR F. JEUNE, P., in *Whitton v. Whitton* (5):

"One has in these cases to consider what is really for the benefit of the children, because I think the authorities show that nothing must be done that on the whole would be for the disadvantage of the children."

In *Blood v. Blood* (6) SIR GORELL BARNES said ([1902] P. at p. 83):

"The recent authorities come to this: that the interests of children may be affected, though undoubtedly the general view expressed throughout the earlier cases would still prevail to this extent at least, that the court will not affect those interests except, as I suggest, when it is found to be practically necessary or expedient that it should be done."

In the same judgment there is the overriding consideration as to the words of the section. SIR GORELL BARNES said:

"Those words are extremely wide, and I am anxious that they should not, by any construction the court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the court, and for which this section is brought into operation, are so diverse that it is, to my mind, extremely important that, so far as possible, the court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case."

The substance of the matter is contained in those passages. There is no doubt

that, at any rate when *Crisp v. Crisp* (3) was decided in 1872, variations of this character would have been held to be out of the question, but the variation now proposed is to insert a clause which is quite usually contained in a settlement, that is to say, a power of appointment in favour of an after-taken husband and the children of the subsequent marriage. No such clause was in fact contained in this settlement. Therefore cases like *Whitton v. Whitton* (5) and *Hodgson Roberts v. Hodgson Roberts* (8), the settlements in both of which contained such a clause which was adapted by the court to the purposes of the proposed variation, are not strictly in point, though the former case is very helpful in relation to general principles. It was not until 1913, in *Atkins v. Atkins and Urquhart* (12), that a clause of this sort was first inserted by the court in a settlement, and this was done, apparently, without argument. In *Webster v. Webster and Williamson* (7) in 1926 HILL, J., having expressed his doubts whether such a variation could be made, decided that it was quite inappropriate in that case, but in the following year in *Scollick v. Scollick* (1) the same learned judge decided to order a variation of this character notwithstanding the doubt he had himself expressed in the other case. I cannot see how HILL, J., could have arrived at that decision without deciding definitely that this court has the power to make such a variation.

The very point was raised here on the registrar's report, because he expressed a doubt whether it was open to the court to do it. *Scollick v. Scollick* (1) is a direct decision that the power exists in an appropriate case. Counsel has pointed out that some doubt may be raised by *Prinsep v. Prinsep* (2) in the Court of Appeal, though there was no reference to *Scollick v. Scollick* (1) because of the generality of the words in the judgment that *prima facie* settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and children of the marriage. In *Prinsep v. Prinsep* (2) HILL, J., had taken part of the trust funds out of the settlement and handed it over, free from the settlement, to the person who was entitled to interests under that settlement, in other words *pro tanto* the settlement was entirely extinguished. The Court of Appeal held that, save for a certain proportion of the settled funds which was to be settled on the wife petitioner and the child of the marriage, the balance should continue to be applied under the trusts of the settlement. *Prinsep v. Prinsep* (2) does not throw any doubt on the propriety, in a proper case, of modifying a settlement by inserting a clause which would have been quite appropriate for insertion in that settlement at the time when it was made, always provided that, on other grounds, on a general consideration of the expediency of so doing, and of the benefit which may arise in so doing to the infant in particular, the court thinks it right that the variation should be made. In *Scollick v. Scollick* (1) the power of appointment in connection with the future marriage was limited to the children, while here it is proposed that it should be to a future husband and future children. I do not think that makes any difference, in view of the fresh settlement in both cases.

I have come very definitely to the conclusion that, in all the circumstances, this proposed variation is for the benefit of the infant. It is quite true, to state the disadvantages, that in certain events the infant in this case might succeed quite early to a life interest in the whole of his mother's trust fund, but it is by no means certain that he would do so under the settlement itself. One of the curious features of this case is that there is considerable doubt whether, in the events that have happened, the wife's trust fund will ever be caught by the settlement at all. That in one sense does not affect this infant, because, in one way or another, as for instance if the mother died and the grandmother died, he would get his mother's share of the settlement. The doubt whether the mother's fund will ever be caught by the settlement arises from the fact that these are interests contingent on her surviving her own mother and that she undertook to settle properties acquired during coverture. It is suggested that the mother has not acquired a vested interest during the coverture.

On the other hand the infant would receive some benefits under the variation of

the settlement itself, and some arising by collateral arrangements ancillary to the proposed scheme. In the first place his interest in his mother's trust fund will be accelerated by the extinguishment of his father's interest, and, secondly, his interest in the father's trust fund will be accelerated by the extinguishment of the mother's interest therein, but that latter provision is not the reality of the matter so far as the child is concerned. It is only a necessary preliminary to an arrangement outside the settlement which the father proposes to make, by which the child is to receive one-fifth of the income from the father's fund when it falls into possession up to a sum not exceeding £250 a year. Then the child is to receive one-fifth of the income of the mother's fund when in possession, which is to be applied for his benefit during infancy. The child is also to have the benefit of the extinguishment of a limitation on the power of appointment in the mother's settlement limiting his interest to a life rent. Over and above that, instead of having to draw on his own right to have advancements made to him out of his interest in the settlement, by an arrangement outside the settlements his grandmother is prepared to covenant to provide for his maintenance and education on suitable lines.

It is quite clear that, though in certain circumstances the child may acquire an interest in the whole of his mother's share of his grandmother's estate, nevertheless, his share may be considerably reduced by the birth of half-brothers and half-sisters by his mother's approaching remarriage. Nevertheless, as a whole, this scheme is greatly to the benefit of the infant.

However, I wish to make it perfectly clear that the order will not be drawn up until the court is satisfied (1) that the grandmother's covenant by deed to provide for the child's education and maintenance has been executed in such manner as the court may approve; (2) that the respondent has similarly executed a deed for the settlement on the child of one-fifth of the income of his fund when it falls into possession up to £250 a year; (3) that the petitioner has entered into a covenant to bring into settlement certain funds so far as such covenant is necessary to resolve the doubts arising as to their being caught by her settlement; and (4) that the order itself be expressed so that the power to appoint to an after-taken husband will be limited to a life interest if he survives the wife. Subject to the registrar being satisfied that conditions (1), (2), and (3) have been fulfilled before drawing the order, I confirm the report.

Report confirmed.

Solicitors: *Cree & Son.*

TAGART v. TAGART AND WHITE

Motion to vary the registrar's report on a petition for variation of settlements following a decree absolute of divorce, dated March 13, 1933, granted to the husband, the petitioner. The custody of the one child of the marriage, a girl aged five years, was granted to the petitioner, the child to remain in the respondent mother's care until further order.

In his report, dated Feb. 5, 1934, the registrar said that at the hearing of the petition the petitioner, the child, the respondent, and the trustees of an antenuptial settlement dated Nov. 4, 1926, were separately represented. By this settlement the petitioner assigned to the trustees (1) half of his reversionary interest under a will expectant on the death of his father; (2) his reversionary interest under the same will expectant on the death of his father and mother; on trust to apply the income therefrom or any portion of it for the benefit of himself, his wife, and the issue of the marriage as the trustees in their discretion should think fit, the balance of such income to be applied in accordance with the trusts of the settlement as if the husband were dead; upon trust, on the death of the husband, to pay the income therefrom to the wife during her life until she should marry again, and after such remarriage to pay the income from a moiety of the fund to her during her life, the other moiety to be applied under the trusts as if she were dead; upon trust, on the death of both spouses, for the children or remoter issue

of the marriage as the husband and wife or the survivor of them should by deed or will appoint, and in default of such appointment for the children in equal shares, and in default of issue for the husband absolutely.

The petitioner's father having died, the gross annual income from that reversion was about £188. On the death of the petitioner's mother there would be an additional income of about £154 a year. By another settlement dated June 19, 1933, made between the respondent and the trustees, the child of the marriage would be entitled to the income from £1,000 on the death of the respondent's father. The petitioner was thirty-two, and the respondent thirty years of age. The petitioner asked that all rights, powers, and interests of the respondent in the husband's settlement should be extinguished, and that a new clause should be inserted in the settlement giving the petitioner power to appoint half of the trust funds in favour of an after-taken wife and the children of a subsequent marriage. Counsel referred to *Scollick v. Scollick* (1),⁴ and submitted that the child had a sufficient quid pro quo for the consequent diminution of her interest by the extinction of the respondent's interest, and by reason of the probability of her having brothers and sisters to share with her if the marriage had continued. Counsel for the child referred to *Webster v. Webster and Williamson* (7) and *Colclough v. Colclough and Fisher* (10), and submitted that there was no sufficient quid pro quo.

The registrar said that it was very doubtful if the court had jurisdiction to introduce into a settlement a fresh power which was clearly not in contemplation of the parties at the time of its execution, and it would seem that the court could only vary the exercise of an existing power. He agreed with the contentions of counsel for the child, and submitted that all the rights, powers, and interests of the respondent in the settlement of November, 1926, should be extinguished as if she were dead and had died in the lifetime of the petitioner, with costs of all parties against the co-respondent.

The court was moved by the petitioner to vary the report by inserting in the settlement of November, 1926, a power enabling him on contracting any further marriage to settle a life or any less interest in the moiety or any less part of the funds subject to the trusts upon any after-taken wife and to settle any share not exceeding a moiety or any less part of the trust funds upon any child or children of such subsequent marriage.

Noel Middleton and H. R. Barker for the petitioner, the husband.

Alexander Grant, K.C., and G. Tyndale for the child.

Talbot Dyer for the trustees of the settlement.

Cur. adv. vult.

April 16. **SIR BOYD MERRIMAN, P.**, reviewed the facts and stated that the petitioner had already married again, and that the income from the settled funds was a comparatively small sum. He continued :

Counsel for the child has reserved to himself the right to say that I have no jurisdiction. The matter was very carefully put before me by experienced counsel in *Newson v. Newson* (supra), and I came to the conclusion, right or wrong, that in a proper case the court has the power to insert a clause of this sort.

It is quite plain that the court would require to be satisfied that the variation as a whole was clearly for the benefit of the existing child or children of the marriage. The court has jurisdiction in a proper case, but I am quite certain that this is not a proper case. The only two considerations which are suggested as being in favour of the infant are that the wife's interest in the husband's trust fund has been extinguished as if she were dead, and to that extent the infant's prospective interest has been accelerated; and that, both parents being young, had the marriage subsisted the child might have had to share with possible brothers and sisters. Neither of those considerations is in the least sufficient ground for the exercise of this power, because in these petitions for variation of settlements the interest of the guilty spouse in the trust funds of the petitioner is almost invariably extinguished as if the guilty spouse were dead. Equally, you can say of every young couple

whose marriage has been dissolved that they might have had more children. It is said that these circumstances, which are present in nearly every case, justify me in exercising a power which ought to be exercised only in cases of comparative rarity. If I did so this variation would become almost common form. I should always require to be satisfied, as in *Newson v. Newson*, that the insertion of the power was for the benefit of the infants and the parties generally. There is no such advantage here and I confirm the report of the registrar.

Report confirmed.

Solicitors: *Gibson & Weldon; Blackett Gill; Holloway, Blount, & Duke.*

[Reported by WILLIAM LATEY, Esq., Barrister-at-Law.]

Re WILLIAM ADLER & CO., LTD.

[COURT OF APPEAL (Slessor and Roche, L.JJ.), November 20, 1934]

[Reported [1935] Ch. 138; 104 L.J.Ch. 58; 152 L.T. 251; 78 Sol. Jo. 898; [1934] B. & C. R. 150]

Company—Winding-up—Compulsory winding-up—Costs—Previous resolution for voluntary liquidation—Costs incurred between resolution and hearing of petition for compulsory winding-up—Companies (Winding-up) Rules, 1929, r. 192 (1).

A resolution to wind-up voluntarily a company was passed and a liquidator appointed. Subsequently, a petition was filed to wind-up the company compulsorily which the liquidator in the voluntary winding-up opposed. A compulsory order was made with the usual order as to costs including the costs of the liquidator in appearing to oppose the compulsory order on a party and party basis. The liquidator, having taxed these costs, presented for taxation another bill which included items incurred by the liquidator after the resolution, but before the hearing of the petition. This further bill was allowed by the registrar on taxation, and an application to review was dismissed by EVE, J.

Held: (i) the allowance of the further costs was a matter for the discretion of the taxing officer and of the judge who heard an application for the review of the taxation; but

(ii) the costs might be allowed as being "fees and expenses properly incurred in preserving the assets" of the company within r. 192 (1) of the Companies (Winding-up) Rules, 1929.

Notes. Rule 192 of the Companies (Winding-up) Rules, 1929, has been replaced by r. 195 of the Companies (Winding-up) Rules, 1949.

As to payment of costs in a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 672 et seq., and for cases see 10 DIGEST 1051. For Companies (Winding-up) Rules, 1949, see 4 HALSBURY'S STATUTORY INSTRUMENTS 125.

Appeal from an order of EVE, J., on a summons to review taxation.

A resolution was passed for the voluntary winding-up of a limited liability company, William Adler & Co., Ltd., on Oct. 20, 1932, and a liquidator was appointed. On Oct. 25 a petition was filed for the compulsory winding-up of the company. The liquidator in the voluntary winding-up appeared in opposition to it. On Nov. 23 BENNETT, J., made an order for the compulsory winding-up of the company with the usual order as to costs which included the costs of the liquidator appearing in opposition to the compulsory winding-up. These costs were taxed

as between party and party. The liquidator then brought in a bill of costs for the period from Oct. 20, 1932, when the resolution for voluntary winding-up was passed, to Nov. 23, 1932, when the order for compulsorily winding-up the company was made. Objection to this bill was taken by the Official Receiver, who contended that the liquidator was entitled only to one bill of costs, to be taxed as between party and party. Mr. REGISTRAR STIEBEL allowed the bill on this taxation on a solicitor and client basis, and the Official Receiver then took out a summons to review the taxation.

By the Companies (Winding-up) Rules, 1929, r. 192 (1):

"The assets of a company in a winding-up by the court, remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound-up voluntarily, such remuneration, costs and expenses as the court may allow to a liquidator appointed in such voluntary winding-up shall, subject to any order of the court . . . be liable to the following payments, which shall be made in the following order of priority, namely: First, the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court. . . ."

EVE, J.—This is an application to review the taxation of a bill of costs brought in for taxation under an order made by BENNETT, J., when he ordered this company, William Adler & Co., Ltd., to be wound-up compulsorily on a petition which was presented on Oct. 25, 1932. The taxation directed was in the usual form, and included the costs of the company, which was in voluntary liquidation, such costs to be taxed as between party and party. In the bill brought in the solicitor acting for the liquidator charged, as against the assets and in his bill, certain items which were not properly included or could not be taxed under the order of BENNETT, J., but costs which the solicitor was undoubtedly entitled to be paid.

In considering such a question regard must be had to three classes of costs. First, there are costs which the company has incurred before the passing of any resolution to go into voluntary liquidation, and, of course, before the filing of any petition for compulsory winding-up. The person claiming those costs is in the same position as any other creditor of the company. The company's solicitor has given the company the benefit of his advice, and, as the company has not paid for it, he must take steps in the winding-up to prove for those costs against such dividend as is payable out of the assets. Secondly, there are the costs of appearing on the petition, and the ordinary rule is to give the company, or the liquidator where the company is being wound-up voluntarily, the costs of appearing on the making of the order, and if there is nothing more than that, the bill which such a liquidator brings in starts with the step which was taken towards the winding-up. As from the date of that he is entitled to be paid out of the assets, as between party and party, such costs as have been properly incurred. Thirdly, if, between the date of a company passing a resolution to go into voluntary liquidation and the subsequent filing of the petition presented for compulsory winding-up, there have been costs incurred by the liquidator, according to well-settled practice he is entitled to have those costs, so far as they are proper, taxed and paid, because under the Companies Act, 1929, the court is bound to treat the commencement of the winding-up as the date when the resolution to wind-up voluntarily was passed. A solicitor carrying in a bill in those circumstances is in the same favourable position as is one who carries in a bill when there has been no voluntary winding-up, but when his services start with the presentation of the petition.

In the present case, as in most cases, the bill delivered was a continuous bill, commencing with the employment of the liquidator in the voluntary winding-up which, it was anticipated, would continue to be voluntary, and including all the items which the solicitor was claiming were due to him from the company after the petition for compulsory winding-up. Some of those items would, of course, fall to be allowed under the party and party order for appearing on the petition,

but that does not mean that, because the solicitor delivers his account for taxation under the party and party order, he cannot recover anything in his bill or in taxation which could not be included in the party and party taxation to which he is entitled under the general practice.

Exception has been taken to the learned registrar having dealt with the whole bill brought in for the period from the date of the resolution for voluntary liquidation to the date of the compulsory winding-up order, item by item, and having treated three items which might not have been payable under the party and party taxation as subject to taxation and certifying what under that taxation ultimately turns out to be due to the solicitor. Exception is also taken on the ground that these costs between the voluntary resolution and the presentation of the petition ought not to be allowed in the bill. That would only necessitate the bringing-in of a supplemental bill of costs, and under the rules it is not usual to adopt that procedure. In my opinion, the position of the liquidator entitles him to deliver this bill and to ask for it to be taxed, although it includes items not allowable under the party and party taxation. He is in the position of being able to say, according to the authorities, that all costs properly incurred between the date of the resolution and the order made on the petition are subject to taxation, and when taxed are entitled to priority over the other claims against the company's assets. All that the learned registrar has done here is to include a few items which could not be included in the party and party costs which were costs that the solicitor properly incurred and was entitled to be paid, and which were conveniently included and dealt with on this taxation. I think that the summons to review taxation was misconceived and must be dismissed.

The Official Receiver appealed.

G. O. Slade for the Official Receiver.

J. B. Lindon for the voluntary liquidator was not called upon.

Nov. 20. **SLESSER, L.J.**—This is an appeal from a judgment of *Eve, J.*, on a review of taxation whereby he has decided that the liquidator of this company, *William Adler & Co., Ltd.*, who employed a solicitor while he was acting as liquidator in the voluntary winding-up before the date when a compulsory winding-up order was made, is entitled to costs as between solicitor and client, some of which were incurred in matters preliminary to and before the opposition to the compulsory winding-up of this company and others in relation to the actual opposition of that order.

In my opinion, the question whether these costs, to which objection is taken, amounting in all to a sum of about £18, should or should not be allowed as between solicitor and client is a matter for the discretion of the taxing officer and of the judge who has heard the application on a review of taxation. By r. 192 (1):

"The assets of a company in a winding-up by the court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration costs and expenses as the court may allow to a liquidator appointed in such voluntary winding-up shall, subject to any order of the court . . . be liable to the following payments, which shall be made in the following order of priority, namely: First, the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court. . . ."

In my opinion, it may properly be found in an appropriate case that the costs of consultations of the liquidator during the voluntary winding-up of the company and relating to the opposition to the compulsory winding-up before the compulsory order has been made, and of what is done by way of attendances on counsel and in obtaining counsel's opinion, may properly be said to be payments of fees and expenses properly incurred in preserving the assets within the meaning of the earlier words in r. 192 (1), which by the terms of the rule may include such

costs and expenses as the court may allow to the liquidator appointed in the voluntary winding-up. Also it may well be considered expedient that a company which is being wound-up voluntarily should desire to preserve that status, and if it can be said that the opposition of a liquidator during a voluntary winding-up to the making of a compulsory order is made to preserve the assets of the company, then the costs of such opposition may properly be allowed, as coming within the same words of the rule. It is for the court to say whether such costs shall be allowed, and, if so, whether they shall be allowed on a solicitor and client or on a party and party basis; it is a matter for the exercise of the discretion of the court. That being so, I have come to the conclusion that we cannot disturb the judgment of EVE, J. The appeal fails.

ROCHE, L.J.—I agree. This is an appeal from the refusal of EVE, J., to accede to an application to review taxation. The total sum at issue is about £18; but it is said that a question of principle is involved which depends upon the incorrect construction of r. 192 (1) of the Companies (Winding-up) Rules, 1929.

To summarise the argument of counsel for the Official Receiver, he says that, as the liquidator could under an order allowing him costs as between party and party come under the heading labelled "First" in the rule

"First, the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court"

for he opposed the order for the compulsory winding-up of the company, and all the more so if, as in this case, the liquidator has brought in a bill of costs under that heading, he is precluded from obtaining those costs under the earlier words of the rule,

"payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound-up voluntarily such remuneration, costs and expenses as the court may allow to a liquidator appointed in such voluntary winding-up."

In my opinion that argument is unsound and no such principle can be deduced. On the contrary, it may very well be that costs included in such a bill might be disallowed on taxation under the "First" heading which in a proper case might be allowed on the footing that they were payments incurred by a liquidator in preserving the assets of the company. Whether this taxation has proceeded rightly is a question which does not involve any such principle, but is one involving, first, a finding of fact and then the exercise of discretion by the court. Mr. REGISTRAR STIEBEL has found, and his finding has been affirmed by the learned judge, that these costs were payments properly incurred in preserving the assets, and they have been allowed on a solicitor and client basis. With that finding of fact and subsequent exercise of discretion this court has no right to interfere. Accordingly, this appeal must be dismissed.

Appeal dismissed.

Solicitors : *Stafford Clark & Co.; Lucien Fior.*

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

CAVE v. DUDLEY CO-OPERATIVE SOCIETY, LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and MacKinnon, JJ.),
April 24, 25, 1934]

[Reported 103 L.J.K.B. 569; 151 L.T. 448; 98 J.P. 265; 30 Cox,
C.C. 151; 82 L.G.R. 515]

Weights and Measures—Bread—Deficiency in weight—Loaf sold with considerable variation in weight—Jurisdiction to consider average weight of other loaves in possession for sale—Number to be weighed—Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 6 (2), s. 12 (1).

The defendants were seen by an inspector of weights and measures to be delivering bread from a horse-drawn vehicle. Under the supervision of the inspector fifty-six loaves were taken from a considerably larger number in the van and weighed. It was found that of the fifty-six so weighed thirty-seven were of less weight than was represented, the average deficiency being 12½ drams. In one loaf, which was purchased by the inspector, it amounted to 2 oz. 4 drams. With regard to the balance of nineteen loaves, they were either of a correct weight or of a weight exceeding 2 lb. The inspector preferred two informations against the defendants. The first charged them with having in their possession for sale thirty-seven loaves of bread, the net weight of each loaf not being 1 lb., or an integral number of pounds, contrary to s. 6 (2) of the Act. The second charged them with selling on the same day a loaf of bread the net weight of which was not 1 lb. or an integral number of pounds, contrary to the same subsection. The justices in each case dismissed the informations without calling on the defendants for their defence, holding that the defendants were protected by s. 12 (1) of the Act, which provides: "In any proceedings under this Act in respect of an alleged deficiency of weight or measure of . . . bread, the court shall disregard any inconsiderable variation in the weight or measure of a single article, and shall have regard to the average weight or measure of other articles of the same kind (if any) sold or delivered by the defendant or in his possession for the purpose of sale or delivery on the same occasion, and generally to all the circumstances of the case."

Held: (i) the proceedings were to be regarded as proceedings in respect of an alleged deficiency of weight within the above subsection, but

(ii) the provision in the subsection which followed the words "weight or measure of a single article" applied only in a case where the variation in the weight or measure of the single article was inconsiderable, and in the present case the variation was not inconsiderable, and, therefore, no inquiry as to the average weight of a number of other articles could arise;

(iii) assuming such an inquiry did arise, the justices were bound to look at the average weight, not of all the loaves weighed, but only of a reasonable number, and there was no evidence on which they could hold that thirty-seven was not a reasonable number;

(iv) therefore, s. 12 (1) did not apply, and the case must be remitted to the justices to hear any other defence submitted by the respondents.

Notes. Section 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, has been suspended by the Bread Order, 1953 (S.I., 1953, No. 1283), art. 3 (4) which provides for the sale of bread of the weight of "fourteen ounces or a multiple of fourteen ounces or is ten ounces or less."

As to weight of bread for sale, see 33 HALSBURY'S LAWS (2nd Edn.) and Bread Order, 1953 (supra), and for cases see 25 DIGEST 117 et seq., and generally tit. Weights and Measures, *ibid.*, vol. 44. For Sale of Food (Weights and Measures) Act, 1926, see 26 HALSBURY'S STATUTES (2nd Edn.) 1292.

Case referred to :

- (1) *Walking, Ltd. v. Robinson* (1930), 99 L.J.K.B. 171; 143 L.T. 105, 106; 94 J.P. 73; 46 T.L.R. 151; 28 L.G.R. 88; (1929), 29 Cox, C.C. 131; Digest Supp.

Case Stated by justices for the borough of Dudley.

At a court of summary jurisdiction sitting at Dudley an information was preferred by Leonard Arthur Cave (the appellant) under the Sale of Food (Weights and Measures) Act, 1926, against the Dudley Co-operative Society, Ltd. (the respondents) for that they on Aug. 15, 1933, did have in their possession for sale thirty-seven loaves of bread, the net weight of each loaf not being one pound or an integral number of pounds, contrary to s. 6 (2) of the Act. At the same time and place a further information was preferred by the appellant under the same statute against the respondents for that they, at the same time and place, did sell a loaf of bread, the net weight of which was not one pound or an integral number of pounds, contrary to s. 6 (2) of the Act. By consent both the informations were heard and dealt with at the same time.

On the hearing of the informations the following facts were proved or admitted :

- (i) The appellant was the chief inspector of weights and measures for the borough. (ii) The prosecutions were instituted by or on behalf of the local authority within the meaning of s. 12 (7) of the Act. (iii) Samuel Rudd was a duly appointed and qualified assistant inspector of weights and measures for the council. (iv) On Aug. 15, 1933, in Forest Road in the borough, the inspector saw one A. W. Jones, a van man in the employ of the respondents, delivering bread belonging to them from a horse-drawn vehicle. (v) The inspector informed A. W. Jones of his identity and the nature of his visit. (vi) Fifty-six presumably 2 lb. loaves, taken from a considerably larger number in the cart, were weighed by an assistant under the direct supervision of the assistant inspector. (vii) Thirty-seven of the fifty-six loaves tested were of less weight than was represented, the average deficiency being $12\frac{1}{2}$ drams. In one case the deficiency amounted to 2 oz. 4 drams. (viii) The remaining nineteen loaves were either correct or in excess of 2 lb. (ix) Detailed particulars of the weights of the nineteen loaves were not taken, but some of the loaves were in excess of 2 lb. They were grouped together as correct or in excess, and were not taken into account in arriving at the average deficiency of $12\frac{1}{2}$ drams. (x) The respondents were given reasonable opportunity to check the weights of the thirty-seven deficient loaves, and gave a certificate to that effect. They could also have weighed the remaining nineteen loaves if they had so wished. (xi) The assistant inspector purchased from A. W. Jones one of the thirty-seven deficient loaves. The loaf was of the net weight of 1 lb. 13 oz. 12 drams, being deficient of the represented weight of 2 lb. by 2 oz. and 4 drams. (xii) The day in question was of more than usual heat. (xiii) Within seven days after the alleged commission of the offences notice in writing of the date and nature of the alleged offences was served and sent by registered post to the respondents.

On the part of the appellant it was contended : (i) with regard to the first information, that s. 12 (1) of the Act did not apply, as the information was not in respect of a single article and thirty-seven was a reasonable number of other articles of the same kind in the respondents' possession for sale for the purpose of average weight being considered, and (ii) with regard to the second information, that s. 12 (1) of the Act did not apply, as a deficiency of 2 oz. and 4 drams was not an inconsiderable variation in the weight of a single article.

On the part of the respondents it was contended : (i) with regard to the first information, that the justices must have regard to the average weight of the whole of the fifty-six loaves weighed, and that they could not do this as the detailed weights of the nineteen loaves which were correct or in excess were not available. Had they been, the average deficiency would have been considerably less and might well have been totally counterbalanced by excess weights if further loaves had been weighed. (ii) with regard to the second information, that the justices must have regard to the average weight of the whole of the fifty-six loaves weighed, and

that they could not do this as the detailed weights of the nineteen loaves which were correct or in excess were not available. (iii) with regard to both informations, that more loaves than on the cart should have been weighed in order to enable the justices to come to a proper conclusion as to average weights for the purpose of s. 12 (1) of the Act.

The justices were of opinion that both informations were proceedings in respect of an alleged deficiency of weight of bread; that s. 12 (1) was, therefore, applicable; and that that section required them to have regard to the average weight of a reasonable number of other articles of the same kind in the respondents' possession for sale or delivery on the same occasion, and generally to all the circumstances of the case. To satisfy this requirement it was necessary, in the justices' opinion, that the prosecution should furnish evidence of the actual weights of all the loaves weighed and not merely of those loaves which were deficient in weight. This evidence could not be given, nor could the prosecution say how many of the nineteen loaves (of correct or excess weight) were correct and how many were of excess weight. The justices, therefore, dismissed both informations without calling on the defence. The appellant appealed to the Divisional Court.

The question upon which the opinion of the court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

Joy, K.C., and D. L. Jenkins for the appellant.

Eales, K.C., and T. S. Sanderson for the respondents.

LORD HEWART, C.J.—It is, I think, important to remember that this Act of Parliament is an Act to provide for the better protection of the public in relation to the sale of food, including agricultural and horticultural produce, and by s. 6 it is provided, first of all, that "a person shall not sell or offer for sale any bread otherwise than by net weight," and, secondly, subject to a proviso, which for the present purposes is immaterial, that

"a person shall not sell or have in his possession for sale or delivery under a contract of sale any loaf of bread unless its net weight is one pound or an integral number of pounds."

The question which was raised at the stage which the cases reached in the court below was whether s. 12 (1) of the statute applied, and, if so, whether it entitled the respondents to an acquittal. The words of s. 12 (1) are indeed, if one may say so respectfully, a little odd, but, upon consideration and after the careful argument which has been addressed to the court, I think that the meaning of the subsection is reasonably clear. The whole section is entitled: "Safeguards to Traders," and sub-s. (1) begins with the words:

"In any proceedings under this Act in respect of an alleged deficiency of weight or measure of any pre-packed article or of bread, the court shall"

do certain things. I think it is clear that the present proceedings were proceedings under the Sale of Food (Weights and Measures) Act, 1926, in respect of an alleged deficiency of weight of bread, and that it was not rightly contended on the part of the appellant that s. 12 (1) had no application.

The further question, however, remains whether, being applied, the subsection afforded upon the facts of these cases materials entitling the respondents to succeed as they did. In my opinion, the construction of this subsection, for which counsel for the appellant has contended, is correct. I will read the words with which s. 12 (1) continues:

"... the court shall disregard any inconsiderable variation in the weight or measure of a single article, and shall have regard to the average weight or measure of a reasonable number of other articles of the same kind (if any) sold or delivered by the defendant, or in his possession for the purpose of sale or delivery on the same occasion and generally to all the circumstances of the case."

It is argued for the appellant—and I think successfully—that the words following “the weight or measure of a single article” apply only in a case where the variation in the weight of the single article is inconsiderable. In other words, if the court finds that there is in the single article only an inconsiderable variation in weight—that is, from the proper weight—then in that case, and only in that case, the court, not deciding the matter upon that inconsiderable variation,

“shall have regard to the average weight or measure of a reasonable number of other articles of the same kind (if any) sold or delivered by the defendant, or in his possession for the purpose of sale or delivery, on the same occasion, and generally to all the circumstances of the case.”

It seems to me that all the words after the words “the weight or measure of a single article” are supplementary to the words which go before “shall disregard any inconsiderable variation in the weight or measure of a single article,” and that the kind of inquiry which is provided for by the later part of that section—an inquiry as to the average weight of a reasonable number of other articles, &c.—does not arise if the variation in the weight of the single article is considerable. But those words, where they do apply, contain the expression “on the same occasion,” and it seems to me that it is a question to be determined in each case upon the facts of the particular case what the occasion is. The subsection does not say “at the same time” or “in the same place,” but “on the same occasion,” and the occasion may differ according to different circumstances. Where, for example, there is a sale, the occasion is an occasion of sale. Where an inspector, as here, inspects the contents of a van, the occasion is an inspection, and in like manner, where an inspector, entering a shop, examines loaves of bread, which are in the possession of a person for sale or delivery, the occasion is again a different occasion. It is the inspection of goods in a shop.

In the present case, so far as the information relating to the sale of a particular loaf is concerned—that is, the second information covered by this Special Case—the variation from the correct weight of 2 lb. being as much as 2 oz. and 4 drams, it does not seem to me that the machinery of s. 12 (1) can be invoked with success. It cannot be said that the variation in the weight of that single loaf was inconsiderable, and, therefore, as it seems to me, upon that information the inquiry with regard to the average weight of a reasonable number of other articles did not arise.

With regard to the information which comes first in this Special Case—the information which charged that the respondents had in their possession for sale thirty-seven loaves of bread, the net weight of each loaf not being one pound or an integral number of pounds—I think the justices were entitled to look at the average weight of a reasonable number of other articles of the same kind, &c., on the same occasion. But what is a reasonable number of other articles? It has been strongly contended by counsel for the respondents that because in this case the inspector tested and weighed fifty-six loaves, therefore the justices were bound to have regard to the average weight of all those fifty-six loaves, while in fact the evidence which was adduced related only to thirty-seven of those fifty-six loaves. That was the contention which prevailed with the justices. They say that, in their opinion, in order to satisfy the requirement that they should have regard to the average weight of a reasonable number of other articles of the same kind, &c., it was necessary that the prosecution should furnish evidence of the actual weights of all the loaves weighed and not merely of those loaves which were deficient in weight. I do not think that the subsection imposes any such obligation. The inspector might have weighed a larger number than fifty-six. The justices would still have had to address their minds to the question whether thirty-seven other loaves—or to speak more accurately, with respect to each of the thirty-seven loaves, whether thirty-six other loaves—was a reasonable number for the purpose of the examination of average weight, and, in my opinion, there was no evidence upon which the justices could properly hold that thirty-six was not a reasonable number.

I think that there was no obligation upon the inspector, merely because he had examined fifty-six loaves, to say: "The reasonable number which I ask you to look at is fifty-six." He was perfectly entitled to say: "The reasonable number which I ask you to look at is thirty-six." That was the course which he took, and I do not think it was open to the justices to hold that he was bound to furnish evidence of the actual weights of all the loaves weighed.

I think, therefore, that so far as s. 12 (1) is concerned, although, no doubt, these were proceedings under this Act in respect of an alleged deficiency, the respondents could not succeed upon these facts under that subsection. They could not succeed under that subsection so far as the sale of the individual loaf was concerned, because it is impossible to say that the variation in weight was inconsiderable. They could not succeed under that subsection so far as the thirty-seven loaves were concerned, because it was not reasonably possible to hold that thirty-six was not a reasonable number.

If the matter rested where it did, in my opinion, there would have been no alternative open to the justices, except to find that the offences charged had been proved. But the case was stopped at the close of the evidence for the prosecution and it is conceivable—I use no stronger word and I say no more upon the point—that the respondents if the case had not been stopped, might have desired to submit a defence under s. 12 (2), or it may be under s. 12 (3). I do not know, nor do I know whether if any such defence were raised, any substance would be found in it, but, the case having been stopped prematurely, I think it ought to go back to the justices upon both these informations with the direction that the defence indicated under s. 12 (1) cannot, upon these facts, succeed, but that the respondents ought to have the opportunity, if they desire it, of seeking to succeed under s. 12 (2) or s. 12 (3). I think, therefore, that this appeal in that sense succeeds.

AYORY, J.—I agree in the conclusion that this case must be remitted to the justices for the reasons stated by my Lord. I assume that the proceedings were in respect of an alleged deficiency of weight of bread, a question which was left undecided in *Walkling, Ltd. v. Robinson* (1), where charges were charges similar to those in the present case. The appellants there were charged with having in their possession for sale, and with selling, loaves of bread which did not weigh one pound or an integral number of pounds, and my Lord reserved his opinion on the question whether such proceedings were, within the meaning of s. 12, proceedings in respect of an alleged deficiency of weight. I expressed the opinion that they were, and **TALBOT, J.**, expressed a contrary opinion. I understand my Lord now to concur in the view that such proceedings are proceedings in respect of an alleged deficiency of weight. Assuming that, I agree that the view taken by the justices in this case was erroneous, and that it was not necessary, in order to satisfy the requirements of s. 12, that the prosecution should furnish evidence of the actual weights of all the loaves weighed, and not merely of those loaves which were deficient in weight.

I think it convenient, for the purpose of my judgment, to deal first with the second charge in this case, namely, that the respondents on the particular day in August, 1933, sold a loaf of bread, the net weight of which was not 1 lb. or an integral number of pounds, contrary to s. 6 (2) of the statute. There can be no question that upon the evidence that offence, *prima facie*, was committed on the sale to the inspector of this particular loaf, the net weight of which was not 1 lb. or an integral number of pounds. I agree also that in that case there was no evidence upon which the court could find as a fact that the variation in the weight of that single article was inconsiderable, and, consequently, that so far as that charge was concerned, no question arises under the remaining part of s. 12 (1) as to the average weight of a reasonable number of other articles of the same kind.

With regard to the second charge which was first in order that the respondents had in their possession for sale thirty-seven loaves of bread, the net weight of each loaf not being 1 lb. or an integral number of pounds, it is necessary to have regard to the latter part of s. 12 (1), and to determine whether, in the circumstances of

this case, it was necessary that the inspector should give evidence of the weight of each of the fifty-six loaves which he in fact weighed. I agree that thirty-seven was a reasonable number of other articles of the same kind within the meaning of s. 12 (1), and that, as soon as the inspector had given evidence of the weight of those thirty-seven loaves, it was unnecessary for him to give any further evidence of the remaining nineteen loaves which in fact he had weighed. If one assumes in the respondents' favour that those other nineteen loaves were all of the correct weight, it was still, I think, open to the inspector to say to the justices: "Here are thirty-seven which are deficient in weight, and that is a reasonable number of other articles of the same kind, and you must have regard to the average weight of that reasonable number of thirty-seven." I agree also with the construction which is put upon the words "on the same occasion." I think those words were introduced to prevent a trader from saying "Although there was a deficiency when I sold a particular loaf or when my van was stopped and I was charged with having in my possession loaves which were not of the proper weight, still in the same day I had another delivery of bread which I can show was all of accurate weight." In the result, therefore, I agree that the case must be remitted to the justices for the respondents, if they can, to establish any defence under sub-s. (2) or sub-s. (3) of s. 12.

MACKINNON, J.—I agree. Even if s. 12 (1) did apply in this case, and if it was the business or duty of the justices to have regard to the average weight or measure of a reasonable number of other articles, they could, of course, do that only on the evidence adduced before them. The inspector adduced evidence of the average weight of thirty-seven loaves, which showed an average shortage of over 12 drams. He added, as I think unnecessarily, and as mere information, "In addition to these thirty-seven I weighed another nineteen loaves." The actual decision of the justices could not have been arrived at upon the basis that thirty-seven was not a reasonable number, and that no number short of fifty-six could be a reasonable number. That is an impossible conclusion, and one to which on the evidence they could not have been entitled to come. Therefore, upon the evidence before them, even if this section applied, there was evidence of a reasonable number, and clear evidence that in that reasonable number the average weight was seriously below the proper weight. As a matter of fact, it is pretty obvious that, if the average weight of fifty-six was to come up to 2 lb., the average excess weight of the nineteen must have been no less than $1\frac{1}{2}$ oz., which was most unlikely. It is unnecessary to dilate on that, except to show how artificial was the principle on which the justices decided this case. I entirely agree with the result that has been indicated by his Lordship.

Case remitted.

Solicitors: *Town Clerk, Dudley; F. W. Green, Dudley.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

R. v. LAMB

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Talbot, JJ.),
March 19, 1934]

[Reported 150 L.T. 519; 50 T.L.R. 310; 78 Sol. Jo. 279; 24
Cr. App. Rep. 145; 30 Cox, C.C. 91]

Criminal Law—Bigamy—Validity of first marriage—"Due notice"—Marriage in register office by certificate after notice—Notice given in false name—Consent of other party—Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 42.

On a prosecution for bigamy it was proved that the prisoner's first marriage had taken place in a register office by certificate after notice and that the prisoner, with the knowledge and consent of the woman, gave the notice in a false name, and that subsequently the prisoner went through a form of marriage with another woman.

Held: the giving of the notice in a false name, with the knowledge and consent of the other party, did not prevent the notice from being "due notice" within the meaning of s. 42 of the Marriage Act, 1836, and, therefore, the first marriage was valid and the prisoner could properly be convicted of bigamy.

Notes. Sections 4 and 42 of the Marriage Act, 1836, have been repealed. Section 42 is now replaced, as regards the giving of "due notice," by s. 49 (a) of the Marriage Act, 1949. The form of notice is now to be found in the Marriage (Prescription of Forms) Regulations, 1949 (S.I., 1949, No. 2414), Sched. I.

As to bigamy, see 10 HALSBURY'S LAWS (3rd Edn.) 663-665, and for cases see 15 DIGEST (Repl.) 881 et seq. For Marriage Act, 1949, see 28 HALSBURY'S STATUTES (2nd Edn.) 650.

Cases referred to:

- (1) *Holmes v. Simmons* (1868), L.R. 1 P. & D. 523; 37 L.J.P. & M. 58; 18 L.T. 770; 16 W.R. 1024; 27 Digest (Repl.) 58, 361.
- (2) *Re Rutter, Donaldson v. Rutter*, [1907] 2 Ch. 592; 77 L.J.Ch. 34; 97 L.T. 883; 24 T.L.R. 12; 27 Digest 57, 354.
- (3) *Plummer v. Plummer*, [1917] P. 163; 86 L.J.P. 145; 117 L.T. 321; 33 T.L.R. 417; 61 Sol. Jo. 558, C.A.; 27 Digest 57, 355.

Appeal against conviction.

The appellant, at Chester Assizes, pleaded Guilty to bigamy, but ATKINSON, J., advised him to alter his plea in order that a point of law as to the validity of the first marriage might be argued on his behalf. The appellant altered his plea accordingly, and counsel was assigned to him. Evidence was given that on April 23, 1914, he married a woman and that the marriage took place in a register office by certificate after a notice which the appellant, with the knowledge and consent of the woman, had given in a false name; that the appellant last lived with this woman in 1924, but had communicated with her by letter in 1931 and 1933; that on June 24, 1933, he went through a form of marriage in church with another woman; and that on that occasion he gave his real name. ATKINSON, J., after hearing full argument, held that the giving of the notice in a false name did not invalidate the first ceremony. The appellant then again pleaded Guilty. ATKINSON, J., passed a nominal sentence of four days' imprisonment and granted a certificate for appeal on the question whether the first marriage was void or not. The Marriage Act, 1836, provided:

Section 4: "In every case of marriage intended to be solemnised in England . . . according to any form authorised by this Act, one of the parties shall give notice under his or her hand . . . to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, . . . and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling-

place of each of them, and the time not being less than seven days during which each has dwelt therein, and the . . . building in which the marriage is to be solemnised . . ."

Section 42: "If any persons shall knowingly and wilfully intermarry . . . under the provisions of this Act . . . without due notice to the superintendent registrar, or without certificate of notice duly issued, . . . the marriage of such persons . . . shall be null and void . . ."

J. F. Marnan for the appellant.

Francis J. W. Williams for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—This appellant pleaded Guilty at Chester Assizes to a charge of bigamy and was sentenced to four days' imprisonment. He now appeals, upon certificate granted by the judge at the trial, against his conviction. The ground of appeal is that the first marriage was void. At the assizes the appellant originally pleaded Guilty, and that plea on the suggestion of the judge was altered to a plea of Not Guilty. Evidence was then called, and, after argument, the appellant again pleaded Guilty, the point of law having been decided against him.

The point which is urged on behalf of the appellant is that he married his first wife in a register office, after notice and certificate, under a name which was to her knowledge false. The argument is that, in those circumstances, upon the true construction of the relevant statutes and the true view of the decided cases, that first marriage was a mere nullity. It has been ingeniously argued by counsel for the appellant that the first marriage ceremony was invalid on the ground that a notice in a false name is not a "due notice" under s. 42 of the Marriage Act, 1836, and, therefore, that under that section the marriage was null and void.

We have carefully considered the relevant statutes and cases to which reference has been made, and, in the opinion of the court, it is a little unfortunate that a suggested distinction as to the meaning of "due notice" between marriage after publication of banns and marriage after notice and certificate in a register office should ever have been drawn. Such a distinction, as it seems to us, was never intended by the legislature, and the root of this controversy is to be traced to an extremely guarded obiter dictum of LORD PENZANCE in *Holmes v. Simmons* (1), who said (L.R. 1 P. & D. at p. 529):

"Whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all may possibly still be a question."

That guarded dictum was considered in *Re Rutter, Donaldson v. Rutter* (2), where SWINFEN EADY, J., held that a marriage was valid, notwithstanding that the maiden name given by the wife before the registrar was false to the knowledge of both spouses. That case was carefully considered ten years later by the Court of Appeal in *Plummer v. Plummer* (3), where BANKES, L.J., after referring to the dictum of LORD PENZANCE in *Holmes v. Simmons* (1), said ([1917] P. at p. 171):

"He merely left that point open as a matter for further consideration. But it seems to me that there is no principle upon which the distinction at which the learned judge hinted can be drawn."

WARRINGTON, L.J., in the same case said ([1917] P. at p. 173):

"It seems to me, therefore, that in a case of marriage by licence under the express terms of the statute, although the notice or declaration may be wilfully false, yet the marriage itself will be valid, the means resorted to by the legislature for protecting the public and the parties concerned against such false notice being the imposition of extremely severe penalties upon those who sign a false notice or make a false declaration."

The position, therefore, is that counsel for the appellant, not without courage, is asking this court to give the "go-by" to the decision in *Re Rutter, Donaldson v. Rutter* (2), approved as that decision clearly was by the Court of Appeal in

Plummer v. Plummer (8). That is an invitation which we cannot accept. We feel that we must follow those decisions and that, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

R. v. LANCASHIRE JUSTICES. Ex Parte COMMISSIONERS OF CUSTOMS AND EXCISE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), April 11, 1934]

[Reported 151 L.T. 376; 98 J.P. 307; 32 L.G.R. 265]

Licensing—Six-day licence—Special order of exemption—Sale of intoxicants authorised on Sundays—"Special occasion"—Train and boat excursions on a number of Sundays and holidays—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 57 (1), s. 58.

The holder of a six-day licence at certain refreshment rooms at L., adjoining a railway station and steamer landing stage, was granted certain special orders of exemption, under s. 57 of the Licensing (Consolidation) Act, 1910, whereby he became authorised to sell intoxicants on nineteen Sundays during the summer months, being days when the railway company ran train and boat excursions to and from L.

Held: the licensing justices had no power to grant the orders (i) because under s. 58 of the Act of 1910 the holder of a six-day licence was prohibited from selling intoxicants to the public on Sundays; (ii) because the occasions in question were not "special occasions" within the meaning of s. 57 (1) of the Act.

Notes. Section 58 of the Licensing (Consolidation) Act, 1910, has been replaced by s. 109 of the Licensing Act, 1953: see also s. 100 (1) of the later Act. Section 57 (1) has been replaced by s. 107 of the Act of 1953.

As to six-day licences and special occasions, see 19 HALSBURY'S LAWS (2nd Edn.) 107, 108, 112, 113; and for cases see 30 DIGEST (Repl.) 77, 79-81. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Case referred to:

- (1) *R. v. Sussex Justices, Ex parte Bubb*, [1933] 2 K.B. 707; 102 L.J.K.B. 577; 149 L.T. 537; 97 J.P. 237; 49 T.L.R. 495; 77 Sol. Jo. 503; 31 L.G.R. 307, D.C.; Digest Supp.

Rule Nisi for certiorari.

On Feb. 9, 1933, the licensing justices for the petty sessional division of Lonsdale North, in the county of Lancaster, granted to Owen Glynn Roberts, of Lakeside, in the said county, a justices' licence by way of renewal authorising him to hold an excise licence to sell by retail at premises known as the Railway Refreshment Rooms, Lakeside, any intoxicating liquor which might be sold under a spirit retailer's or publican's licence for consumption either on or off the premises. The licence contained a condition that the premises should be closed during the whole

of Sunday, such licence being a six-day licence within the meaning of s. 58 of the Licensing Act, 1910.

The premises were owned by the London, Midland and Scottish Rail. Co. and adjoined the company's railway station and steamer landing stage. On March 13, 1933, Mr. Roberts gave notice of his intention to apply to the justices for permission to sell intoxicants, as in former years, at the said refreshment rooms on Good Friday, April 14, Easter Sunday, April 16, and on each Sunday from May 28 to Sept. 24 inclusive, between the hours of 11 a.m. and 8 p.m. Similar applications had been made and granted for several years past, in order that the licensee might be able to sell intoxicating liquor on the occasion of the railway company's train and boat excursions. Such orders had been granted on an oral undertaking by the applicant that intoxicating liquor would only be sold to passengers on the said trains and boats and would only be served with meals.

On March 23, 1933, the above application was heard by the justices. It was opposed by the chief constable of Lancashire, but the justices granted it, subject to the same conditions as had been imposed in previous years. They granted twenty orders of special exemption exempting the licensee of the said refreshment rooms from the provisions of the Licensing Acts relating to permitted hours during the hours and on the occasions specified in each such order, namely, during the hours from 11 a.m. to 8 p.m. of Good Friday, April 14, Easter Sunday, April 16, and each Sunday from May 28 to Sept. 24, 1933, in order that the applicant might be able to sell intoxicants on the occasion of the London, Midland and Scottish Rail. Co.'s train and boat excursions.

Rule nisi for certiorari, calling upon the justices to show cause why the above orders should not be removed into the High Court in order to be quashed, were granted at the instance of the Commissioners of Customs and Excise.

No one appeared to show cause, but an affidavit was filed by the chairman of the justices, in which it was submitted, inter alia, that the words "holder of a justices' on-licence" in s. 57 of the Act of 1910 comprised every holder of such a licence, including the holder of a six-day licence; that the definition of "permitted house" in s. 20 of the Act of 1921 referred to "any day" and was wide enough to allow sale on Sunday by the holder of a six-day licence; that the occasions in question were "special occasions," in that special excursion trains were run by the railway company; and that the only remedy against justices who improperly granted orders of exemption was to apply to the Lord Chancellor to remove them from the commission of the peace.

The Attorney-General (Sir Thomas Inskip, K.C.) and W. Bowstead in support of the rule.—In the case of a six-day licence the sale of intoxicants to the public on Sunday is absolutely prohibited by s. 58 of the Act of 1910. Section 57 deals only with extension of permitted hours, and cannot apply to a sale on Sunday by the holder of a six-day licence, as that is a day on which there are no permitted hours at all. Further, in view of the decision of this court in *R. v. Sussex Justices, Ex parte Bubb* (1), it cannot be contended that nineteen Sundays in the summer are special occasions.

By the Licensing (Consolidation) Act, 1910 :

Section 57 (1): "If the holder of a justices' on-licence applies to the local authority for an order (in this Act called a special order of exemption) exempting him from the provisions of this Act relating to general closing hours on any special occasion or occasions, the local authority may, if in their discretion they think fit to do so, grant to the applicant such a special order so exempting him during the hours and on the special occasion or occasions specified in the order."

Section 58 (1): "Where, on the occasion of an application for a new justices' on-licence or the transfer, removal, or renewal of a justices' on-licence, the applicant, at the time of his application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which the licence is or is to be granted closed during the whole of Sunday, the

justices shall insert that condition in the licence. (2) The holder of a justices' on-licence in which such a condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sundays shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in the Sixth Schedule to this Act instead of certain hours only, but nothing in this provision shall oblige the holder of a six-day licence to close his premises the whole of Christmas Day or Good Friday as if it were Sunday. (3) The holder of a six-day licence shall not sell any intoxicating liquor on Sunday to any person whatever not lodging in his house. (4) If the holder of a six-day licence sells intoxicating liquor on Sunday to any person not lodging in his house, he shall be deemed to be selling intoxicating liquor without a justices' licence."

By the Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 6 (2), it is provided that the provisions of the Licensing (Consolidation) Act, 1910, specified in Part II of Sched. I shall have effect subject to the modifications therein set out. One such modification is that in s. 57 of the Act of 1910 the reference to the provisions of that Act relating to general closing hours shall be deemed to be a reference to the provisions of the Act of 1921 as to permitted hours.

By s. 20 of the Act of 1921, the expression "permitted hours" is defined as meaning, in respect of any licensed premises or club, the hours on any day during which intoxicating liquor may be sold or supplied therein.

LORD HEWART, C.J.—In my opinion the argument of the learned Attorney-General is conclusive. There are two grounds stated in the grounds for the rule. The first is that the licensee has only a six-day licence. It follows from that fact that, under s. 58 (3) of the Licensing (Consolidation) Act, 1910, he "shall not sell any intoxicating liquor on Sunday to any person whatever not lodging in his house." That is an absolute prohibition fortified by other subsections of that section. The second ground is that none of the said occasions was a "special occasion" within the meaning of s. 57 (1) of the Act of 1910. It seems to me to be obvious that we must apply the principle which we have applied in previous cases. There is nothing special about these occasions, and these orders were really orders of a general nature. I have listened with attention to the elaborate affidavit which has been sworn on the part of the justices and regret that it is not possible to give effect to any of the points therein contained. I think, therefore, that this rule should be made absolute.

AYORY, J.—I am of the same opinion. The affidavit of the chairman does not really deal with the point which appears to be conclusive against the power to grant exemption in this case—that is to say, it does not deal with the express provision of s. 58 (3) relating to the holder of a six-day licence, which expressly prohibits him from selling any intoxicating liquor on Sunday to any person whatever not lodging in his house, and which also provides by sub-s. (4):

"If the holder of a six-day licence sells intoxicating liquor on Sunday to any person not lodging in his house, he shall be deemed to be selling intoxicating liquor without a justices' licence."

It seems to be quite clear that Mr. Roberts, to whom the order of exemption was granted, still remains and would remain liable to proceedings under s. 58. I only wish to add that I do not think we can give effect to the suggestion made by the chairman that we have no jurisdiction to interfere in this case and that the only remedy is to apply to the Lord Chancellor to remove those who make such orders from the commission of the peace.

HUMPHREYS, J.—I agree.

Rule absolute.

Solicitor: Solicitor of Customs and Excise.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

THE STENTOR

[COURT OF APPEAL (Scrutton and Greer, L.J.J.), March 26, 27, 1934]

[Reported [1934] P. 133; 103 L.J.P. 105; 152 L.T. 450; 18 Asp.M.L.C. 490]

Costs—Appeal and cross-appeal—Both dismissed with costs—Appellants allowed sum by which their costs increased by cross-appeal—No apportionment in absence of special order.

The plaintiffs' steamship *G.C.* was in collision with the defendants' steamship *S.* On the trial of the collision action the *G.C.* was held four-fifths and the *S.* one-fifth to blame. The defendants appealed and the plaintiffs cross-appealed. Both appeal and cross-appeal were dismissed with costs. On taxation the defendants' bill of costs which had been lodged at £1,935 10s. 1d. was taxed down to £91 4s. 11d. upon the ground that the defendants' costs had been increased only to this extent by the cross-appeal. On defendants' summons to review the taxation, BATESON, J., held that the appellants' and the respondents' costs should be apportioned between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals. The plaintiffs appealed.

Held: what order should be made with regard to costs was always within the discretion of the court, but, in the absence (as here) of a special order, the principle of no apportionment applied, and the defendants were only entitled to such extra costs as they incurred by reason of the cross-appeal.

Notes. The Court of Appeal has power to make such order as to the whole or any part of the costs of an appeal as may be just: see R.S.C., Ord. 58, r. 4, and 26 HALSBURY'S LAWS (2nd Edn.) 128. For cases see DIGEST (Practice) 793 et seq.

Cases referred to:

- (1) *The Lauretta* (1879), 4 P.D. 25; 48 L.J.P. 55; 40 L.T. 444; 27 W.R. 902; 4 Asp.M.L.C. 118, C.A.; 1 Digest 242, 1687.
- (2) *Robinson v. Drakes* (1883), 23 Ch. 98; 48 L.T. 740; 31 W.R. 871, C.A.
- (3) *Jones v. Stott*, [1910] 1 K.B. 893; 102 L.T. 670.
- (4) *Medway Oil and Storage Co. v. Continental Contractors, Ltd.*, [1929] A.C. 88; 98 L.J.K.B. 148; 140 L.T. 98; 45 T.L.R. 20, H.L.; Digest Supp.
- (5) *The Bremen*, [1931] P. 166; 100 L.J.P. 122; 145 L.T. 565; 47 T.L.R. 505; 18 Asp.M.L.C. 252, C.A.; Digest Supp.
- (6) *Saner v. Bilton* (1879), 11 Ch.D. 416; 48 L.J.Ch. 545; 40 L.T. 314; 27 W.R. 472; 40 Digest 436, 569.
- (7) *Christie v. Platt*, [1921] 2 K.B. 17; 90 L.J.K.B. 555; 124 L.T. 649, C.A.; 40 Digest 436, 568.
- (8) *Wilson v. Walters*, [1926] 1 K.B. 511; 95 L.J.K.B. 624; 134 L.T. 597, D.C.; 40 Digest 437, 571.
- (9) *Crean & Sons, Ltd. v. M'Millan*, [1922] 2 I.R. 105; 40 Digest 436.
- (10) *The Young Sid*, [1929] P. 190; 98 L.J.P. 97; 141 L.T. 234; 45 T.L.R. 389; 18 Asp.M.L.C. 22, C.A.; Digest Supp.

Appeal by the plaintiffs from an order of BATESON, J., on a review of taxation of costs.

The plaintiffs were the Union Castle Mail Steamship Co., Ltd., the owners of the steamship *Guildford Castle*, and the defendants were the China Mutual Steam Navigation Co., Ltd., the owners of the motor vessel *Stentor*. The action was for damage by collision between the *Guildford Castle* and the *Stentor* in the River Elbe on May 31, 1933. BATESON, J., found that both vessels were to blame, and that the plaintiffs should bear four-fifths and the defendants one-fifth of the damage. The defendants appealed and the plaintiffs cross-appealed, both parties alleging by their notice of appeal that the other vessel was alone to blame. At the hearing of

the appeals, however, the plaintiffs did not contend that the *Guildford Castle* was free from blame, but maintained that she was to blame in less degree than the *Stentor*. The Court of Appeal (SCRUTTON, LAWRENCE, and GREER, L.J.J.) dismissed both appeal and cross-appeal with costs.

The costs of the plaintiffs were lodged for taxation at £802 14s. 6d. and those of the defendants at £1,935 10s. 1d. The assistant registrar allowed the plaintiffs £755 17s. 9d., but in the case of the defendants the costs, a moiety of which was claimed against the plaintiffs, were taxed down to £91 4s. 11d. In reply to the defendants' objection to the taxation, the assistant registrar answered that the only question to be determined on this taxation was: "Were the defendants' costs increased by reason of the cross-appeal and, if so, by how much?" The cases upon which he founded this opinion were *The Lauretta* (1) and *Robinson v. Drakes* (2). There were other cases, but these were sufficient to show what he believed to be the recognised practice in cases where appeal and cross-appeal had been dismissed with costs, and the appellants' costs had not been increased by reason of the cross-appeal. Except in respect of the actual notice of cross-appeal and small items connected therewith, he had been unable to find any indication that the defendants' costs had been increased either in the brief or elsewhere, nor had their representative on the taxation been able to point out to anything suggesting such increase.

On the defendants' application for the taxation to be reviewed, BATESON, J., ordered

"that the taxation of the [defendants' and the plaintiffs'] costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied in the hearing of the appeals,"

and the bills were, accordingly, referred back to the assistant registrar. The plaintiffs appealed.

Digby, K.C., and *Main Thompson* for the plaintiffs.—The assistant registrar followed the practice in allowing the plaintiffs the general costs of the defendants' appeal and the defendants such extra costs as were caused by the cross-appeal: *The Lauretta* (1). In *Jones v. Stott* (3) the appeal and cross-appeal dealt with different questions. In *Medway Oil and Storage Co. v. Continental Contractors, Ltd.* (4) the House of Lords disapproved of the principle of apportionment in the absence of a special order.

Kenneth Carmichael for the defendants.—BATESON, J., was right in following *Jones v. Stott* (3) which was not overruled in *Medway Oil and Storage Co. v. Continental Contractors, Ltd.* (4). In *The Lauretta* (1) and in *Robinson v. Drakes* (2) orders as to costs were made at the trial. In *The Bremen* (5) the order was no costs on either side. On the facts the assistant registrar took too limited a view as to the costs allowed.

SCRUTTON, L.J.—This case deals with a matter which has arisen in a series of cases of the same sort since the original decision by FRY, J., in *Saner v. Bilton* (6). The *Guildford Castle* was coming down the River Elbe and the *Stentor* was bound up the river, and they collided with each other. This court made the order that the appeal and cross-appeal from the decision of BATESON, J., should be dismissed with costs, and the registrar was left to work out the taxation. Whether in the circumstances the Court of Appeal would have been wiser to do what they did in *The Bremen* (5), namely, order no costs to either side, to avoid a serious quarrel about taxation, is a matter we shall have to consider next time we come across this class of case, but the order which the Court of Appeal made was: "Appeal and cross-appeal dismissed with costs."

We are left to our memory and the assistance of counsel, also acting apparently on their memory, as to exactly what happened in the court below and in our court, because we have not a copy of the judgment. As I understand it, the *Guildford Castle* was found to be four-fifths to blame because (i) she had gone over to the

wrong side of the river; (ii) she was going too fast; and (iii) although in the neighbourhood of fog, she had not been blowing her whistle properly. The *Stentor* was found one-fifth to blame because, having fog ahead, she did not stop her engines as soon as she heard the first whistle of the *Guildford Castle*. Perhaps the *Stentor* was a little lucky in getting off in that way, because our assessors advised us that, in view of the misty weather, she had been coming up too fast before she heard the other vessel.

On the order that we made, that each appeal should be dismissed with costs, the matter went to the assistant registrar, who took the view, I understand, not on the claim and counter-claim cases, but on *The Lauretta* (1), and what we find in *Jones v. Stott* (3), that the right method of carrying out our order was on these lines:

"The *Guildford Castle* appeals against all liability. I treat her cross-appeal as a separate appeal, and I order her to pay the costs which are occasioned by her failing on that separate appeal."

The taxation was, of course, on two appeals, and the assistant registrar said that the amount to be determined was the amount that the defendants' costs were increased by the cross-appeal. He said:

"The cases upon which I found this opinion are *The Lauretta* (1) and *Robinson v. Drakes* (2). I think there are other cases, but these are sufficient to show what I believe to be the recognised practice in cases where appeal and cross-appeal have been dismissed with costs and the appellants' costs have not been increased by reason of the cross-appeal."

The owners of the *Stentor* appealed to BATESON, J., and each appeal is dealt with in the same way.

"The appellants as respondents to the cross-appeal object to the taxation of their costs and to the taxation of the respondents' costs as cross-appellants, on the ground that both the costs on behalf of the appellants as respondents to the cross-appeal and the respondents' costs have been taxed on a wrong basis, and that an apportionment should have been made of such items in each bill as refer to work done or payments made which have been available for the use of each party in resisting their opponents' and supporting their own appeal."

The same thing was said about the other vessel. The learned judge being in chambers, we have no note of his judgment, and it is doubtful what cases he looked at, but he set aside the taxation and ordered that

"the taxation of the appellants' (respondents to the cross-appeal) and the respondents' costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals, and he referred the said bills back to the assistant registrar."

In my view, the decisions that have been given in claim and counter-claim cases, which raises almost exactly the same point, though under different circumstances, ought to be considered as the guide in this matter. The matter arose before FRY, J., in *Saner v. Bilton* (6) over fifty years ago. At that time there was a considerable doubt, and FRY, J., consulted with all the taxing masters of both Divisions to ascertain what was the practice, and all the taxing masters advised him that when there was no express authority they thought the right principle was on the lines which he stated as follows (11 Ch.D. at p. 47, n):

"The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions."

Claim and counter-claim cases went along on those lines until ATKIN and YOUNGER, L.JJ., had a case (*Christie v. Platt* (7)) which induced them to believe that the principle in *Saner v. Bilton* (6) was wrong. That was a case where the *Saner v. Bilton* (6) ruling resulted in the plaintiff getting £200 and the defendant £8, which they said did not look right, and they laid down the principle of apportionment. Shortly after that SARGANT, L.J., and I had the same sort of point raised in a running-down case (*Wilson v. Walters* (8)), where each side was appealing, and we took the view that *Saner v. Bilton* (6) was applicable, and that apportionment should not be allowed.

The matter then came up before the House of Lords in 1929, in the *Medway Oil and Storage Co. v. Continental Contractors, Ltd.* (4), a case which raises the point very neatly. I will not go into details, but the headnote in the House of Lords is as follows:

"Where a claim and counter-claim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone and the counter-claim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counter-claim can be costs of the counter-claim. In the absence of special directions by the court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded. *Saner v. Bilton* (6), *Crean & Sons, Ltd. v. M'Millan* (9), and *Wilson v. Walters* (8) approved and followed. *Christie v. Platt* (7) explained and distinguished."

LORD BLANESBURGH, who, having been a party to *Christie v. Platt* (7), was a member of the court in *Medway Oil and Storage Co. v. Continental Contractors, Ltd.* (4), said that he agreed that *Christie v. Platt* (7) had gone very much further than they intended, in view of the previous decisions. I think that is very nearly enough to be a decision against apportionment. It is a decision on this principle—the plaintiff appeals, treat that as a separate matter; if he fails, he is bound to pay all the costs occasioned by the defendant resisting his appeal. If there has been a cross-appeal, the matter is not to be dealt with by apportionment between the two, but only those extra costs which are occasioned by the cross-appeal are the subject-matter of the order for costs on the cross-appeal.

That seems to be the principle on which the assistant registrar has proceeded, and to be entirely justified on the decision of the House of Lords; the learned judge's order appears to me to be a *Christie v. Platt* (7) order—apportionment. I think the decision of the House of Lords shows that apportionment is not the proper principle to apply, and I therefore think that this appeal must succeed. At the same time I desire to say, as I said in *The Young Sid* (10), remembered as being *The Ocean Swell*, that there is to be no binding of the courts as to the orders they make in this way. Each judge, under the present system now set up by Order LXV, r. 1, has discretion, and he can make such order as he likes. If he makes an order in common form, it is no doubt important that it should be known what the order in common form means, but nothing is to bind any Division to make any particular form of order. If the judge thinks a better result will be obtained as in *The Bremen* (5) by saying no costs, or by making an express order as to apportionment, he is perfectly at liberty to do it. It is only if he follows a common form order, which up to this time has had a meaning, that any rule of taxation, or any rule as to the order which should be made, applies. I say that because I do not want there to be too great a rigidity in any sort of orders as to costs; the judge should make such an order as, knowing the practice, he thinks will give a proper result between the parties. In this case the Court of Appeal did make an order which at the time, in my view, had a particular meaning, and I think it had the meaning which the taxing officer has followed. If we had meant that there was to be apportionment, we should have said so; but we did not say

anything about it. For this reason I think the appeal succeeds and the objections to the taxation fail.

GREER, L.J.—I agree. I think that the learned judge was not entitled to come to the conclusion that the taxation had been conducted upon a wrong principle; and if he was not so entitled it was not for him to work out the results in pounds, shillings and pence.

It is true that the learned assistant registrar based himself upon two cases, *The Lauretta* (1) and *Robinson v. Drakes* (2), and counsel for the defendants is right when he says that those are not decisions as to what is to happen in a case where the appeal is dismissed with costs, and the cross-appeal is dismissed with costs, but that they are only an indication of what the judges thought would be the appropriate result of that position. They did not leave the matter undecided in their judgments; they made a special order in each case. We are told that the principle upon which the assistant registrar acted is the principle on which the taxing officers of the Admiralty Court have been acting for a considerable time when the order of the appellate court has been similar to that which was made in this case.

I agree with my Lord that, in looking for the right principle, we ought to be guided by what the House of Lords said in *Medway Oil and Storage Co. v. Continental Contractors, Ltd.* (4) in which LORD HALDANE examined all the authorities, from *Saner v. Bilton* (6) downwards, dealing with the proper way to tax the costs on claim and counter-claim. I think the position of the appellant in appeal and cross-appeal is analogous to that of claim and counter-claim. My recollection of the present case is that the appellants, the owners of the *Stentor*, in order to prove that she was not to blame, went into the whole of the facts, including all the facts relating to the conduct of the other vessel; and if there had been no cross-appeal the costs would have been very nearly identical with what they in fact turned out to be. Having regard to the fact that there was a cross-appeal, which in form challenged the blame attached to the *Guildford Castle*, but in substance, as presented to us, was only supported by an argument that the *Stentor* was more to blame, and inasmuch as some of the costs or some of the time may have been taken up in argument whether the proportions should be altered, no doubt the assistant registrar was entitled to say that the costs which were awarded to the respondents should be diminished by such costs as were due to their appeal. In my judgment, this meets the justice of the case.

As a general rule it is desirable to look at the matter from the point of view of substance. Who really is the successful party in the litigation in the court below in the case of claim and counter-claim; and who is really the successful party in appeal and cross-appeal? I think in this case the respondents were successful and that they ought to have, in substance, all the costs which have been given to them by the assistant registrar.

I have observed in the various cases which have been cited that these questions have given rise to considerable differences of opinion, especially in cases on claim and counter-claim. When counter-claims were introduced they were a substitute for cross-actions, and in the early days they were treated as if they were cross-actions; but latterly it was appreciated that in substance the counter-claim might really be a defence, and, if it fails, all that happens in regard to costs is that the addition to the costs by reason of the counter-claim should be at the expense of the counter-claiming defendant. I think that a similar result should follow with regard to a cross-appeal—namely, that any costs attributable to the cross-appeal which have increased the costs of the parties to the proceedings in the cross-appeal, ought to be given to the successful party in that cross-appeal. It might be in some cases that that would be a substantial figure; it might be in others that the experienced taxing officer would be able to come to the conclusion that the figure was not a substantial one, as he has done in this case. I agree with my Lord,

therefore, that this appeal should be allowed and the order of the assistant registrar A restored.

Solicitors: *Parker, Garrett & Co.*; *Stokes & Stokes*, for *Alsop, Stevens & Collins Robinson*, Liverpool.

[Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.]

DUKE OF ATHOLL v. READ

[KING'S BENCH DIVISION (Avory, Acton and Charles, JJ.), February 26, 1934]

[Reported [1934] 2 K.B. 92; 103 L.J.K.B. 417; 150 L.T. 499;
98 J.P. 176; 50 T.L.R. 264; 78 Sol. Jo. 193; 32 L.G.R. 123;
30 Cox, C.C. 85]

Case Stated—Case not served on respondent at prescribed time—Jurisdiction of court to entertain appeal—Summary Jurisdiction Act, 1857 (20 & 21 Vict., c. 43), s. 2.

Section 2 of the Summary Jurisdiction Act, 1857, provided that an appellant by way of Case Stated against an order of a court of summary jurisdiction, within three days after receiving the Case signed by the justice or justices, should "transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the Case so stated and signed, to the other party to the proceeding in which the determination was given. . . ."

Held: the giving of the notice of appeal, with a copy of the Case Stated, to the other party before the Case was filed was a condition precedent to the jurisdiction of the court, and where, by inadvertence, the Case had been filed before notice of appeal with a copy of the Case had been given to the other party, the court had no jurisdiction to entertain the appeal; nor could the intending appellant withdraw and re-file the Case, by reason of the statutory provision that an appellant must apply in writing for a Case to be stated within three days of the determination of the information.

Ashdown v. Curtis (1) (1862), 31 L.J.M.C. 216, applied.

Simmonds v. Elliott (2), [1917] 2 K.B. 894, not followed.

Wills & Sons v. McSherry (3), [1913] 1 K.B. 20, distinguished.

Notes. Section 2 of the Summary Jurisdiction Act, 1857, was repealed by the Magistrates' Courts Act, 1952, ss. 87 to 92 of which deal with Cases Stated, while R.S.C., Ord. 59, r. 33, provides that the appellant shall serve the Case on the respondent together with notice of the appeal within fourteen days after receiving it.

Referred to: *Gregory v. Cattle*, [1943] 1 All E.R. 654.

As to appeals by way of Case Stated, see 21 HALSBURY'S LAWS (2nd Edn.) 722 et seq., and for cases see 33 DIGEST 407 et seq. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Cases referred to:

- (1) *Ashdown v. Curtis* (1862), 31 L.J.M.C. 216; 6 L.T. 331; 26 J.P. 312; 8 Jur.N.S. 511; 10 W.R. 667; 33 Digest 417, 1275.
- (2) *Simmonds v. Elliott*, [1917] 2 K.B. 894; 87 L.J.K.B. 42; 117 L.T. 626; 82 J.P. 37; 15 L.G.R. 816; 26 Cox, C.C. 54, D.C.; 33 Digest 417, 1277.
- (3) *Wills & Sons v. McSherry*, [1913] 1 K.B. 20; 82 L.J.K.B. 71; 107 L.T. 848; 77 J.P. 65; 29 T.L.R. 48; 23 Cox, C.C. 254, D.C.; subsequent proceedings, [1914] 1 K.B. 616; 33 Digest 416, 1269.
- (4) *Morgan v. Edwards* (1860), 5 H. & N. 415; 29 L.J.M.C. 108; 24 J.P. 245; 6 Jur.N.S. 379; 157 E.R. 1243; 33 Digest 416, 1266.

- (5) *Woodhouse v. Woods* (1859), 29 L.J.M.C. 149; 1 L.T. 59; 23 J.P. 759; 6 Jur.N.S. 421; 33 Digest 415, 1257.
- (6) *Syred v. Carruthers* (1858), E.B. & E. 469; 27 L.J.M.C. 273; 23 J.P. 37; 6 W.R. 595; 120 E.R. 584; 33 Digest 416, 1265.
- (7) *Rust v. The Churchwardens of St. Botolph, Bishopsgate* (1906), 94 L.T. 575, D.C.; 33 Digest 415, 1262.
- (8) *Hill v. Wright and Wilson* (1896), 60 J.P. 312, D.C.; 33 Digest 416, 1270.

Motion for leave to proceed with appeal.

An information was preferred by Read, a chief inspector of the Metropolitan Police, alleging that the defendant, the Duke of Atholl, had, on Sept. 26, 1933, unlawfully sold a ticket in a lottery. The case was heard by a police magistrate, who, on Nov. 24, 1933, delivered a reserved judgment, convicting the defendant, fining him £25, and ordering him to pay a certain sum for costs. Within three days of that decision, the defendant asked the magistrate to state a Case for the opinion of the High Court. On Feb. 6, 1934, the magistrate approved and signed the Case which had been settled by counsel. On Feb. 15 the defendant entered into recognisances to prosecute his appeal, and the signed Case was handed to his solicitor. On Feb. 16 the solicitor, by a slip, filed the Case in the High Court, and at the same time notified the opposing solicitor that he had done so, and forwarded him a copy of the Case and of the notice of appeal. The defendant applied to a Divisional Court for leave to proceed with his appeal despite the above irregularity or, alternatively, for leave to withdraw the Case from the Central Office and to re-file it. The prosecutor took the objection that by reason of non-compliance with s. 2 of the Summary Jurisdiction Act, 1857, the court had no jurisdiction to entertain the appeal.

By the Summary Jurisdiction Act, 1857, s. 2:

"After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . either party to the proceeding . . . may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a Case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law to be named by the party applying; and such party . . . shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the Case so stated and signed, to the other party to the proceeding in which the determination was given. . . ."

Norman Birkett, K.C., and *G. O. Slade* for the defendant.

The Solicitor-General (Sir Donald Somervell, K.C.) and *Eustace Fulton* for the prosecutor.

AVORY, J.—The application which is made to the court in this case is that the defendant, the Duke of Atholl,

"may be given leave to proceed with his appeal by way of Case Stated and signed by the Chief Magistrate of the Metropolis on the 15th day of February, 1934, notwithstanding the fact that the Case was transmitted to this court before notice in writing of such appeal, and a copy of the Case so stated and signed, had been given to the prosecutor, as required by s. 2 of the Summary Jurisdiction Act, 1857; or, alternatively, for an order that the defendant may be permitted to withdraw the said Case from the Central Office, and forthwith to re-file the same, so as to cause the service of such notice of appeal, and copy of the Case as aforesaid, to precede the filing of the said Case, and that such further or other consequential directions may be given as will enable the defendant to comply with the requirements of the said section."

I regret to have to come to the conclusion that we cannot give effect to either of these applications.

The first application is that the defendant may be given leave to proceed with his appeal notwithstanding the fact that the Case was transmitted to the court before notice in writing and a copy of the Case had been given to the prosecutor. I have come to the conclusion that it is impossible to give effect to that application consistently with the decided cases, which have held that the giving of the notice in writing, with a copy of the Case, to the respondent before the Case is transmitted to this court is a condition precedent which cannot be waived, and which must be complied with if this court is to have jurisdiction to entertain the Case Stated.

The only decision which is in conflict with the many previous decisions on this point is *Simmonds v. Elliott* (2). In that case counsel for the appellant called the attention of the court to the fact that the notice of appeal and copy of the Case were not served on the respondent until half an hour after the Case had been lodged at the Central Office. He referred to the words of s. 2 of the Summary Jurisdiction Act, 1857. The respondent did not appear, and there was no argument on the point. DARLING, J., said:

"There is nothing to prevent the court hearing the appeal. The respondent was in no way prejudiced, and he does not appear and take the point."

It appears to me impossible to adopt the decision in that case without in effect overruling all the previous decisions which have held that the court has no jurisdiction in such circumstances. I doubt whether the court in that case would have come to the conclusion to which they did, in allowing the case to be heard and determined, if there had been any appearance on the part of the respondent, and the point had been fully argued. I think the true view of that case is that, because the point was not taken by the respondent, the court thought that they were not bound to give effect to the objection. I am not saying that that was a good reason, because, in my view, in whatever way a point going to the jurisdiction of the court is brought to the notice of the court, the court is bound to give effect to it.

Probably the strongest case against the application is *Ashdown v. Curtis* (1). The headnote in the LAW JOURNAL REPORTS is as follows:

"If notice of appeal under the [Summary Jurisdiction Act, 1857], s. 2, be not given to the respondent before the Case is lodged in court, the Case will be struck out. It is not sufficient to post the notice of appeal to the respondent within the three days allowed for lodging the Case, if it does not reach the respondent until the day after the Case is transmitted to the office."

The facts in that case appear to be identical with the facts in the present case, and the decision in *Ashdown v. Curtis* (1) has never been criticised or overruled. Counsel for the appellant in the present matter has invited us to apply the decision in *Wills & Sons v. McSherry* (3), but I am clearly of the opinion that that decision has no application, because it was a decision on the ground, and solely on the ground, that in that case it was physically impossible for the appellant to comply with the provisions of the statute. There is no suggestion in this case that there was any physical impossibility of complying with the statute.

It becomes necessary, therefore, to consider the alternative application—

"that the appellant may be permitted to withdraw the Case, and forthwith to re-file the same, so as to cause the service of such notice of appeal and copy of the Case to precede the filing."

At one time I thought it was possible that the court might give effect to that application by a rule in the nature of a mandamus to the magistrate to re-state and re-sign the Case so that the provisions of the statute might be complied with, but I have come to the conclusion that it is not possible to give effect to this alternative application. The statute requires that

"either party . . . may, if dissatisfied with the determination . . . apply in writing within three days after the same to the . . . justice . . . to state and sign a Case,"

&c., and it is impossible in the circumstances for the appellant to comply with the statute by making any application within three days after the determination of the case. The only way in which effect could be given to this alternative application would be, if it were possible, to commence the proceedings entirely *de novo*, which would involve the issue of a fresh summons, and that is impossible because of the six months' limitation in time. I have, therefore, reluctantly come to the conclusion that we cannot give effect to the alternative application.

The result, much as it is to be regretted, is that, this objection having been taken and brought to the notice of the court, we have no jurisdiction to entertain this appeal, and the only order we can make is that it be struck out.

ACTON, J.—I am of the same opinion. At a very early stage of the argument I was of the opinion that *Wills & Sons v. McSherry* (3) was not in point because that case was concerned with impossibility and the present case has nothing whatever to do with impossibility. In the course of the argument it appeared to me that that case, instead of being an authority in the defendant's favour, is an authority against him, and I say so by reason of the following sentences in the judgment of CHANNELL, J. He says ([1913] 1 K.B. at p. 27):

"The law applicable to the point [of impossibility] is clearly stated in MAXWELL ON THE INTERPRETATION OF STATUTES (5th Edn. at p. 621):

'Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed when performance is idle or impossible. . . .'

In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown."

For the purpose of the present decision, the words to be emphasised or italicised are "without any default on the part of the person on whom the duty was thrown." Here the question is one of default and nothing else, and no question of impossibility or impracticability is suggested. CHANNELL, J., goes on:

"The author then refers to *Morgan v. Edwards* (4), *Woodhouse v. Woods* (5), and *Syred v. Carruthers* (6), and says:

'If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with. . . . Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with; and if it be impossible, the jurisdiction fails.'

That last passage shows that there is a difficulty in holding that the court has power to dispense with the performance of the conditions precedent laid down in this statute. If the point is put in that way I think the court clearly cannot do so."

That is the point which is raised, as I understand it, by the Solicitor-General, that non-compliance with the condition precedent to the jurisdiction prescribed by the statute is fatal. That proposition seems to me to be quite clearly enunciated in the very authority on which counsel for the defendant relies. I agree with the judgment delivered by my Lord, and for the reasons stated by him.

CHARLES, J.—With the same reluctance that was expressed by my Lord, I agree that this application fails. Indeed, were we to come to any other conclusion it would, in my judgment, be contrary to every decision since 1859. The question

has been considered again and again whether or no the words which I am about A to read are a condition precedent to the hearing of the appeal.

"The appellant shall, within three days after receiving such Case, transmit the same to the court named in his application, first giving notice in writing of such appeal,"

and so forth. In 1859, in *Woodhouse v. Woods* (5), BLACKBURN, J., said in his judgment (29 L.J.M.C. at p. 150): B

"The court has no jurisdiction to hear the appeal, except by this Act of Parliament; and the second section gives that jurisdiction, and uses the words 'first giving notice,' &c. If the legislature intended to say that the giving such notice should be a condition precedent to our hearing the appeal, I see no other words which could have been used. The legislature must be considered to have made it a condition precedent." C

That decision was approved in *Ashdown v. Curtis* (1), to which my Lord has referred.

In 1906 the matter was again considered in *Rust v. The Churchwardens of St. Botolph, Bishopsgate* (7), in which case LORD ALVERSTONE, C.J., said, at p. 576, that, sharing the feelings of LORD RUSSELL OF KILLOWEN, C.J., expressed in *Hill v. Wright* (8), he gave effect to this preliminary objection with reluctance. Then he goes on: D

"But I consider the practice is too rootedly fixed to enable us to overrule it. It is a statutory condition . . ."

We have been asked to say that we have jurisdiction to consider this matter because of the decision in *Wills & Sons v. McSherry* (3). I cannot see that that case has any application. This is a case of inadvertence, and that was a case of impossibility. Where it is shown to the satisfaction of a court that impossibility exists, then compliance with the statute may be assumed, but where there is no such impossibility but mere inadvertence, the court, in my opinion, has no power at all to give itself a jurisdiction which the statute does not give. E

We are asked to say that *Simmonds v. Elliott* (2) should enable us to accept jurisdiction in this case. It is perfectly true that there the matter was not one of impossibility, but only of difficulty. But, in that case, the respondent did not appear and take the point; the matter was never argued, and DARLING, J., said: "There is nothing to prevent the court hearing the appeal." I cannot help thinking that, if the matter had been argued, a different conclusion would have been arrived at, and I say so the more because I observe that DARLING, J., was a party to the judgment in *Rust v. The Churchwardens of St. Botolph* (7), to which I have already referred. If those matters had been brought to the notice of the court the result probably would have been that the long line of cases, to some of which I have referred, would have been followed, and it would have been held that the court had no jurisdiction to consider the application. Certain alternatives have been proposed which would surmount the difficulty in which the applicant finds himself here involved. I think it unnecessary myself to refer to those suggested methods, whereby the condition precedent which has not been fulfilled might yet be so brought into shape that it ultimately was fulfilled. F

I agree with what my Lord has said on this point, and I do not desire to add anything further on the proposed method of curing that which is, in my judgment, an incurable defect.

Appeal struck out.

Solicitors: *Walter Crimp & Co.; Treasury Solicitor.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

BANCO DE VIZCAYA v. DON ALFONSO DE BORBON Y AUSTRIA

[KING'S BENCH DIVISION (Lawrence, J.), March 1, 2, 9, 1934]

[Reported [1935] 1 K.B. 140; 104 L.J.K.B. 46; 151 L.T. 499;
50 T.L.R. 284; 78 Sol. Jo. 224]

Conflict of Laws—Foreign law—Enforcement—Penal law—Confiscation of property.

Securities which had been purchased by the defendant, the former King of Spain, out of his own moneys were by his instructions deposited with an English bank in London to the order of its Madrid branch as his agent. In 1923, when the Madrid branch was about to be closed, the defendant gave instructions that the securities should thenceforward be held by the London bank to the order of the plaintiffs, a Spanish bank, as his agents, and these instructions were carried out. On November 26, 1931, a decree of the legislative body of the recently established Spanish republic declared the defendant to be guilty of high treason and an outlaw, and that all his properties, rights, and grounds of action in Spanish territory should be seized by the Spanish republic for its own benefit. In 1932 the Spanish bank (on behalf of the Spanish republic) claimed from the ex-King delivery of the securities. The London bank, having interpleaded,

Held: (i) the substance of the right sought to be enforced by the Spanish bank was the delivery to them of the securities, and the enforcement of that right would directly or indirectly involve the execution of penal laws of the Spanish republic;

(ii) on the true interpretation of the decree of Nov. 26, 1931, only the Spanish State could seize the property of the ex-King;

(iii) on both these grounds the Spanish bank had not established any right to the possession of the securities.

Notes. Referred to: *Frankfurter v. Exner, Ltd.* (1947), 177 L.T. 257.

As to the recognition of foreign law by English courts, see 7 HALSBURY'S LAWS (3rd Edn.) 8 et seq., and for cases see 11 DIGEST (Repl.) 322–324, 515.

Cases referred to:

(1) *Huntington v. Attrill*, [1893] A.C. 150; 62 L.J.P.C. 44; 68 L.T. 326; 57 J.P. 404; 41 W.R. 574; 8 T.L.R. 341, P.C.; 11 Digest (Repl.) 515, 1293.

(2) *Folliott v. Ogden* (1789), 1 Hy. Bl. 123; 126 E.R. 75; affirmed (1790), 3 Term Rep. 726; (1792), 4 Bro. Parl. Cas. 111, H.L.; 11 Digest (Repl.) 537, 1471.

Interpleader Issue tried by LAWRENCE, J.

In 1919 the defendant, Don Alfonso de Borbon y Austria, who was formerly King of Spain, purchased certain securities with his own moneys. Acting as his agent, the Madrid office of the Westminster Foreign Bank deposited these with the Westminster Bank, London, with directions that they were to be held for the account of the Madrid office under the rubric Don Alfonso de Borbon y Austria. In 1922 further securities belonging to the defendant were similarly deposited by the Madrid office of the Westminster Foreign Bank. In August, 1923, that office being about to close, the defendant gave instructions that the securities should thenceforward be held by the Westminster Bank, London, for the account of the Banco de Vizcaya, under the same rubric. On Nov. 26, 1931, after the revolution in Spain, a decree was enacted by the Constituent Cortes of the Spanish Republic, declaring the defendant to be guilty of high treason and an outlaw, and that all the properties, rights and grounds of action belonging to him which were situated within Spanish territory would be seized by the Spanish State for its own benefit. In 1932 the defendant claimed from the Westminster Bank, London, possession and delivery of the securities, and the Banco de Vizcaya made a like claim against

the defendant on behalf of the Spanish republic. The Westminster Bank, Ltd., A London, interpleaded, and an issue was directed to be tried between the Banco de Vizcaya, as plaintiffs, and Don Alfonso de Borbon y Austria, as defendant, whether the plaintiffs were entitled, as against the defendant, to the securities, and to possession thereof, and delivery thereof by the Westminster Bank, Ltd.

Stuart Bevan, K.C., and *H. G. Robertson* for the plaintiff bank.
F. P. M. Schiller, K.C., and *Bensley Wells* for the defendant.

Cur. adv. vult.

March 9. **LAWRENCE, J.**, read the following judgment. In this interpleader issue the plaintiffs, the Banco de Vizcaya, a Spanish bank, affirm, and the defendant, H.M. Don Alfonso de Borbon y Austria, ex-King of Spain, denies, that the plaintiffs are entitled as against the defendant to certain securities and the possession thereof and to delivery thereof by the Westminster Bank, Ltd., in London. The securities in question were purchased by the defendant with his own moneys and by his instructions deposited with the Westminster Bank in London to the order of its Madrid branch as the defendant's agent. On Sept. 7, 1923, the Madrid branch of the Westminster Bank being about to be closed, the defendant gave instructions to that branch, and to the plaintiffs, that the securities should be held by the Westminster Bank in London to the order of the plaintiffs as the defendant's agents. These instructions were carried out by the Westminster Bank's head office in London sending the securities to its Foreign Office Branch in London to be placed "under the dossier of the plaintiff's rubric Don Alfonso de Borbon y Austria."

On May 13, 1931, a decree was enacted by the Presidency of the provisional government of the Spanish republic, providing by art. 1 for the seizure of all properties situate or placed in Spain which might belong to the private fortune of the defendant, and by art. 3 that bankers established in Spain, who had in deposit such properties as were referred to in art. 1, should make delivery thereof to the Spanish Treasury. On June 3, 1931, an order of the Spanish Ministry of Finance was made for the due execution of the decree of May 13, 1931, and on Nov. 26, 1931, a decree was enacted by the Constituent Cortes of Spain declaring the defendant to be guilty of high treason and an outlaw, and that all the properties, rights, and grounds of action belonging to him which were situated within the national territory should be seized for its own benefit by the Spanish State.

In these circumstances, on April 25, 1932, the defendant brought an action against the Westminster Bank for the delivery of the securities to him. The plaintiffs also claimed to be entitled to the securities in question on the ground that the transaction which took place on Sept. 7, 1923, was a contract under which the defendant's rights in respect of the securities became solely a right of action against the plaintiffs as depositaries; that that right of action was situated in Spain; that the effect of the above-mentioned decrees was to transfer the defendant's right of action to the Spanish republic; and that the rights of the plaintiffs against the Westminster Bank remained unimpaired. The Westminster Bank interpleaded.

It is not suggested that the plaintiffs have, or ever had, any lien on the securities, or claim of any kind against the defendant. It is contended on behalf of the defendant that these decrees are penal laws of a foreign State, and ought not to be recognised in an English court.

In such circumstances the judgment of the Judicial Committee of the Privy Council in *Huntington v. Attrill* (1) ([1893] A.C. at p. 155) lays down that I have to construe and apply an international rule, and to determine, first, the substance of the right sought to be enforced, and in the second place, whether its enforcement will, directly or indirectly, involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of

this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish government in defiance of the mandate of the defendant, and, that being so, it seems to me unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees.

It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action, because they are asserting, not the right of the Spanish government, but their own contractual right, to the securities as against the Westminster Bank. I am unable to accept this contention. The plaintiffs are asserting, not their contractual rights as they originally existed, but those rights as altered by the decrees of the Spanish republic. Nor are they in substance asserting their own rights at all; they are asserting the rights of the Spanish republic. It is true, as is pointed out in *Huntington v. Attrill* (1), that some actions for penalties are not penal actions within the meaning of the above-mentioned international rule—where, for instance, the penalties are exigible, not by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of LORD LOUGHBOROUGH in *Folliott v. Ogden* (2) (1 Hy. Bl. at p. 185):

“The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither comes with all his transitory rights; he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.”

These words have frequently been cited with approval, and, in my judgment, they are directly applicable to the present case. I, therefore, hold that H.M. Don Alfonso and not the plaintiffs is entitled to the securities in question.

That disposes of the issue, but it is, perhaps, desirable that I should notice two other contentions on behalf of the defendant: (i) that the present proceedings are proceedings in rem, and that, even if the Spanish republic's right to affect the right of action of the defendant against the plaintiffs in Spain must be recognised, the decrees do not purport to affect the defendant's right to the securities themselves, which are and have been at all material times in this country; (ii) that the plaintiffs have not established their right to claim the securities. Evidence as to the effect of the decrees in Spanish law was called on behalf of the plaintiffs, and was not contradicted, and, as I understand that evidence, the defendant under Spanish law had no right to the securities themselves or against the Westminster Bank, but only a right of action as depositor against the plaintiffs as depositaries. I am not satisfied that Spanish law was the law of the contract made between the defendant and the plaintiffs with reference to these particular securities, which were then deposited in an English bank in England, but as this question was not fully argued, I do not decide the case on this ground.

As to the plaintiffs' right to claim in these proceedings, I think that I must assume that the Court of Appeal by their judgment of April 10, 1933 [on an interlocutory appeal in this case] (49 T.L.R. 414), decided that, if the plaintiffs could establish their right to the possession of these securities, they were entitled to succeed on this issue, even though in so doing they relied on a right to the property in the securities in the Spanish republic; but, in my judgment, the plaintiffs have not discharged the onus which rests on them of proving any right to possession. The Spanish lawyer who was called did not give any evidence as to the effect of

the decree of Nov. 26, 1931, upon the decree of May 13, 1931, and I am, therefore, compelled to decide its effect without the help of any evidence on the subject. In my opinion, the true interpretation of the decree of Nov. 26, 1931, is that the Spanish State, and the Spanish State alone, can seize the properties of the defendant, and, as there is in this decree no provision analogous to art. 3 of the decree of May 13, 1931, I hold that the plaintiffs have not established any right to possession of the securities. For this reason, therefore, as well as for the reason that the enforcement of the plaintiffs' claim involves the execution of the penal law of a foreign state, I decide this issue in favour of H.M. Don Alfonso de Borbon y Austria, with costs.

Judgment for defendant.

Solicitors: *Petch & Co.; Johnson, Jecks, & Colclough.*

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

Re RUSSO-ASIATIC BANK

[CHANCERY DIVISION (Eve, J.), February 19, 20, 21, 22, 28, July 23, 1934]

[Reported [1934] Ch. 720; 103 L.J.Ch. 336; 152 L.T. 142; 78 Sol. Jo. 647; [1934] B. & C.R. 71]

Conflict of Laws—Debt—Location—Agreement with foreign corporation to pay sterling in London.

Limitation of action—Accrual of action—No person in existence capable of being sued.

In 1915 the Bank of England, in order to rehabilitate the Russian exchange, arranged (i) that approved Russian banks should draw three months' sterling bills on approved London banks and accepting houses, and sell the drafts to the Banque de l'Etat, Petrograd; (ii) that that bank should forward the bills to London for acceptance and discount and disposal of the proceeds; (iii) that such bills be specially marked; (iv) that the London banks should renew them until a year after the war; (v) that the Banque de l'Etat should put the accepting houses in funds to meet the bills; (vi) that Imperial Russian sterling bills due the year after the war be lodged with the Bank of England as collateral security; and (vii) that London banks and accepting houses should receive $\frac{1}{2}$ per cent. In January, 1918, all the acceptances were assigned to the Bank of England in consideration of the issue to the accepting houses of an equivalent amount of Exchequer bonds. Notice of the assignments were given to, among other banks, the Russo-Asiatic Bank, but owing to the disturbed conditions in Russia probably never reached the addressees. Later in 1918 some of the bills, then matured, were presented and accepted by a number of London banks and accepting houses, the agreement providing that the acceptances should not exceed £50,000 for any one house. In 1916 the Russo-Asiatic Bank had drawn bills on accepting houses, and these were among those assigned in 1918, but meanwhile, in December, 1917, or January, 1918, all private banks in Russia, including the Russo-Asiatic Bank, were abolished, their assets being transferred to the State. In 1926 the London branch of the bank, which had been opened in 1908, was ordered to be wound-up, and the liquidator rejected a proof of the Bank of England for £752,500 in respect of the aforementioned transactions.

Held: (i) although, as a general rule, the location of simple contract debts

was the place in which the debtor was to be found, that rule did not apply in the present case where the obligation was to pay in sterling in London, and, therefore, the liability of the drawers of the bills referred to in the proof was not governed by Russian law by which all the said liabilities were discharged or were vested in the Russian State.

(ii) the corporate existence of the bank had ceased at latest in January, 1918; thereafter it could not be sued; and, therefore, the Limitation Act, 1623, s. 3, did not operate to render the claim by the Bank of England out of time.

Notes. The Limitation Act, 1623, was repealed by the Limitation Act, 1939. See now s. 2 of the Act of 1939.

Referred to: *Re Helbert Wagg & Co., Re Prudential Assurance Co.*, [1956] 1 All E.R. 129.

As to the location of contract debts, see 7 HALSBURY'S LAWS (3rd Edn.) 44, 75, and as to limitation of actions, see *ibid* (2nd Edn.), vol. 20, 618. For cases see 11 DIGEST (Repl.) 384 et seq., 420 et seq., and 32 DIGEST 327 et seq. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888, H.L.; Digest Supp.
- (2) *Lambert v. Taylor* (1825), 4 B. & C. 138, 6 Dow. & Ry. K.B. 188; 3 L.J.O.S.K.B. 160; 107 E.R. 1010; 32 Digest 322, 71.
- (3) *Perry v. Eames*, [1891] 1 Ch. 658; 60 L.J.Ch. 345; 64 L.T. 438; 39 W.R. 602; 7 T.L.R. 297; 19 Digest 63, 358.
- (4) *Administrator of Austrian Property v. Russian Bank for Foreign Trade* (1932), 48 T.L.R. 37, C.A.; Digest Supp.
- (5) *Russian and English Bank v. Baring Bros. & Co., Ltd.*, [1932] 1 Ch. 435; 101 L.J.Ch. 157; 146 L.T. 424; 48 T.L.R. 193; 76 Sol. Jo. 68; Digest Supp.
- (6) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; 49 T.L.R. 253; 77 Sol. Jo. 197; [1933] B. & C.R. 157; Digest Supp.
- (7) *Douglas v. Forrest* (1828), 4 Bing 686; 1 Moo & P. 663; 6 L.J.O.S.C.P. 157; 130 E.R. 933; 32 Digest 328, 140.
- (8) *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 42 W.R. 545; 10 T.L.R. 493; 38 Sol. Jo. 511; 9 R. 519, C.A.; 32 Digest 347, 306.
- (9) *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; 10 Digest (Repl.) 1297, 9151.
- (10) *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K.B. 682; 92 L.J.K.B. 1079; 129 L.T. 725; 68 Sol. Jo. 38; 39 T.L.R. 574, C.A.; reversed [1925] A.C. 150; 93 L.J.K.B. 1084; 132 L.T. 116; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; Digest Supp.
- (11) *Concha v. Murrietta, De Mora v. Concha* (1889), 40 Ch.D. 543; 60 L.T. 798, C.A.; 22 Digest (Repl.) 614, 7083; reversed sub nom. *Concha v. Concha*, [1892] A.C. 670; 66 L.T. 303; 8 T.L.R. 460, H.L.; 36 Digest (Repl.) 365, 30.
- (12) *Di Sora (Duchess) v. Philipps* (1863), 10 H.L.Cas. 624; 2 New Rep. 553; 33 L.J.Ch. 129; 11 E.R. 1168, H.L.; 22 Digest (Repl.) 622, 7154.
- (13) *Re Steel Wing Co.*, [1921] 1 Ch. 349; 124 L.T. 664; 65 Sol. Jo. 240; [1920] B. & C.R. 160; sub nom. *Re Steel Ring Co., Lord's Petition*, 90 L.J.Ch. 116; 10 Digest (Repl.) 854, 5631.
- (14) *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K.B. 81; 102 L.J.K.B. 241; 148 L.T. 313; 37 Com. Cas. 304; 18 Asp.M.L.C. 334, C.A.; Digest Supp.
- (15) *Roxburghe v. Cox* (1881), 17 Ch.D. 520; 50 L.J.Ch. 772; 45 L.T. 225; 30 W.R. 74, C.A.; 8 Digest (Repl.) 623, 632.

- (16) *Rhodes v. Smethurst* (1840), 6 M. & W. 351; 9 L.J.Ex. 330; 4 Jur. 702; 151 E.R. 447, Ex.Ch.; 24 Digest 737, 7653.
- (17) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322; 61 L.J.Ch. 129; 65 L.T. 800; 40 W.R. 212; 8 T.L.R. 90; 36 Sol. Jo. 91, C.A.; 9 Digest 512, 3375.
- (18) *Allen v. Kemble* (1848), 6 Moo P.C.C. 314; 13 Jur. 287; 13 E.R. 704, P.C.; 6 Digest 430, 2786.
- (19) *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; 1 Horn & H. 319; 7 L.J.Ex. 297; 150 E.R. 1390; 6 Digest 446, 2866.
- (20) *English, Scottish and Australian Bank, Ltd. v. I.R.C.*, [1932] A.C. 238; 101 L.J.K.B. 193; 146 L.T. 330; 48 T.L.R. 170; Digest Supp.
- (21) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; 40 T.L.R. 430; 68 Sol. Jo. 477, C.A.; Digest Supp.

Summons.

The following statement of facts is taken from the judgment:

The first of the two companies to which these proceedings relate was incorporated under the laws of Russia in the year 1895, under the name of the Russo-Chinese Bank. Its head office was at St. Petersburg. It first established a place of business in England in 1908, and in 1910 changed its name to the Russo-Asiatic Bank. On Dec. 19, 1926, upon a petition presented on Nov. 26, 1926, it was ordered to be wound-up by the court under the provisions of the Companies (Consolidation) Act, 1908. The respondent, Bernhard Heyman Binder, was the liquidator, and by this summons issued on Nov. 21, 1933, the Attorney-General, on behalf of the Crown, seeks to review the rejection by the liquidator of the proof lodged on behalf of the Crown in the winding-up for £752,500, and to have the proof allowed in full.

The alleged indebtedness arises in very exceptional circumstances. In the latter part of the year 1915 it was realised that some steps ought to be taken to rehabilitate Russian exchange in London, and that in order to attain this object funds would have to be provided in London for the purposes of exchange between Petrograd and London. In October, 1915, a document was prepared by or on behalf of the Bank of England embodying a suggested arrangement for giving effect to these proposals. It was thereby proposed that approved Russian banks—and that would seem to mean banks approved by the Banque de l'Etat, Petrograd—should draw three months' sterling bills on approved London banks, and accepting houses, and sell the drafts to the Banque de l'Etat, Petrograd; that the Banque de l'Etat should forward the bills to London for acceptance, and discount, the proceeds to be disposed of in London as the Banque de l'Etat might direct; that all bills drawn under the proposed arrangement should be marked on their face with the words:

"Drawn under credit arranged in memorandum of Oct. 5, 1915, approved by the Banque de l'Etat";

that the London banks and accepting houses should undertake to renew the bills (unless previously redeemed) until one year after the termination of the war; that the Banque de l'Etat would put the accepting banks and houses in funds to meet their acceptances under that agreement three clear days before maturity of the acceptances; that all bills bought by the Banque de l'Etat should be advised to the Bank of England and be regarded as A1 bank bills for the purpose of discount or otherwise; and that Imperial Russian sterling Treasury bills due one year after the termination of the war to the amount of acceptances drawn under Imperial Ukase should be lodged with the Bank of England as collateral security for the engagement of the Russian banks to put the London banks and accepting houses in funds to meet their acceptances within one year of the termination of the war.

These suggested arrangements proving to be acceptable to the Banque de l'Etat, they entered into agreements in January, 1916, with twenty-one banking houses carrying on business in the city of London, and in March, 1916, agreements were

made between the above-named Russo-Asiatic Bank and each of the said twenty-one banks (exhibit S.D.W.3). By the former agreements, signed on behalf of the Banque de l'Etat, they were to be at liberty to present to the addressee for acceptance through their agents, Baring Brothers & Co., Ltd., and the addressee was to accept bills drawn upon the addressee at three months' sight by the therein-mentioned Russian banks for the amounts therein placed against their respective names. Among the Russian banks were the Bank Russo-Asiatique, Petrograd, and the Russian Bank for Foreign Trade, the amount against their respective names being in each case £100,000. The documents went on to provide that as—that is to say, "as and when"—the bills were covered in cash, the Banque de l'Etat was to be at liberty from time to time to present to the addressee for acceptance through Baring Brothers & Co., Ltd., and the addressee was to accept in renewal thereof further bills drawn by the said Russian banks upon the addressee at three months' sight, and in like manner was to continue, upon any renewed bill being covered in cash, to accept further like bills; that the addressee was not to be under any obligation to accept bills or renewals maturing later than twelve months after the determination of the war; that the bills should bear on their face the words set out in the memorandum of Oct. 1, 1915, and that the addressee's acceptances under that arrangement outstanding at any one time should not, unless the addressee should otherwise agree, exceed the total sum of £100,000, and it was thereby stipulated that the addressee should be placed in funds from time to time by the said Russian banks through Baring Brothers & Co., Ltd., to meet their respective bills and renewals in sterling in London three clear days before the date of maturity in each case and should not be bound to accept any further bills or renewals unless so placed in funds, and the Banque de l'Etat guaranteed that if the said Russian banks should fail to place the addressee in funds in sterling in London to meet their respective bills and renewals three clear days before the date of maturity in each case, they would do so themselves, and as security for the due fulfilment of the said Russian banks, were lodging with the Bank of England sterling Treasury bills of the Imperial Russian Government payable in London twelve months after the determination of the war to the amount, in the case of the Russo-Asiatic Bank, of £100,000, and in the unlikely event of the Treasury not being placed in funds to meet the acceptances or any of them at maturity, the Bank de l'Etat thereby authorised the Bank of England to issue to the addressee sterling Treasury bills of the Imperial Russian Government to the amount of the acceptances unprovided for, such Treasury bills to bear interest at 6 per cent. per annum from date of issue until payment, with liberty to the addressees to realise or otherwise deal with them or any of them at such time and in such manner as they should think fit.

By each agreement entered into in March, 1916, each Russian bank undertook and agreed with each of the accepting banks, in consideration of their having entered into the arrangement with the Banque de l'Etat contained in the agreements of January, 1916, to place the acceptors in funds in sterling in London through Baring Brothers & Co., Ltd., to meet the bills and renewals three clear days before the date of maturity in each case. Two series of bills were accepted under these arrangements, but consequent upon the disturbed condition of affairs in Russia and of the uncertainty whether any of the Russian banks would present funds for meeting the acceptances at maturity, great difficulty arose in carrying out the arrangements to which I have already referred, and in December, 1917, the climax was reached when, by a decree published on the 17th of that month, the Soviet Republic declared banking to be a State monopoly and all existing joint stock banks and banking houses amalgamated with the State bank and the assets and liabilities of the liquidated banks were taken over by the State bank.

In reply to certain recommendations to the Treasury made on behalf of the Bank of England for averting the damage to the general credit of the country, which it was apprehended would result from the non-payment of the bills on the due dates, a letter was addressed to the bank on Jan. 18, 1918, wherein the Treasury, after disclaiming any direct responsibility in regard to any of the out-

standing bills, authorised the bank to inform the acceptors of the bills drawn A under the arrangement of October, 1915, that the Bank of England, acting on behalf of His Majesty's Treasury,

"will be prepared to undertake now that when from time to time acceptances fall due the bank will, to the extent that the acceptances are not provided for by the drawers on the Banque de l'Etat, deliver to the acceptors 3 per cent. B Exchequer Bonds due Jan. 28, 1930, to the amount of such acceptances in exchange for the paid bills, the acceptors transferring to the Bank of England all their rights under or by virtue of the bills of exchange including their right to call upon the Banque de l'Etat to fulfil its obligations under the agreement C with the acceptors, on condition that the acceptors, for their part, agree (i) to follow all instructions and to afford all reasonable assistance that the Bank of England might at any time require; (ii) to take all such legal or other action against the drawers of the bills or any of them and against the Banque de l'Etat or any person concerned as and when so requested by the Bank of England or to allow such action to be taken in their names or on their behalf; and (iii) to hand to the Bank of England all acceptances when paid."

A warrant for the preparation and issue of the said Exchequer Bonds dated Jan. 21, 1918, was sent to the Bank of England on the 28th of the same month, and on the 21st, each of the twenty-one accepting banks in writing transferred and assigned to the Bank of England all their rights, claims and demands against the drawers and the Banque de l'Etat and any other parties to such of the bills as might not be provided for by the drawers or the Banque de l'Etat, and under the arrangement for rehabilitating Russian exchange in London of Oct. 1, 1915, and their agreement with the Banque de l'Etat made under that arrangement, and to hand D to the Bank of England the bills as and when paid, the Bank of England in exchange for the bills not so provided for by the drawers or the Banque de l'Etat to hand to the transferors Exchequer Bonds to the amount of such bills, and the transferors thereby authorised the Bank of England to use their names in any proceedings the bank might think fit to institute to enforce such rights, and under- F took to follow all instructions the bank might give to them, and to afford all reasonable assistance to the bank in relation to such proceedings, and not to take any action upon or in respect of the said bills, or the said arrangement, or arrangements, except as requested by the bank. At the date of the said assignments none of the said bills had become payable. In the months of February, March, April and May, 1917, efforts were made to give notice to the Russian banks including G the Russo-Asiatic Bank of the assignments, but owing to the suspension of the sending of correspondence by means of Foreign Office bags, and to the generally disturbed conditions in Russia, it is doubtful if service of any such notice was ever accomplished.

Early in March, 1918, a signed duplicate of the notice sent on March 15, and again on the 22nd, to the Banque de l'Etat was sent to Messrs. Baring Brothers & Co., Ltd., with a request to them to forward it by post to its destination. They expressed their willingness so to do as soon as postal communication with Petrograd had been restored. The notice sent by the bank of March 22 never reached Petrograd. It was returned by the Post Office in the original covering registered envelope (unopened), and marked: "Service suspended." There is no evidence I that the notices sent to Barings ever reached Petrograd. The bills were duly met and discharged by the acceptors out of their own moneys, and the fund for repayment of the moneys was provided by the Bank of England in accordance with the arrangements I have just read. The Treasury bills of the imperial Russian government deposited as collateral security for payment of the bills are not, and never were, of any value. The bills having been met, no claim can be made thereunder, but there being some assets in the liquidation of the English branch of the bank a proof was lodged in November, 1932. It is supported by an affidavit of Mr. Basil Gage Catterns, the Chief Cashier of the Bank of England, duly authorised

by the Lords Commissioners of His Majesty's Treasury, acting on behalf of His Majesty, and the governor and company of the Bank of England, agents or nominees of the said Lords Commissioners, in respect of the matters thereafter mentioned, and is for a sum of £752,500, being the aggregate amount of 151 bills of exchange drawn by the Russo-Asiatic Bank on various banks therein mentioned, and by them accepted pursuant to arrangements made in the document of Oct. 1, 1915, and agreements made in pursuance of the said arrangements between the Banque de l'Etat and the accepting banks, and between the Russo-Asiatic Bank, and the other accepting banks (S.D.W.3). The proof goes on to state that as part of the arrangements under which the said bills were paid on maturity all the rights, claims and demands of the said several banks and accepting houses in respect of the said bills were transferred and assigned to the governor and company of the Bank of England as agents or nominees of the Lords Commissioners of His Majesty's Treasury (acting on behalf of His Majesty), who provided Exchequer Bonds against delivery of the paid bills.

Evidence as to the effect of the decrees of the Soviet government was given. On behalf of the Bank of England it was said that the Russo-Asiatic Bank ceased to exist as a legal entity, and was dissolved as the immediate result of the Soviet government of Dec. 14, 1917, dissolving all joint stock banks. On behalf of the liquidator it was said that the Russo-Asiatic Bank continued to exist so long as a single branch continued to function. The decree was a declaration of policy only: see instructions of the Soviet government of Dec. 10, 1918: *Lazard v. Midland Bank* (1).

The Attorney-General (Sir Thomas Inskip, K.C.), Wilfrid Lewis, and A. Andrewes-Uthwatt for the Bank of England.—The Russo-Asiatic Bank was at the date of its winding-up indebted to the Bank of England, as agents of the Treasury, in the sum of £752,500 on bills drawn by it, for which it had received no satisfaction. The imperial Russian sterling treasury bills deposited as collateral security were worthless. The claim was not barred by the Statutes of Limitation. Time did not run against the Crown, nor against its agents and trustees: *CHITTY ON THE PREROGATIVE OF THE CROWN* (1820 Edn. at p. 388); *LIGHTWOOD'S TIME LIMIT ON ACTIONS*, p. 224. The operation of the statute was suspended: *Lambert v. Taylor* (2); *Perry v. Eames* (3); *Administrator of Austrian Property v. Russian Bank for Foreign Trade* (4). If the Russian private banks were abolished by the decree of Dec. 14, 1917, there was no debtor to be sued, and the statute never began to run: *Companies Act, 1929, s. 388*; *Russian and English Bank v. Baring Bros., Ltd.* (5); *Lazard v. Midland Bank* (1); *Re Russian Bank for Foreign Trade* (6). A decree of the Soviet government did not affect a debt situate here: *Douglas v. Forrest* (7); *Musurus Bey v. Gadban* (8); *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (9); and *Banque Internationale de Commerce de Petrograd v. Goukassow* (10).

Cohen, K.C., and V. R. Idelson for the liquidator.—If the Russo-Asiatic Bank was not dissolved on or before March, 1918, the dissolution abroad would not prevent the statute from running. We submit, on the authorities, that the bank was in existence on March 25, 1918. When there is a conflict of evidence as to the effect of foreign law the court is entitled to examine the code and to form its own opinion: *Concha v. Murrietta* (11); *Di Sora v. Philipps* (12). The relation between the Bank of England and the Crown is that of trustee and cestui que trust: see *Re Steel Wing Co., Ltd.* (13); *Williams v. Atlantic Assurance Co.* (14); *Roxburghe v. Cox* (15); *Rhodes v. Smethurst* (16); *Perry v. Eames* (3). The interpretation of a bill of exchange is governed by the law where the contract is made, except where it is indorsed in a foreign country: *Bills of Exchange Act, 1882, s. 72*; *BYLES ON BILLS* (18th Edn. at p. 307); *Archer's Case* (17); *Allen v. Kemble* (18). The debt is a simple contract debt, and, therefore, situate in Russia: see *Attorney-General v. Bouwens* (19); *English, Scottish, and Australian Bank, Ltd. v. Inland Revenue Commissioners* (20); *New York Life Insurance Co. v. Public Trustee* (21). A branch surviving in England, though the main stem has been destroyed, is not

new in our law: *Lazard Bros. & Co. v. Midland Bank, Ltd.* (1); *Russian and English Bank v. Baring Bros. & Co.* (5); *Russian Commercial Bank v. Comptoir d'Escompte de Mulhouse* (9). The Statute of Limitations is a defence to the claim.

Van den Berg, K.C., and H. S. G. Buckmaster for the Russian Bank for Foreign Trade.

The Attorney-General in reply.

Cur. adv. vult.

July 23. **EYE, J.**, read a judgment in which he stated the facts as set out above and continued: The first point raised by the liquidator was that the arrangement was one which concerned the Bank of England, and that the Crown was really not interested therein, but the uncontradicted statements in the affidavit of Mr. Sigismund Waley, Principal Assistant Secretary to the Treasury, filed on Nov. 8, 1933, wherein he deposes that by a letter dated Jan. 18, 1918, the Lords Commissioners of His Majesty's Treasury, acting on behalf of His Majesty, authorised the governor and company of the Bank of England, on behalf of His Majesty, to accept from the said twenty-one banking houses assignments of the respective rights of the said banking houses, and in consideration of the said assignments to issue to the said twenty-one banking houses Exchequer Bonds, effectually disposed of this point.

It was then argued that the assignments executed in pursuance of that authority did not pass to the Crown or to the Bank of England on behalf of the Crown, the rights under S.D.W.3, it being assumed and, as I think, rightly, that in a case like this where the respective rights are the subject-matter of an elaborate arrangement reduced into writing, recourse to general principles is not open to the parties—they are bound by the documents into which they have entered, and there is no room for implications. The point resolves itself into a question of construction. Did the assignment of January, 1918, include the right of action, that is, an action to recover damages for breach of contract under S.D.W.3? I think it did. The language of the concluding part of the first paragraph:

"All our rights, claims and demands against the drawers and the Banque de l'Etat and any other parties to the said bills and under the above arrangement"

that is the arrangement embodied in the document of Oct. 1, 1915—"and our agreement with the Banque de l'Etat made under that arrangement," is, in my opinion, sufficient to include all the rights of action under S.D.W.3, and the rest of the document S.D.W.6 strongly supports this view; it is directed expressly to proceedings to enforce such rights. But, although the adoption of the construction contended for by the liquidator might, indeed I think would, have disposed of the claim of the bank as agent or trustee for the Crown, the construction I have adopted does not do more than give them an equitable title only. They could not recover without joining the acceptors as parties, and in these circumstances they are willing to let the claim be dealt with on the footing that before it is finally disposed of the assignors must be before the court.

I ought, perhaps, before dealing with this point, to have directed attention to the various grounds on which the respondent relies as justifying his rejection of the proof. Several grounds of objection have been put forward, but counsel is content to confine himself to some of those contained in one or other of the two notices dated Dec. 18, 1933, and Jan. 23, 1934. What I have so far dealt with is covered by paras. 2 and 5 of the earlier notice and paras. 3, 4, and 5 of the later one. Paras. 1 and 7 of the former and para. 1 of the latter are not insisted upon and there survive paragraphs which raise the following points: (a) that the liabilities of the drawer of the bills referred to in the proof of debt are governed by Russian law; (b) that the agreements between the Russo-Asiatic Bank and the English banks became impossible of performance and the debts thereunder were discharged by the operation of Russian law; (c) that under the agreements between the Banque de l'Etat and the various accepting banks and houses it was agreed that

in the events that have happened sterling treasury bills of the imperial Russian government would be accepted in full satisfaction of the indebtedness of the company to the accepting banks and houses; and (d) that the only effect, therefore, of the purported assignment in favour of the Crown can be the vesting in the Crown of the right to demand from the Bank of England the said treasury bills; and last, but by no means least, that the amounts claimed in the proof were barred by the Statute of Limitations.

No evidence has been tendered in support of the alleged agreement on the part of the acceptors to accept in the events which happened the treasury bills of the imperial Russian government in satisfaction of the indebtedness of the Banque de l'Etat to the accepting banks and houses. Such bills, as I have already indicated, never had any value, and by an order duly made by the Department of Local Institutions of the People's Bank of the Russian Socialist Federal Soviet Republic on April 16, 1918, it was declared that they were out of circulation and that no payment of the same could be allowed. Apart, however, from this, it is, I think, quite plain that they were lodged with the Bank of England as collateral security for the engagement of the Russian banks to put the London banks and accepting houses in funds to meet their acceptances within one year of the termination of the war. This conclusion disposes, I think, of the objections raised in paras. (c) and (d).

There still remain for consideration the allegations (i) that the liability of the drawers of the bills referred to in the proof is governed by Russian law, which by its operation has discharged all the said liabilities or alternatively has vested them in the Russian State; and (ii) that the amounts claimed in the proof are barred by the Statute of Limitations. The answer to the former of these questions depends on the construction of the contract between the drawers and acceptors of the bills and in this connection the fact that the bills were paid by the acceptors and that no action can be brought upon them must not be lost sight of; and although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London. I think the law to be applied is the English, and not the Russian law.

The answer to the second of the above questions depends upon the date to which the dissolution of the Russian banks is to be assigned. This is a question of fact, and I have been assisted in an attempt to arrive at a right conclusion by the evidence-in-chief, and under cross-examination, of the well-known and highly qualified experts whose evidence has been a feature of many previous trials, by reference to a series of documents emanating from acquisitive bodies identified with the Soviet government and an exhaustive citation of all the reported and some unreported cases wherein the point has been fully discussed. One cannot, I think, apply one's mind to these materials without appreciating that they disclose a gradual inclination towards the opinion which Mr. Konkevitch has repeatedly expressed, that the joint stock banks ceased to possess a juristic personality in December, 1917, or at the latest in January, 1918. I accept that view, and I hold that corporate existence of the respondent bank ceased on or before Jan. 26, 1918. The result is that the Statute of Limitations has no application and the applicant is, in my opinion, entitled to be admitted to prove as a creditor in the winding-up. The costs of all parties will be paid out of the assets. There will be general liberty to apply.

A similar order will be made in the case of the Russian Bank for Foreign Trade.

Solicitors: *The Treasury Solicitor; Gilbert Samuel & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

AGER v. GATES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), March 23, 1934]

[Reported 151 L.T. 98; 98 J.P. 223; 32 L.G.R. 167; 30 Cox, C.C. 105]

Nuisance—Statutory nuisance—Abatement notice and order—No objection or appeal by owner—Order for penalties—Appeal to quarter sessions—Jurisdiction of quarter sessions to question validity of original order and notice—Public Health Act, 1875 (38 & 39 Vict., c. 55), ss. 94, 95, 96, 98.

On failure by an owner of premises to abate a nuisance thereon when required by notice to do so, the sanitary inspector caused a complaint to be preferred to a court of summary jurisdiction. The owner made no objection to the contents of the notice and the court made an order requiring him to abate the nuisance. He did not appeal against that order. On the failure of the owner to comply with the order the sanitary inspector caused a further complaint to be preferred before the same court, which ultimately made an order imposing penalties on the owner. Against that order the owner appealed to quarter sessions, and on the hearing of the appeal he, for the first time, took objection to the original notice and the abatement order. The court of quarter sessions allowed the appeal on the ground that the original notice and order were bad.

Held: as no objection had been made to the original complaint and no appeal had been brought against the abatement order, the court of quarter sessions on an appeal against the order imposing penalties had no jurisdiction to inquire into the validity of the original notice and the abatement order.

Notes. Sections 94, 95, 96 and 98 of the Public Health Act, 1875, were repealed by the Public Health Act, 1936, being replaced by ss. 93, 94 (1), 94 (2) and 95 (1) of the later Act respectively. As to appeals to quarter sessions, see s. 301 of the Act of 1936.

As to summary proceedings for nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 97 et seq., and for cases see 36 DIGEST (Repl.) 332 et seq. For Public Health Act, 1936, see 19 HALSBURY'S STATUTES (2nd Edn.) 302.

Case referred to:

- (1) *Warman v. Tibbatts* (1922), 128 L.T. 477; 87 J.P. 53; 21 L.G.R. 184, D.C.; 36 Digest 273, 253.

Case Stated by Essex Quarter Sessions.

The respondent, Gates, was at all material times owner of premises in the rural district of Romford. On July 8, 1932, the appellant, Ager, the sanitary inspector of the Romford Rural District Council, by notice of that date, required the respondent to abate an alleged nuisance then existing on the premises. The respondent failed to obey the notice, and on Oct. 4, 1932, the appellant caused a complaint relating to the alleged nuisance to be preferred to a court of summary jurisdiction. On Oct. 20, 1932, the court made an order requiring the respondent to abate the nuisance. The respondent did not appeal against that order, nor did he comply with it, and on Dec. 20, 1932, the appellant caused a further complaint to be preferred to the same court. At the hearing the appellant gave evidence that certain of the works specified in the order of Oct. 20 had not been carried out by the respondent, and on the respondent's solicitor giving an undertaking on behalf of his client to complete the works, the matter was adjourned to Feb. 23, 1933. The works were not completed, and on Feb. 23, 1933, the court of summary jurisdiction made an order imposing penalties on the respondent. Against that order the respondent appealed to quarter sessions, and on the hearing before quarter sessions he, for the first time, took objection to the original notice and order, on

the ground that it contained two items of work which the respondent could not be required to do under s. 94 of the Public Health Act, 1875.

The following facts were admitted or proved at the hearing before the court of quarter sessions: (a) The respondent was at all material times the owner of premises situated in the parish of Great Warley, in the rural district of Romford. (b) On July 8, 1932, the appellant, pursuant to s. 94 of the Public Health Act, 1875, by notice of that date duly served on the respondent, required the respondent to abate an alleged nuisance then existing in the premises. (c) On Oct. 4, 1932, the respondent having failed to obey the notice, the appellant, pursuant to s. 95 of the Public Health Act, 1875, caused a complaint relating to the alleged nuisance to be made to a court of summary jurisdiction at Brentwood. On Oct. 20, 1932, an order was made by the court, under s. 96, whereby the respondent was required to abate the nuisance. That order was duly served on the respondent. (d) On Dec. 20, 1932, the appellant, pursuant to s. 98 of the Public Health Act, 1875, caused a complaint to be made to the court of summary jurisdiction. The appellant at the hearing gave evidence to the effect that certain of the works specified in the order of Oct. 20, 1932, had not been carried out by the respondent, and on the respondent's solicitor giving an undertaking on behalf of his client to complete the works, the matter was adjourned to Feb. 23, 1933. (e) The works were not completed, and on Feb. 23, 1933, the court of summary jurisdiction made an order imposing penalties, and that order was duly served on the respondent. (f) On March 1, 1933, the respondent served notice of appeal against the order of Feb. 23, 1933.

It was contended on behalf of the respondent: (i) that the notice of July 8, 1932, and the order of Oct. 20, 1932, contained two items of work which the respondent could not be required to do under s. 94 of the Public Health Act, 1875, namely, "fix a door to copper furnace" and "thoroughly repair and renew cooking stove"; (ii) that the notice of July 8, 1932, and the order of Oct. 20, 1932, were bad and of no legal effect, and alternatively so much of the notice and order as referred to the two above items was bad and of no legal effect; (iii) that accordingly the order of Feb. 23, 1933, was invalid and should be quashed.

It was contended on behalf of the appellant: (i) that it was not competent to the court of quarter sessions nor to the court of summary jurisdiction, when hearing a complaint under s. 98 of the Public Health Act, 1875, to consider the validity of the order of Oct. 20, 1932, made pursuant to s. 96 of the Act; (ii) that the respondent, having failed to appeal against the order of Oct. 20, 1932, was estopped from denying its validity; (iii) that, the respondent having failed to satisfy the court that he had used all due diligence to carry out the order of Oct. 20, 1932, within the meaning of s. 98 of the Act, the court of summary jurisdiction were right in making the order of Feb. 23, 1933; (iv) that it was not possible to decide whether the two items of which the respondent complained were such as could be included in such a notice and the order without hearing evidence regarding them.

The court were of opinion that the contentions of the respondent were correct and that, upon the authority of *Warman v. Tibbatts* (1), the items relating to the door to the copper furnace and repair of the cooking stove were matters which could not properly be included in a notice under s. 94 of the Public Health Act, 1875, and that, as the notice was bad in part, it was bad as a whole and that, accordingly, the order of Oct. 20, 1932, was bad. The court allowed the appeal with costs.

The sanitary inspector appealed, by Case Stated, to the Divisional Court. The question for the opinion of the Divisional Court was whether, on the facts above stated, the court of quarter sessions were right in point of law.

Section 94 of the Public Health Act, 1875, provided that a local authority, if satisfied of the existence of a nuisance, should serve a notice requiring, *inter alia*, the owner or occupier of the premises on which the nuisance arose

"to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Section 95 empowered the local authority, if such notice were not complied with, to prefer a complaint before a court of summary jurisdiction. Section 96 empowered a court of summary jurisdiction to make an order requiring abatement of the nuisance. Section 98 provided that

"Any person not obeying an order to comply with the requisition of the local authority or otherwise to abate the nuisance shall, if he fails to satisfy the court that he has used all due diligence to carry out such order, be liable to a penalty. . . ."

P. C. Lamb for the appellant.

E. J. P. Cussen for the respondent.

LORD HEWART, C.J.—I am clearly of opinion that this appeal ought to be allowed. The respondent appealed to quarter sessions from an order imposing penalties and then sought, and sought successfully, to raise the point that two items in the notice and order were such as could not properly be required to be done under s. 94 of the Public Health Act, 1875. In other words, he sought to take that point after three stages at least had been passed. He had taken no such objection to the order requiring the work to be done, and he had not appealed to quarter sessions against that order; on the contrary, he had obtained an adjournment upon an undertaking given by his solicitor that he would complete the work. In my opinion, it was not open to him afterwards, upon appeal to quarter sessions against the order imposing penalties, to question the contents of the original order.

The court of quarter sessions appears to have been misled by the citation of *Warman v. Tibbatts* (1), but it is apparent when one looks at that case that it had nothing whatever to do with this matter. In *Warman v. Tibbatts* (1) a Case had been stated by a metropolitan police magistrate arising out of the preferring of an original complaint against the owner of a workhouse for allowing a nuisance to exist in that workhouse. If the respondent here had acted with due diligence he might either have obtained a Case Stated upon the nature of the original order or he might have appealed to quarter sessions, but he took neither of those steps. It seems to me that *Warman v. Tibbatts* (1) has no more relation to the matter which was before the court of quarter sessions in the present case than, for example, a case in the Probate, Divorce and Admiralty Division. Some elements of ingenuity seem to have led the court into giving a decision based on quite irrelevant material.

I am of opinion that the appeal must be allowed, and the order of quarter sessions reversed.

AYORY, J.—I am of the same opinion. I do not think that it was competent for the court of quarter sessions to inquire whether the two items referred to in the notice could properly be included therein, as there was no evidence that on the original complaint objection had been taken to either item—and the court had power on the original hearing to make any necessary amendment—and as there was no appeal from the order made for the abatement of the nuisance, I think that the court of quarter sessions had no jurisdiction to inquire into those items, especially in view of the fact found

"that it was not possible to decide whether the two items of which the respondent complained were such as could be included in such a notice and (or) order without hearing evidence regarding them."

No evidence was given to show that these items or one or other of them might not be a nuisance in the circumstances of this particular case. The fact that it was held in *Warman v. Tibbatts* (1) that a hole in an oven was not a proper subject of proceedings under s. 94 seems to me to have no bearing on the present case, particularly in view of the reason given by the magistrate in that case for holding that the oven did constitute a nuisance. I agree that that case has no bearing on the present point: and that, in view of the fact that there was no appeal at the

proper time, quarter sessions were wrong in going into the merits of the particular terms in the order.

TALBOT, J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Bentleys*, for *Symons & Gay*, Romford; *R. C. Monty Hellier*.

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

COUNTESS RUSSELL v. EARL RUSSELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), November 15, 16, 22, 1934]

[Reported [1935] P. 39; 104 L.J.P. 10; 152 L.T. 283; 51 T.L.R. 173; 78 Sol. Jo. 930]

Divorce—Discretion—Disclosure of adultery—Agreement by separation deed not to plead or allege previous adultery—Need to disclose such adultery and pray for discretion in respect thereof—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 178, 181 (1), 198—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 4, s. 10 (1), s. 32 (3).

The fact that the parties to a suit for divorce have by deed agreed not to plead or allege certain adultery committed by them before the deed does not permit a party to seek a decree without disclosing such adultery committed by him and praying for the exercise of the court's discretion in respect thereof.

Dictum of SIR F. JEUNE, P., in *Gooch v. Gooch* (1), [1893] P. 99 at p. 106 applied.

Rose v. Rose (2) (1883), 8 P.D. 98, *L. v. L.* (3), [1931] P. 63, and *Hyman v. Hyman* (4), [1929] A.C. 601 considered.

Notes. Rule 28 of the Matrimonial Causes Rules, 1957, S.I. 1957 No. 619, now requires every party to a matrimonial cause praying for the exercise of the court's discretion to grant a decree nisi notwithstanding his adultery to lodge a discretion statement, and provides for the matters to be specified therein and the procedure to be followed. Rule 4 (4) makes it obligatory to include in the petition, "in appropriate cases, a prayer that the court will exercise its discretion to grant a decree notwithstanding the adultery of the petitioner during the marriage." Notice to the other spouse of allegations of a matrimonial offence made in a discretion statement is obligatory: see r. 28 (4) inspection of the statement is governed by r. 28 (5) and the effect of the decision in *Russell v. Russell* (5) [1924] A.C. 687, has now been taken away by s. 32 (1) of the Matrimonial Causes Act, 1950. Sections 198, 178, and 181 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, are now respectively ss. 32 (3), 4, and 10 (1) of the Matrimonial Causes Act, 1950.

Followed: *N. v. N. & L.*, [1957] 1 All E.R. 914.

As to the effect of an agreement not to plead or allege certain adultery or the need to pray for discretion in respect of such adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 319, para. 641, text and note (k).

For the Matrimonial Causes Act, 1950, s. 4, s. 10 (1), s. 32 (1), (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 394, 398, 417.

Cases referred to:

- (1) *Gooch v. Gooch*, [1893] P. 99; 62 L.J.P. 73; 68 L.T. 462; 41 W.R. 655; 9 T.L.R. 303; 1 R. 516; 27 Digest (Repl.) 440, 3698.
- (2) *Rose v. Rose* (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 31 W.R. 573, C.A.; 27 Digest (Repl.) 493, 3616.
- (3) *L. v. L.*, [1931] P. 63; 100 L.J.P. 76; 144 L.T. 723; 47 T.L.R. 260; 75 Sol. Jo. 192; 27 Digest (Repl.) 377, 3105.
- (4) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 45 T.L.R. 444; 73 Sol. Jo. 317; 27 L.G.R. 379, H.L.; 27 Digest (Repl.) 235, 1888.
- (5) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; 27 Digest (Repl.) 318, 2649.
- (6) *Apted v. Apted and Bliss*, [1930] P. 246; 99 L.J.P. 73; 143 L.T. 353; 46 T.L.R. 456; 74 Sol. Jo. 338; 27 Digest (Repl.) 428, 3588.
- (7) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 25 T.L.R. 291; 53 Sol. Jo. 265, C.A.; 27 Digest (Repl.) 363, 3005.
- (8) *Phillips v. Phillips*, [1917] P. 90; 86 L.J.P. 57; 116 L.T. 544; 33 T.L.R. 226; 61 Sol. Jo. 370; 27 Digest (Repl.) 292, 2377.
- (9) *Cullen v. Cullen*, [1933] P. 218; 102 L.J.P. 81; 149 L.T. 323; 49 T.L.R. 469; 77 Sol. Jo. 447, C.A.; 27 Digest (Repl.) 427, 3575.
- (10) *Bevis v. Bevis*, [1935] P. 22; 151 L.T. 560; 103 L.J.P. 110; reversed [1935] P. 86; 104 L.J.P. 41; 152 L.T. 545; 51 T.L.R. 291; 79 Sol. Jo. 194, C.A.; 27 Digest (Repl.) 324, 2696.
- (11) *Rowley v. Rowley* (1866), L.R. 1 Sc. & Div. 63; 35 L.J.P. & M. 110, H.L.; 27 Digest (Repl.) 376, 3103.
- (12) *Heath v. Heath and Frost*, not reported.
- (13) *Besant v. Wood* (1879), 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443; 27 Digest (Repl.) 236, 1894.

Divorce Petition, dated March 15, 1934, by Countess Russell, née Black, of Telegraph House, Harting, Petersfield, Hampshire, praying for the dissolution of her marriage with Earl Russell on the ground of his adultery with a Miss Marjorie Spence since the beginning of 1933. The marriage took place in September, 1921. The petition did not embody a prayer for the exercise of the discretion, and was not defended.

Bayford, K.C. (with him *R. M. Middleton* and *H. E. Salt*) for the petitioner, the wife.—The petitioner has herself been guilty of adultery committed before a deed of separation dated Dec. 31, 1932, but the existence in the deed of a mutual *Rose v. Rose* (2) clause debars the petitioner from going into matters adverse to the respondent occurring before the deed. The covenant was as follows:

"No proceedings shall be commenced or prosecuted by or on behalf of either of them the husband or the wife in respect of any cause of complaint which now exists or has arisen before the date of these presents, and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence."

Any statement put forward for the court to consider under the direction in *Apted v. Apted and Bliss* (6) must of necessity be purely a one-sided statement which would place the petitioner in an entirely wrong position before the court. The object of such a statement to the court is not only that everything which can be stated against the petitioner should be set out, but also all the material as against the other party which the court would have to take into consideration in deciding

on the question of discretion. If the petitioner is barred by covenant from saying anything with regard to the other party, it means of necessity that any such statement would be one-sided, conveying to the court a false impression of the real situation. The whole object of the direction and practice following *Apted v. Apted* (6) is that the court should have everything before it, but I doubt if there is any decision of the court which alters the effect of the statute or what the court has to consider under the statute. The separation deed shows that the petitioner committed adultery and that the respondent condoned it. It would not be right for the court to go behind the covenant.

Evidence was given of the respondent's adultery with the woman named. The petitioner, in evidence, admitted adultery anterior to the deed of separation with two named men, and said that she had not otherwise committed adultery.

Counsel said that by virtue of the covenant he could not put anything more before the court, and he asked for a decree on the footing of his submission, coupled with the evidence.

SIR BOYD MERRIMAN, P.—That is quite impossible. To do so would mean that, in every undefended suit, it would only be necessary, provided the suit remained undefended, to enter into a deed of separation with a *Rose v. Rose* (2) clause two or three months, or some suitable and decent interval, before a petition was presented on the ground of adultery subsequent to the date of the deed, and the court would then be precluded from hearing from any source whatever—because it “shall not be admissible in evidence”—anything about the conduct conducing of the other party. I am expected, in this case, to pronounce a decree nisi without knowing anything about the antecedent history and being debarred from knowing anything about it except from the King's Proctor, if he chooses to bring the facts to my knowledge. The argument raises a point which cuts at the whole root of the court's duty under s. 178 of the Judicature Act, 1925, of inquiring into the whole of the relevant facts. If I were to accede to the petition it would mean that proceedings in this court would soon be radically altered in every undefended suit where the parties could afford a deed of separation. I do not propose, without further argument, to afford the opportunity for so radical a change in the law and practice of the Divorce Court. I will invite the assistance of the King's Proctor for the purpose of considering the whole matter.

The hearing was resumed on Nov. 15, 1934.

The Attorney-General (Sir Thomas Inskip, K.C.) and Clifford Mortimer for the King's Proctor.—Though the clause in *Rose v. Rose* (2) has attained a certain validity and status, the authorities do not go beyond the proposition that a spouse who has made a covenant as in the first part of the covenant in the present case cannot take action against the other spouse in respect of matrimonial offences committed before the deed. The first part of the clause cannot be held to be invalid as against public policy. The second part of the clause, from the words “and every offence” to the word “condoned,” is a very special form of condonation which does not permit, as between the parties, a fresh matrimonial offence committed after the date of the deed to revive one committed before. The third and final part of the clause, however, is said to restrict and negative the duty of the court under s. 178 of the Supreme Court of Judicature Act, 1925, to inquire into the material facts. It would be a very remarkable result if the effect of a covenant of that sort were to alter the duty of the court, and I submit that that part of the covenant would not bind the court. The parties may regulate their arrangements inter se by contract, the husband binding himself not to recriminate, or, in other words, not to claim relief on facts which but for the deed might be a basis for relief. But how is the court to discharge its duty on the footing that facts which have been brought to its notice do not exist? The petitioner's case is that she cannot plead or give evidence of conduct conducing or of condonation by reason of her covenant.

It would be most material for the court to know facts of which, according to counsel for the petitioner, she was precluded from giving evidence by the last part of the clause. The decisions on *Rose v. Rose* (2) do not establish the validity of that part of the clause if it is intended by it to force the court to shut its eyes to facts which might radically alter the position. It would be putting the court in an utterly false position. If, aliunde or by the evidence of a third party, the court were informed of circumstances which might affect the exercise of the discretion, the court would nevertheless, if counsel for the petitioner's argument were supported, have to be blind to those facts because of the covenant between the parties. The cases show that parties may be estopped by their own agreement from claiming relief on the ground of adultery which took place before the date of the deed. That is very different from saying that a petitioner may take advantage of the deed by refraining from making disclosures for the purpose of obtaining the exercise of the discretion, which would deprive the court of carrying out its duties under s. 178 of the Supreme Court of Judicature Act, 1925. In *Rose v. Rose* (2) it was decided, within narrow limits, that the covenant deprived the spouses of the right to attack each other, but the decision did not go so far as to say that the parties could give themselves new rights. That was pointed out by SIR FRANCIS JEUNE, P., in *Gooch v. Gooch* (1), in which the form of clause merely restrained the parties from setting up matrimonial offences already existing. In *Hyman v. Hyman* (4) the Master of the Rolls said ([1929] P. at p. 28):

"The court is charged under the original Acts, and the Consolidation Acts, to be satisfied in divorce suits that the case has been proved, that there has not been connivance or collusion for the purpose of obtaining a divorce 'contrary to the justice of the case,' that there has not been condonation, and that its interference is justified. The court cannot forgo its duties; it cannot be bound by an estoppel between the parties."

The Master of the Rolls cited with approval a dictum of LORD COZENS-HARDY, M.R., in *Harriman v. Harriman* (7) ([1909] P. at p. 131), pointing out that no admission of cruelty or adultery, however formal, could bind the court. In *Hyman v. Hyman* (4) SCRUTTON, L.J., said ([1929] P. at p. 30):

"The Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie and the terms on which it should be dissolved involve far wider considerations than the will or consent of the parties to the marriage. The court does not, as other courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions. . . . Many arguments between husband and wife will not be recognised, as being contrary to public policy. . . . The alteration of the status of marriage involves considerations beyond the private agreement of the parties."

When the same case came before the House of Lords LORD HAILSHAM, L.C., said ([1929] A.C. at p. 613) that

"a covenant not to invoke the jurisdiction of the court to order permanent maintenance in a suit for dissolution of marriage is not a bar to such an application being made."

LORD BUCKMASTER said (at p. 625):

"Judicial separation . . . is nothing but enforcing through an order of the court an arrangement which the parties could—were they willing—equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart, but divorce destroys the whole relationship, and only by remarriage can it be restored. It is, in my opinion, associated with and inseparable from the power to grant this change of status that the courts have authority to decree maintenance for the wife; and in the exercise of this authority they are in no way bound by the contracts

made between the parties, though . . . the consideration of all contractual rights possessed by the wife must be borne in mind."

Harriman v. Harriman (7) FLETCHER MOULTON, L.J., said ([1909] P. at p. 142):

"The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them."

LORD MERRIVALE dealt with the case of *L. v. L.* (3) on the footing of decisions on the *Rose v. Rose* (2) clause covering the first part of the clause only. The clause in the deed is not binding on the present petitioner to prevent her from giving evidence. She is asking a favour of the court in seeking the exercise of the discretion. She is asking the court to overlook what was a discretionary bar. To hold otherwise would be to make nonsense of the exercise of the discretion, for people could demand a decree by suppressing evidence which might tend to make the court refuse to exercise its discretion. A petitioner could base non-disclosure on the fact that he or she had agreed with the other spouse that no such evidence should be given.

During the argument the President asked what was the view of the King's Proctor about the desirability or otherwise of the present practice of filing a statement of facts when the discretion was sought.

The Attorney-General.—The King's Proctor holds the view very strongly that difficulties in carrying out the practice should not lead to its withdrawal. He would be very sorry indeed if that were done.

Bayford.—There being a *Rose v. Rose* (2) clause in this case, the court cannot go behind it and call on either of the parties to go into the matters which they agreed were not to be pleaded or be admissible in evidence. The covenant of the parties does not purport to affect the duty of the court under the statute, but it prevents them from giving evidence. According to LORD MERRIVALE in *L. v. L.* (3), there is no statutory duty on the parties to give such evidence. That is so even if the court inquired into any suggestion of collusion; they would not be compellable witnesses. Questions of connivance or collusion may be brought before the court by the King's Proctor or a member of the public, but all that the court can do, if it is not satisfied, is to send the papers to the King's Proctor for inquiry. If the court takes a contrary view, I ask for leave to amend the petition by inserting a prayer for the exercise of the discretion and to lodge a statement by the petitioner.

Other points in the argument for the petitioner are dealt with in the judgment.

Clifford Mortimer (replying).—There would be no need to invoke the exercise of the discretion at all if a *Rose v. Rose* (2) clause were held to make everything that had happened before a closed book. In *L. v. L.* (3) the wife petitioner was not guilty of any matrimonial offence at all, and therefore there was no need to invoke the exercise of the discretion. It was true that the husband set up a counter-charge, but in fact the King's Proctor made investigations and found no foundation for any charge of adultery. What LORD MERRIVALE said to the respondent, in striking out his charges, was, in effect: "You have no duty cast on you by statute to recriminate." The *Rose v. Rose* (2) clause was designed to prevent hostile recrimination between the parties, and it could not affect the position of a person who sued for divorce and had to invoke the exercise of the discretion. Moreover, a line of cases of which the principal was *Phillips v. Phillips* (8) laid it down that the court would not have regard to an estoppel by deed unless the respondent set it up, and here the respondent was taking no part in the suit.

The hearing was adjourned for the discretion statement to be filed and notice of it given to the respondent.

Nov. 22, 1934. At the resumed hearing it was stated that the respondent had been served with notice of the petitioner's intention to pray for the discretion and to file a statement in accordance with the usual practice, and the respondent had intimated that he did not intend to take any part in the proceedings.

The President gave formal leave for the petition to be amended by inserting a prayer for the exercise of the discretion and for a statement to be filed forthwith. The statement was accordingly placed before the court, and the petitioner deposed to the truth of its contents.

SIR BOYD MERRIMAN, P.—This is a wife's petition for divorce on the ground of her husband's adultery. The petition contained no prayer for the exercise of the discretion of the court. The registrar's certificate was obtained on the basis that it was an ordinary undefended case, and the suit appeared accordingly in the undefended list. In opening the petition counsel for the petitioner called attention to the absence of any prayer for discretion. He stated that the omission was deliberate, and was justified by the existence of a deed of separation containing a clause in the identical form approved in *Rose v. Rose* (2). [His Lordship recited the clause, which is set out at p. 570, ante, and continued:] Counsel for the petitioner added, however, that the deed of separation itself showed that the petitioner had been guilty of adultery, and stated that his client was praying for the discretion of the court notwithstanding the failure to follow the prescribed procedure, which he submitted was not obligatory and had no sanction in the statute or rules. The court would be asked to exercise its discretion on such facts as could be stated by the petitioner consistently with her covenant in the deed of separation, but this covenant, he argued, prevented the wife from informing the court of any matrimonial history anterior to the deed implicating the husband, however relevant it might be to the issue.

It is true that there is no provision in any statute or rule of court [but see now Matrimonial Causes Rules, 1957, No. 4 (4), 28] as to the procedure to be followed in a suit in which the petitioner is compelled to invoke the discretion of the court, but since *Apted v. Apted and Bliss* (6) it has been the practice to require that the petition shall contain a prayer to this effect, and that a statement setting forth the facts which require the exercise of discretion and the grounds on which it is prayed—usually referred to as the discretion statement—shall be lodged. This practice has been approved by the Court of Appeal in *Cullen v. Cullen* (9). I am satisfied that the practice is beneficial and that, with proper safeguards against abuse, it is of great assistance to petitioners. It has long been established that the utmost candour is necessary on the part of a petitioner who is invoking the exercise of the discretion. No one is obliged to petition for divorce. By doing so a petitioner is assumed to volunteer the disclosure of his own adultery. No infringement of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925 (relating to the rule of evidence as to questions tending to show adultery), is involved in requiring him to give evidence of it. Indeed it is difficult, in view of s. 178 of that statute, to see how otherwise anything which could fairly be regarded as discretion could be exercised. A petitioner, particularly if he is nervous in the unfamiliar surroundings of a court, may, without any intention of deceiving the judge, forget to give evidence of some material particular of his own misconduct. He may then find himself in great difficulty if the attention of the King's Proctor is drawn to the omission. On the contrary, failure to disclose material facts is unlikely to occur by inadvertence if the matter has been carefully discussed between the petitioner and his solicitor and the facts have been reduced into writing.

Recently it has become the practice that notice shall be given to the other spouse of any allegation of conduct on his or her part, not referred to in the pleadings which the petitioner is making by way of excuse for his or her own adultery. In the argument in this case the King's Proctor made it plain that he attached the greatest importance to the preservation of this practice. It is, however, necessary that petitioners should be safeguarded from any hostile use of the statement, so that there may be no indirect contravention of s. 198. In *Cullen v. Cullen* (9) the Master of the Rolls said ([1933] P. at p. 218):

"There is no indication that it was intended by the practice or by the sections

that this statement revealing the petitioner's adultery was to enure in favour of the other spouse. It is plain, therefore, that there is a discretion given to the court as to how it will exercise the powers given it under the proviso to s. 178."

It is the practice, therefore, not to permit any other party to inspect the statement on the file without leave of a judge. It has recently been held by LANGTON, J., in *Bevis v. Bevis* (10), that the statement is not admissible as evidence on which to found a petition against the spouse making it.

In the course of the argument in the present case it soon became apparent that issues much more important than any mere point of procedure or practice were raised. As the argument developed it took two forms which are mutually inconsistent. It was said, first, that the existence of a deed containing the clause in question relieved the petitioner of any obligation to refer to her antecedent adultery on the ground not merely that it had been condoned by the deed, but that all rights in respect of it had been completely released by the husband, and indeed that, by the very wording of the clause, "no act [of the petitioner] in relation to any such offence shall be . . . admissible in evidence." However, as I have already stated, counsel for the petitioner began by opening that adultery had been committed, and the second branch of his argument was that the court ought to exercise discretion in favour of the petitioner, notwithstanding such adultery, on the ground that the deed of separation was conclusive to show that it had been condoned by the husband, and obliged the petitioner to refuse, and the court to uphold her refusal, to give any further evidence of the circumstances in which she committed adultery, or of the matrimonial history in so far as it was relevant in extenuation of her offence. It is manifest that either branch of the argument would have the most far-reaching consequences. No simpler method could be devised for the presentation of collusive suits. Nor was the probability that this result would follow diminished by counsel's subsequent argument that, though actual collusion would vitiate such a deed, and though in certain circumstances the existence of the deed itself might be evidence of collusion, it was not open to the court to go behind the deed unless and until there was a formal allegation of collusion and its existence had been proved aliunde.

That the full implications of this submission may be understood it is only necessary to suppose a case where for a long period before the date of the deed both parties had been living to each other's knowledge in adultery, the conduct of each conducing to that of the other, and in which the wife filed a petition based on evidence of an act of adultery committed by the husband shortly after the execution of the deed. Counsel for the petitioner admitted that such a matrimonial history, coupled with the deed, would be cogent evidence that the petition had been presented in collusion. He admitted that his argument led to the conclusion that the adultery of the wife need not, and, indeed, ought not, to be referred to, and that the matrimonial history, and the circumstances in which the deed came to be executed, could not be inquired into unless and until it had been established by some other means that collusion existed.

In these circumstances I thought it necessary before accepting such an argument, to refer the matter, under s. 181 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to the King's Proctor for his assistance, and I have had the great advantage of an argument by the Attorney-General and Mr. Mortimer, who appeared for the King's Proctor.

I now proceed to state the material facts: The parties were married in September, 1921. The husband was forty-nine and the wife was twenty-seven years of age at that date. Since that time the petitioner has given birth to four children. In the course of her evidence the petitioner stated that during the course of her married life, and before the deed of separation, she had committed adultery with two men whom she named; that she had not committed adultery with any other man; and that she had not committed adultery since the deed of separation. She also stated that at the time the deed was executed the respondent knew of her

previous adultery, and that at the respondent's instance her two elder children had been made wards in Chancery.

The deed of separation was dated Dec. 31, 1932. It contained three recitals; the first, a recital of the existence of matrimonial differences; the second, of the birth of the two elder children; and the third, of the birth and parentage of the two other children. Counsel for the petitioner, at the beginning of his opening, said that the deed of separation contained an admission that the wife had committed adultery. There is no such statement in terms, but he was referring to this third recital. He was obliged to admit, however, that by virtue of the decision in *Russell v. Russell* (5) I am not permitted to look at this recital. The admissible evidence, therefore, of the petitioner's adultery, up to this point, is limited to her own statement that she has committed adultery with two men and that the respondent knew about it.

Evidence was called that at an hotel in North Wales the respondent committed adultery with the woman named between September, 1933, and April, 1934. In answer to a question by me, counsel for the petitioner said that this was all the evidence which he proposed to adduce, and invited me to deal with the case on this material. In support of his contention that he was disabled by the covenant in the deed from putting any other evidence before the court, he argued that it was desirable in the public interest that married people should be encouraged to adjust their differences, and submitted that it was difficult to ensure that differences were adjusted without some such clause as was contained in the deed. He relied on *Rowley v. Rowley* (11) and on the fact that the particular clause in this deed had stood unchallenged for fifty years since its approval by the Court of Appeal in *Rose v. Rose* (2), and had recently been approved by LORD MERRIVALE in *L. v. L.* (3).

As to this part of the argument, it seems to me to be established beyond question that, as between the parties, not only is it not against public interest that such a clause should be included in a deed of separation, but that such clauses are positively beneficial.

Counsel for the petitioner admitted that no agreement by the parties could affect the obligation of the court to carry out the duties imposed on it by s. 178. He contended, however, than in *L. v. L.* (3), and in *Heath v. Heath and Frost* (12), heard on May 1, 1933, LORD MERRIVALE had held that the existence of this covenant precluded any inquiry into antecedent misconduct on the part of the petitioner, and obviated the necessity for invoking the discretion of the court. At the least, counsel for the petitioner argued, it prevented the petitioner from giving any evidence herself or tendering any evidence, whether oral or documentary, as to the matrimonial history antecedent to the deed. In the transcript of the shorthand notes of *Heath v. Heath and Frost* (12) Mr. Bayford [who appeared for the petitioner in that case too], in opening the case to LORD MERRIVALE, is reported as follows:

"Mr. Bayford: 'Then there is cl. 9, which is a very important clause. It is the *Rose v. Rose* (2) clause in full.' The President: 'I notice the third and fourth recitals in this separation deed.' Mr. Bayford: 'Under these circumstances I do not propose to go into any matters, whoever may be at fault, anterior to the date of that deed.' "

There is no further comment by LORD MERRIVALE. The report does not show what the third and fourth recitals contained, but Mr. Bayford informs me that the passage I have quoted was intended to convey to LORD MERRIVALE that the wife had been guilty of adultery, but nevertheless was not invoking the discretion of the court, and that LORD MERRIVALE was, in fact, aware of the adultery, and was assenting to this course. I must admit that, on reading the transcript without Mr. Bayford's assistance, this interpretation of the passage did not occur to me, but I need scarcely say that I accept his statement that in some way, whether by reason of the recitals or otherwise, LORD MERRIVALE was aware of the facts.

counsel for the King's Proctor, however, speaking on the instructions of the King's Proctor, made it clear that the King's Proctor had not become aware that there were any such special features in that case, nor was he aware of any other case in which a similar course had been taken to his knowledge. I find myself entirely unable to accept that case as being intended to be a decision on a point of such far-reaching importance.

L. v. L. (3), however, requires closer consideration. In that case a deed of separation was entered into on Dec. 20, 1929, containing a clause identical with the clause in the present case. On Aug. 18, 1930, the wife filed a petition for divorce, based on adultery of the husband since the date of the deed. The petition contained no prayer for discretion. In his answer the husband, while denying the charge of adultery made against him, counter-charged the wife with adultery, the last charge being before the date of the deed. The case came before LORD MERRIVALE on a motion to strike out of the husband's answer the paragraphs making the counter-charge. The argument for the husband took the form that as the wife could not by her own covenant preclude the court from inquiring into antecedent matrimonial offences the clause was against public policy, as being an instrument whereby the court might be deceived and have matters kept from it which were essential to its decision. So far the argument appears to resemble very closely the considerations as to public policy in relation to collusion to which I have already alluded. But there is this important distinction. From this it was sought to deduce the conclusion that it was the duty of the respondent to recriminate and that a covenant which prevented him from doing so was against public policy. This argument might appear to be somewhat bold, having regard to the decisions in *Rowley v. Rowley* (11) and *Rose v. Rose* (2), but it was suggested that public policy in 1931 differed from public policy in 1866, and that the decision of the House of Lords in *Hyman v. Hyman* (4)—that a covenant for the provision of maintenance at a certain date in a separation deed did not preclude the court from awarding the appropriate maintenance on a decree of dissolution—had affected the principle of the decision of *Rose v. Rose* (2). In other words, the question in *L. v. L.* (3) was not whether the covenant absolved the petitioner from making full and free disclosure of her own conduct, but whether it was against public policy that the husband should be prevented from making counter-charges against his wife, notwithstanding his covenant to refrain from doing so. That this is so is made clear both by the report of the argument and by LORD MERRIVALE's judgment ([1931] P. at p. 71):

"Putting it in the broadest way, it is said on behalf of the husband here that these parties, in view of the nature of the statutes and the jurisdiction, could not lawfully enter into an agreement which precluded one or the other of them from alleging misconduct of the other in any proceedings in this jurisdiction affecting their marriage."

The context shows that the emphasis is on the word "alleging."

Again, after referring to the duties imposed on the court by s. 178 of the Supreme Court of Judicature Act, 1925, LORD MERRIVALE said:

"Public interest is said to require that there shall be a complete investigation of the relations of the parties, and the respondent, having been made a suitor, must conform to that requirement of public interest."

He then proceeds to refer to the necessity for a petitioner for divorce, who is seeking the exercise of the discretion, to make disclosure of the facts in respect of which the exercise of the discretion is sought, and adds:

"That, of course, is an important matter in the exercise of the jurisdiction in divorce, but that, so far as I know, is the extreme length to which practice or authority has gone in respect of disclosure of that kind."

And then he adds the significant sentence: "No citizen is under any obligation to become a suitor for divorce." Having regard to the fact that this case was decided

some nine months after his own direction regarding the prayer for discretion, to which reference has already been made, it is inconceivable that in the passage I have just quoted he was intending to impose any limits on the necessity of full and frank disclosure on one who elected to become a suitor for divorce. However, he contrasted with this the supposed obligations on a respondent, who has been made a suitor, to recriminate, held that there was no such duty on the respondent, and reaffirmed that, as between the parties, it was in the public interest that they should enter into an agreement precluding mutual recrimination. It is also worth observing that, having regard to the practice recently instituted by the President's own direction, there could be no question, as the pleadings were constituted, of the exercise of discretion in favour of the petitioner. Nor was there a cross-prayer based on the counter-charge by the respondent husband. The issue on the pleadings as they stood was whether or not the respondent husband should be allowed to defeat the wife's petition by making counter-charges in respect of matters covered by the covenant. I may add that, though nothing appears about this in the report, I was informed by counsel for the King's Proctor, speaking on instructions, that the King's Proctor made a full investigation and was completely satisfied that in fact there was no ground for impugning the wife's conduct in any way.

For these reasons I cannot regard *L. v. L.* (3) as having been intended to decide that a petitioner who has in fact committed adultery is by the existence of the covenant in question absolved from invoking the discretion of the court or from the necessity of making full and candid disclosure of the circumstances in which the discretion is invoked.

It seems to me to be reasonably clear that in *Rose v. Rose* (2) itself the Court of Appeal were not contemplating that any such result would follow from their decision. SIR GEORGE JESSEL, M.R., there said (8 P.D. at p. 99):

"We were referred to another doctrine: it is said that adultery by a husband, however condoned or got rid of by deed, would prevent his obtaining a decree for dissolution, and that this shows that condonation of matrimonial offences is not final. That question may come before the Court of Appeal, and I do not mean to give a concluded opinion upon it, but my present impression is that adultery by a husband which has been condoned is not necessarily a bar to his obtaining a dissolution for adultery of the wife, and the point must be considered as open."

It seems to me that in that passage SIR GEORGE JESSEL, M.R., was saying that on the one hand the fact that the husband has committed adultery is not necessarily a bar to a decree, and that on the other hand the fact that the wife has condoned his adultery is not necessarily decisive, but that the whole matter must be inquired into.

Again, in *Harriman v. Harriman* (7) ([1909] B. at p. 131), LORD COZENS-HARDY M.R., held that the non-cohabitation provision in a magistrate's order, while it might, perhaps, operate by way of estoppel inter partes, could not in any way estop the court.

"For [he said] the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied."

In the same case, at p. 142, LORD JUSTICE FLETCHER MOULTON said:

"By s. 31 of the Matrimonial Causes Act, 1857 [now s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925], the relief is made dependent on the court being satisfied on the evidence that the case of the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them."

This view was expressly approved in *Hyman v. Hyman* (4), particularly in the judgment of the present Master of the Rolls, where he precedes a quotation of the passage from the judgment of LORD COZENS-HARDY, which I have just read, by the words ([1929] P. at p. 28):

"The court cannot forgo its duties, and it cannot be bound by an estoppel between the parties."

The very point which I have to decide, however, seems to me to be covered by a passage in the judgment in *Gooch v. Gooch* (1). In that case it was held that a covenant in a deed of separation, obliging the parties not to begin or prosecute proceedings in respect of any antecedent cause of complaint, was not equivalent to condonation and did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed. The covenant itself differed essentially from that in *Rose v. Rose* (2), but it was argued that it had the same effect. In the course of his judgment LORD ST. HELIER (then MR. F. JEUNE, P.) set out the effect of the covenant in *Rose v. Rose* (2) in words on which I cannot attempt to improve:

"But it is clear, I think, that the parties cannot, by stipulation, produce any higher effect than they can by condonation, or can impose on the court the necessity of granting a judicial separation notwithstanding the adultery of the petitioner. It is clear from the authorities ending with the cases of *Rowley v. Rowley* (11), *Besant v. Wood* (13), and *Rose v. Rose* (2) that no rule of public policy, nor any other rule, prevents parties from agreeing that they will not found an application to the court on past misconduct. The view of the law in the present day, no doubt, is that, as parties can compromise, and agree to compromise, a suit, so they can agree not to bring it, or can agree not to put forward specified matters as foundation for it. But it is altogether another thing to say, and I do not think that any of the last-mentioned cases show that the parties can, by any arrangement between themselves, dictate to the court on what principle relief sought is to be granted. If it is a rule that an adulterous spouse cannot obtain a judicial separation or dissolution except under certain special circumstances recognised by judicial authority, the parties, surely, cannot by any agreement relax or modify that rule. They may contract themselves out of their rights, but they cannot contract the court out of its duty. That would be to make a law for themselves."

For these reasons I indicated to counsel for the petitioner, at the conclusion of his argument, that I did not feel that I had sufficient material on which I could fairly be asked to decide how my discretion should be exercised. Being very reluctant, however, to decide this suit on what I regarded as a misconception of the effect of the covenant, I gave the petitioner yet another opportunity to put herself fairly in the hands of the court. Accordingly she made a discretion statement, and notice of its contents was given to the respondent. The petitioner was recalled and she supported her statement in the witness-box. It suffices to say that her statement shows that both instances of her adultery of which she has spoken were preceded by at least two cases of infidelity on the part of her husband, and that he had been guilty of numerous acts of adultery in circumstances which are usually held to aggravate the offence. I am referring to the fact that she spoke of the infidelity of the respondent with persons in the household or engaged in the business in which they were mutually occupied. Finally, there had been, for at least two years before the deed of separation, association with the woman with regard to whom evidence of adultery after the date of the deed was given. Having considered the facts in this case, I have no hesitation whatever in saying that this is a case in which the court ought to exercise its discretion.

Decree Nisi.

Solicitors: *Rowe & Maw; The King's Proctor.*

[Reported by WILLIAM LATEY, Esq., Barrister-at-Law.]

LONDON AND NORTH-EASTERN RAIL. CO. v. BRITISH TRAWLERS FEDERATION AND OTHERS

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Russell, Lord Macmillan and Lord Wright), January 25, 26, 29, 30, February 22, 1934]

[Reported [1934] A.C. 279; 103 L.J.K.B. 311; 50 T.L.R. 275; 150 L.T. 461]

Dock—Access to public for shipping and unshipping goods—Licence by dock authority limiting use of vehicles for removing goods unshipped—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict., c. 27), s. 33.

The appellants railway company were the owners of a harbour and docks estate constructed under special Acts which incorporated the provisions of the Harbour, Docks, and Piers Clauses Act, 1847, s. 33 of which provides: "On payment of rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods . . ." For many years markets for the sale of fish had been carried on by the appellants on the dock quays, and for most of that time fish bought at the markets for consignment for long distances was conveyed by the appellants' railway, but latterly buyers had increasingly used motor vehicles for such conveyance. The appellants thereupon sought to exclude from the markets any vehicle for which the owner did not hold a licence granted by the appellants which provided that the vehicle should not be used in connection with the transport of fish outside a radius of twelve miles from the markets.

Held: in view of the definition of "dock" in s. 2 of the Act of 1847 as including "works connected therewith by the special Act authorised to be constructed," the fish markets were among the works authorised by Parliament in the present case; under s. 33 of the Act of 1847 the harbour was to be open to all persons for the purpose of unshipping goods; that must include the consequential purpose of removing the goods unshipped, and such removal necessitated the employment of appropriate vehicles; and, therefore, in the absence of a valid byelaw, the appellants had no more power to restrict the access of appropriate vehicles to the markets for the removal of fish bought there than they had to restrict the access of appropriate vehicles to the ship's side for the removal of goods unloaded.

Notes. Applied: *Pigott (J. H.) & Son v. Docks and Inland Waterways Executive*, [1953] 1 All E.R. 22. Referred to: *London and North-Eastern Rail. Co. v. Chester & Son* (1932), 147 L.T. 308.

As to harbours and docks, see 30 HALSBURY'S LAWS (2nd Edn.) 973 et seq., and for cases see 44 DIGEST 96 et seq. For Harbours, Docks, and Piers Clauses Act, 1847, see 23 HALSBURY'S STATUTES (2nd Edn.) 1117.

Case referred to:

(1) *Perth General Station Committee v. Ross*, [1897] A.C. 479; 66 L.J.P.C. 81; 77 L.T. 226; 13 T.L.R. 546, H.L.; 8 Digest (Repl.) 173, 1131.

Appeal by the appellants, the London and North-Eastern Rail. Co., defendants in the action, from an order of the Court of Appeal (SCRUTTON, LAWRENCE, and GREER, L.JJ.), reported 149 L.T.Rep. 149.

The first plaintiffs in the action, the British Trawlers Federation, Ltd., were an association of persons interested in the fishing industry; the second plaintiffs Consolidated Fisheries, Ltd., were the owners of a large fleet of trawlers; and the other plaintiffs and respondents to the appeal were Valori Bros., A. Craske, and C. S. Mortimer, fish merchants of Norwich, East Dereham, and Ipswich respectively. The catches of fish by the fleet of Consolidated Fisheries, Ltd., were landed at either the Trawl Fish Market or the Herring and Mackerel Market a

the harbour authorities might direct. There they were sold by auction to local merchants or to persons who came from a distance. The second plaintiffs had a licence from the railway company to hold these sales, but it was part of the arrangement with the buyer that the latter should remove his purchases from the docks. Before 1926 (the year of the general strike) long-distance transport had been done by rail, but thereafter the use of mechanical road transport became general and was increasing. The railway company were the owners of the harbour and docks undertakings, and in 1930 they sought to impose restrictions, and inaugurated a licensing system for vehicles entering the docks, excluding vehicles not so licensed. It was proved in evidence that, if restrictions were not imposed, the business of the railway company at its dock sidings would be seriously interfered with.

The Consolidated company sold some fish to a customer who sent his carter to fetch his purchase, and the present action arose from the refusal of the railway company to admit the carter because he did not hold the licence on which they were insisting. The vehicles of the last three plaintiffs were also refused admission for the same reason. In all cases the fish was to be delivered at a distant place. The plaintiffs based their claim on their common law right of access to the docks and to attend the fish market which they alleged was established there. The Court of Appeal held, reversing the decision of BRANSON, J., that there was by implication given by the company's statutes and the byelaws made thereunder a right to all members of the public to resort to the harbour and the market with such reasonable and usual commercial vehicles as were not prohibited by the existing byelaws, and, therefore, the plaintiffs were entitled to the following declarations limited to trawl fish:

"(i) That the plaintiffs and each of them, and other owners of fish landed at the defendants' docks or harbour or at their fish markets at Lowestoft, or purchased in the said docks, harbour or markets, are entitled to remove such fish by the usual commercial methods, including removal by means of motor and other vehicles, or by their agents or contractors on their behalf by such methods. (ii) That the defendants are not entitled to impose as a condition of the removal of fish from the said docks, harbour, or markets by the said methods any restriction upon the manner in which the fish is to be dealt with or carried, or the place to which it may be taken by the plaintiffs or other owners of such fish after removal from the defendants' premises or to require the plaintiffs to obtain or accept licences containing the said conditions before sending or taking vehicles to the said markets for the purposes aforesaid. (iii) That each of the plaintiffs and other owners of fish is entitled to take or send on or to the said docks, harbour, and markets, motor and other vehicles for the purpose of removing fish landed or purchased by them at the said docks, harbour, or markets."

The defendants appealed.

A. T. Miller, K.C., James Wylie and Colin H. Pearson for the appellants.

F. P. M. Schiller, K.C., Sir Robert Aske, K.C., and H. M. Abrahams for the respondents.

The House took time for consideration.

Feb. 22. The following opinions were read.

LORD TOMLIN.—The appellants are the owners of a railway and harbour and docks at Lowestoft in the County of Suffolk. The respondents are bodies and persons connected with or interested in the trawl fishing trade at Lowestoft. The action out of which this appeal arises was begun by the respondents against the appellants claiming certain declarations to the effect that the appellants were not entitled to impose, as a condition of admitting the respondents' vehicles to the harbour and docks of the appellants for the purpose of removing their fish landed at or purchased in the fish markets carried on within the appellants' premises, any

restriction as to the manner in which or the place to which after removal from the appellants' premises the fish was to be utilised or removed and claiming also an injunction and damages. A

The case was tried by BRANSON, J., who made certain declarations with which neither side was satisfied, and ordered payment by the appellants to each of the respondents, Valori Bros. and Arthur Craske, of the sum of £2 by way of damages and directed that all parties should pay their own costs. The respondents gave notice of appeal, and the appellants gave notice of a cross-appeal. Upon the hearing of the appeal and cross-appeal the Court of Appeal (SCRUTTON, LAWRENCE, and GREER, L.JJ.) varied the judgment of BRANSON, J., in regard to the form of the declarations, making such declarations more favourable to the respondents, and directed that the judgment as to damages and costs should stand and that the appellants should pay the costs of the appeal and the cross-appeal. Against the order of the Court of Appeal the appellants appeal to your Lordships' House. B C

The appellants are the owners of a considerable area of land at Lowestoft, comprising their railway, harbour, and docks estate in that borough. This estate has been acquired and the railway, harbour, and docks, and other works thereon have been constructed under the powers of a series of Acts of Parliament extending over more than a century and obtained by the appellants or their predecessors in title or some of them. There has been carried on by the appellants and their predecessors on the dock quays, since, at any rate, before 1852, a market or markets for the sale of fish landed at the port. The position of the markets is such that they can only be reached by the private roads and approaches which form part of the appellants' estate. The question is how far the appellants, in exercise of their statutory powers or of their powers as proprietors, are entitled to impose restrictions upon the access to the fish market by those desiring to buy fish thereat or remove fish therefrom. As will hereafter appear, the appellants are seeking to exclude any vehicle, the owner of which will not take from the appellants a form of licence, some of the conditions of which are directed to securing the removal by rail and not by road of all fish consigned to places beyond a radius of twelve miles from Lowestoft. D E F

The history of the appellants' undertaking began with the Norwich and Lowestoft Navigation Act, 1827, under which the Company of Proprietors of the Norwich and Lowestoft Navigation were authorised to construct certain works for the purpose of establishing a waterway between Norwich and Lowestoft and a port or harbour at Lowestoft, and certain powers to levy rates and duties were conferred on the company. Under the Lowestoft Railway and Harbour Act, 1845, a new company called the Lowestoft Railway and Harbour Company succeeded to the position of the original company with increased powers, including a power to build a railway from Reedham to Lowestoft. This second company was in turn superseded by the Norfolk Railway Company under the Norfolk Railway Act, 1846. The rules and regulations made for the harbour in force before 1852 contained a clause to the following effect: G H

"A convenient fish-wharf and market being provided on the north side of the harbour, convenient also for the railway station, no fish will be allowed to land elsewhere."

New rules and regulations for the harbour were brought into force in 1852, and these contained a provision that all fish were to be landed at the fish market on the north side of the harbour and that no fish would be allowed to be landed elsewhere without special permission. In 1859 there came into force new rules and regulations entitled "Rules and Regulations of Lowestoft Harbour and Fish Markets." The rules as to the fish markets were as follows: I

"FISH MARKET RULES AND REGULATIONS.—First.—No fish shall be landed at any place within the harbour excepting at the Fish Markets. Second.—A true statement of the quantity and description of all fish delivered shall be given by the master of each fishing craft or his agent to the clerk of the

market, at his office, and the *landing dues* thereon shall be paid forthwith unless the salesman agree in writing, signed by him, to be responsible for payment of them. Third.—Masters of fishing craft shall clear their nets before coming alongside the markets, and shall remove their crafts immediately after the fish have been delivered. Fourth.—Fish must be removed from the markets on the day of landing if practicable, and if not, before 8 o'clock on the following morning. Fifth.—No fish, offal, or offensive matter shall be left in the market or in the roads or approaches thereto, nor be deposited beneath the flooring. Sixth.—No nuisance of any kind must be committed in the Fish Markets or the approaches thereto. Seventh.—No ballast, earth, dust, ashes, stones, or other things shall be thrown or put into or upon the harbour, fish markets, or any of the works. Eighth.—All orders for the regulation of the markets and the business thereof, given by the harbour-master or his deputies, the clerk of the market, constable, or other officials, must be strictly and promptly obeyed."

It is obvious, therefore, that at this date the appellants' predecessors were permitting to be conducted and were controlling fish markets upon the estate which formed their statutory undertaking.

The next step was the formation by the Great Eastern Railway Act (Capital, &c.), 1862, of the Great Eastern Rail. Co. through the amalgamation of the Norfolk Rail. Co. and a number of other railway companies, and the transfer to the Great Eastern Rail. Co. of the statutory undertakings of the amalgamated companies including the statutory undertaking with which this appeal is concerned. By the Great Eastern Railway (Capital, &c.) Act, 1865, additional powers were conferred on the Great Eastern Rail. Co. The preamble to the Act contained, *inter alia*, the following recitals:

"Whereas it is expedient that the company should have further powers with reference to Lowestoft Harbour, and the company's station and property in connection therewith, and for the better regulation thereof, and of vessels and the fish market thereat; and that the company should be empowered to take certain tolls, duties, and charges, . . . And whereas the objects aforesaid cannot be effected without the Authority of Parliament."

Sections 12, 14, 16, and 17 of the Act so far as they are material enacted as follows:

"12. The provisions of 'the Harbours, Docks, and Piers Clauses Act, 1847,' incorporated with this Act, shall apply to the Lowestoft Harbour, and to the company in respect thereof, as if such harbour were under this Act authorised to be constructed by the company, and the Lowestoft Harbour shall for the purposes of this Act be deemed to include the station, wharves, and property of the company facing the harbour or the River Waveney flowing into the same. 14. In addition to the purposes specified in s. 83 of 'the Harbours, Docks, and Piers Clauses Act, 1847,' for which the company may make by-laws, the company may make byelaws for the following purposes: For regulating the times of entry and departure into and from the harbour of all vessels and boats, whether decked or not decked, bringing fish for sale within the harbour, and the mooring, stationing, or placing thereof: For regulating the fish markets and the places and times for vessels landing their fish, and the sale of fish on that part of the company's station known as the fish market, or on any other part of the company's property. 16. In lieu of all or any tolls, rates, or dues which the company now take or are entitled to charge with respect to the pier, fish market, or harbour at Lowestoft, the company may lawfully demand and take the following sums by way of toll, rate, or due; (that is to say) . . . For fish landed at the fish market or on any part of the company's premises as follows; (that is to say) . . . 17. And in order to enable the company to ascertain the quantity of fish landed from any vessel or sold by any salesman at the market or any part of the company's premises, and chargeable with duty under this Act, it shall be lawful for the harbour-

master, deputy harbour-master, or clerk of the market, at any reasonable time in the day, to examine the sale books of the salesman or salesmen respectively by whom such fish shall have been sold; and any salesman who shall withhold his sale books when lawfully required to produce the same, or shall obstruct the said officer from properly examining the same for the purposes aforesaid, shall for every such offence forfeit and pay by way of penalty a sum not exceeding £2."

I think it is a necessary implication from the provisions of the Act to which I have just referred that the fish market carried on upon the premises of the Great Eastern Rail. Co. was part of their statutory undertaking and that they had power to expend their funds in the maintenance of it. However this may be, the matter is, I think, placed beyond doubt by the next Act which it is material to mention, namely, the Great Eastern Railway (General Powers) Act, 1893. This Act recited that it was expedient that the company should be authorised to complete and maintain an extension of the trawl basin and fish market in the company's harbour at Lowestoft. It then incorporated the Harbours, Docks and Piers Clauses Act, 1847, with the exception of certain sections not material to be mentioned and enacted (s. 5) that subject to the provisions of the Act the company from time to time might make, execute and maintain certain works, including the following:

"(4) The completion and maintenance of an extension in the parish of Lowestoft in the county of Suffolk of the trawl basin and fish market in the company's harbour at Lowestoft for the distance of about 6½ chains westward of such trawl basin . . ."

The Act then provided that the construction of the works already executed by the company in or towards such extension and the purchase of lands and property by the company for the same and the expenditure of money by the company in respect thereof were thereby sanctioned and confirmed. Section 6 of the Act was as follows:

"6. The company may subject to the provisions of this Act from time to time make and maintain all necessary and convenient stations approaches quays wharves landing-places warehouses market houses custom houses mooring buoys lifts machinery and other works and conveniences connected with the works hereinbefore described or any of them."

Section 19 of the same Act contained a provision in the following terms:

"19. The extension of the trawl basin and fish market in the company's harbour at Lowestoft by this Act authorised and sanctioned shall as regards toll rates and duties the powers and duties of the harbour-master and as regards byelaws and in all other respects form part of the existing trawl basin and fish market aforesaid and the Acts relating to the said existing trawl basin and fish market so far as they are now in force shall be applicable to and within the said extension as if they had been specifically re-enacted and made applicable thereto by this Act."

In the face of this Act it is, in my opinion, impossible to say that the fish market is not part of the statutory undertaking.

The Great Eastern (Lowestoft Harbour) Act, 1897, authorised the Great Eastern Rail. Co. to construct certain further works. It provided (s. 7) as follows:

"7. The works by this Act authorised and the area between the same and the existing harbour of the company at Lowestoft shall for the purposes of tolls rates and charges byelaws rules and regulations the powers and duties of the harbour-master and in all other respects form part of the existing harbour and of the existing south pier (Lowestoft Pier) hereinbefore mentioned and of the company's fish market at Lowestoft and the Acts relating to the said existing harbour pier and fish market so far as they are now in force shall be applicable to and within the works by this Act authorised as if they had been specifically re-enacted and made applicable thereto by this Act."

By s. 10 of the Act, 1897, the Great Eastern Rail. Co. were authorised to use and maintain the existing sea wall as part of their fish market or for other purposes in connection therewith.

By the Great Eastern Railway Act, 1902, the Great Eastern Rail. Co. were authorised to carry out:

“(B) An enlargement and extension in the parish of Lowestoft in the borough of Lowestoft in the county of Suffolk for a distance of about ten chains northward or north-eastward of the basin in the company’s harbour at Lowestoft known as the Herring Basin and of the company’s herring and mackerel market on the western side of the existing basin;”

and it was enacted that upon completion of such enlargement and extension all public or other rights of way or other rights over all or any of the lands taken or used for the purposes thereof under the powers of the Act should be by the Act extinguished. By s. 17 of the same Act it was enacted as follows:

“17. The enlargement and extension of the Herring Basin and of the herring and mackerel market in the company’s harbour at Lowestoft by this Act authorised shall as regards tolls rates and duties the powers and duties of the harbour-master and as regards byelaws and in all other respects be deemed to form part of the existing basin and market and the Acts relating to the existing basin and market so far as they are now in force shall apply thereto accordingly.”

At this stage it will, I think, be convenient to state the effect of the several clauses in the Harbours, Docks, and Piers Clauses Act, 1847, which are incorporated in the statutes governing the Lowestoft undertaking and are material to the questions under consideration. Section 2 of the Clauses Act defines the expression “the harbour, dock or pier” as meaning the harbour, dock, or pier and the works connected therewith, by the Special Act authorised to be constructed. Section 83 is as follows:

“Upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.”

Section 68 provides as follows:

“No goods shall be allowed to remain upon any of the piers or quays, or in the approaches thereto, for a longer time than shall be allowed by the byelaws of the undertakers . . .”

Section 83 provides as follows:

“The undertakers may from time to time make such byelaws as they shall think fit for all or any of the following purposes; (that is to say) For regulating the . . . shipping and unshipping, landing, warehousing, stowing, depositing, and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers.”

Section 89 is as follows:

“All byelaws made and confirmed according to the provisions of this and the Special Act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same.”

In 1922 the appellants under an amalgamation scheme had vested in them the undertaking of the Great Eastern Railway.

At all material times there have been in force in relation to the harbour and fish markets general byelaws duly made by the appellants under their byelaw-making power and confirmed by the competent authority, but as the matters complained of do not arise by reason of the byelaws or anything done thereunder, but

in respect of the action of the appellants taken without recourse to their byelaw-making power, and as the appellants do not rely upon the byelaws as a defence, it is unnecessary to consider the contents or effect of the byelaws themselves.

On June 7, 1930, the appellants sent out a circular letter to persons who were in the habit of resorting to the fish markets intimating that in future no vehicle would be admitted to the appellants' premises unless the owner had first taken from the appellants a licence containing certain restrictions. The licence contained the following provisions :

"In consideration of the London and North Eastern Rail. Co. granting to me (us) this licence to admit the vehicle described in the schedule hereto on to the private roads of the company in the vicinity of their fish docks and quays at Lowestoft I (We) agree to accept and abide by the following conditions: 1. The said vehicle shall at all times whilst upon the said roads exhibit in a conspicuous position the distinguishing badge issued by the said company with this licence. 2. The said vehicle shall not be used for the transport of fish beyond the boundaries of the Railway Company's Fish Docks Estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the fish docks or elsewhere outside such radius as previously approved by the said company. 3. No fish transported by the said vehicle shall be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the fish docks. 4. The vehicle shall use only the recognised cart roads and landings at the fish docks and quays for receiving or delivering fish or other goods. 5. The person or persons in charge of the vehicle shall at all times whilst upon the company's premises obey and abide by all the rules and regulations of the company and the instructions of their duly authorised officials. 6. The company may at any time they may deem it necessary to do so withdraw this licence by notice in writing without assigning the reason for their so doing and in that event I (We) undertake to return to the company upon demand this licence and the badge issued to me (us) with it. 7. This licence is not transferable either from vehicle to vehicle or from owner to owner, and in the event of the vehicle for which it is issued being sold or disposed of, the badge must be returned immediately to the company. 8. This licence unless withdrawn in accordance with condition 6 remains in force for a period of twelve months from the undermentioned date."

It may well be that some reasonable regulation of traffic coming to the docks and harbour is necessary, but one, at any rate, of the appellants' purposes in introducing this licensing system is to compel those whose fish is to be taken to distant places to use the railway instead of road transport. The plaintiffs objected to this attempt to restrict their liberty of access to the fish markets, and hence the present litigation. It is said by the appellants that they are the owners of the railway, harbour and docks estate, and as such, in their capacity of proprietors, are entitled to exclude altogether or admit upon such terms as they may arbitrarily determine any person who seeks access to the estate except so far as such person has any statutory right of access, and in support of this contention they rely upon the decisions of which *Perth General Station Committee v. Ross* (1) is an example. Further they say that the fish market is only held in the docks by their leave and licence, that they are not bound to continue it, and that they can regulate as they please the access to it. As to any statutory right of access they contend that it is limited under s. 38 of the Harbours, Docks, and Piers Clauses Act, 1847, for the purpose of shipping and unshipping goods in the narrow sense, that it does not extend to attendance at such market as the appellants may permit to be held on the premises, and that anyhow it does not authorise access with vehicles.

I think that the appellants have misapprehended their position. The case against them may, in my opinion, be stated in two ways: (i) I think that upon the

true construction of the Acts governing the statutory undertaking, and, in particular, the Acts of 1865 and 1893, the carrying on and control of the fish markets is either expressly or by necessary implication authorised as part of or incident to the harbour and docks undertaking. Except upon this basis it is difficult to see how the appellants can justify the expenditure of their funds upon the upkeep of the markets and the payment of the market officers. In fact, they have been authorised by statute to acquire lands for the extension of the markets and to exercise powers in relation to them beyond those which they could exercise as mere proprietors. The result, in my opinion, must be that, as long as they do carry on the markets (and it is not necessary to determine whether they are bound to carry them on) there is necessarily implied a right of access on the part of those who bona fide desire to resort to the markets, subject only to such regulations as may be imposed by valid byelaws duly confirmed by the competent authority. (ii) It may fairly be said that having regard to the terms of the definition of harbour, dock and pier in the Clauses Act and s. 12 of the special Act of 1865, and to the fact that under the special Acts the fish markets are part of the works authorised to be carried on by the appellants, the marketing of the fish when landed must be regarded for the purposes of the special Acts as part of the unshipping process, access for which is given by s. 23 of the Clauses Act. I do not think that the words "shipping" and "unshipping" are to be confined to the narrow operation of lifting goods from the quay to the ship or from the ship to the quay, nor do I think that the access under the section can be limited to access in person without any vehicle. It must, I think, be such access with such vehicle as the party seeking it bona fide deems necessary, but it is an access always subject to be controlled by valid and operative byelaws.

On either of these views of the case the appellants obtain no assistance from such cases as *Perth General Station Committee v. Ross* (1) already referred to. I think, therefore, the appeal fails.

With all respect to the Court of Appeal, I am unable to appreciate why they thought it proper to limit the declarations to the market for trawl fish. It is true that the respondents are persons interested in that market, but they come before the court as members of the public suffering special damage by alleged wrongful interference with their statutory right of access to the markets. The question whether they can be restricted by the licence system in question is a matter for determination upon a consideration of the rights and duties of the appellants and the public respectively in respect of a property belonging to the appellants, but forming part of a statutory undertaking, and must depend upon the construction of the relevant statutes and the common law rights of a proprietor. No question of reasonableness arises upon which alone it seems to me evidence as to the course of business in the different fish markets in the docks would be relevant. Further, the form of declarations granted does not seem to me to be satisfactory, and I would invite your Lordships, while dismissing this appeal, to substitute for the declarations made by the Court of Appeal the following declarations (that is to say): (i) That, subject to any valid byelaw made by the defendants and duly confirmed by competent authority, each of the plaintiffs is entitled to take or send on to the defendants' harbour, docks and fish markets at Lowestoft motor and other vehicles for the purpose of removing fish landed or purchased by him or them at such harbour, docks or fish markets. (ii) That the defendants are not entitled to impose upon any of the plaintiffs as a condition of the removal of fish from the said harbour, docks or fish markets any restriction upon the manner in which, after removal from the defendants' premises, the fish is to be dealt with or carried or upon the place to which after such removal the fish is to be taken, or to require any of the plaintiffs to obtain or accept licences containing any such restriction before sending or taking vehicles to the said harbour, docks and fish markets for the purposes aforesaid.

The costs of the appeal should, in my opinion, be paid by the appellants. I, accordingly, move your Lordships in the sense which I have indicated.

LORD WARRINGTON.—I concur.

LORD RUSSELL.—I agree.

LORD MACMILLAN.—The present appeal raises an important question affecting the rights of the public in relation to the harbour of Lowestoft, which is a statutory undertaking vested in the appellant railway company. The legislative history of the undertaking, which has been traced in detail by my noble and learned friend on the Woolsack, records a progressive extension of the harbour works and of the facilities there provided for the trade of the port. In approaching the consideration of the particular matter now at issue it is well to bear in mind that the powers and privileges conferred upon the appellants and their predecessors by a long series of private Acts have been obtained by them from Parliament on the representation of the public utility of the harbour and find their counterpart in the duties imposed upon them in the public interest. The appellants are, no doubt, the proprietors of the lands which have been acquired for the purposes of the harbour undertaking and of the works which it comprises, but their rights as proprietors are subject to important statutory qualifications.

The most general obligation towards the public which Parliament has laid upon the appellants is that contained in s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, which has been made applicable to the undertaking. By this section it is provided that, upon payment of the rates exigible, the harbour, dock, and pier shall be open to all persons *inter alia* for the shipping and unshipping of goods. There has been little occasion in the past to construe these wide words, for hitherto harbour undertakers have been more disposed to welcome than to restrict the access of persons desirous of doing business at their harbours. But the advent of the commercial motor vehicle with its extended range and its large carrying capacity has been responsible for the raising of the present, as of so many other problems. The question which has now to be determined is whether and to what extent the appellants are entitled to restrict the admission to the harbour of motor vehicles which members of the public engaged in the fish trade claim the right to use for removing fish purchased at the fish markets on the harbour premises.

The harbour of Lowestoft is pre-eminently a fishing harbour, to which trawlers and drifters resort in large numbers to land their catches. The immediate disposal and dispatch of the fish so landed is a practical necessity of the industry, and in order to facilitate these processes the appellants and their predecessors have established and maintain various fish markets on the quays. The legislature has recognised that the provision and carrying on of such markets is reasonably incidental to the conduct of the harbour enterprise, as is evidenced by the quotations which my noble and learned friend LORD TOMLIN has made from the harbour statutes. To these markets members of the public engaged in the fish trade have long been in the habit of resorting and from these markets the fish have either been consigned by rail or removed in vehicles by the purchasers.

The appellants now seek to place restrictions on the use of motor vehicles for the removal of fish bought at the markets. They allege that the unrestricted resort of motor vehicles to the fish markets (a) will lead to congestion and inconvenience, and (b) will increasingly divert from their railway the fish traffic which makes it worth their while to carry on the harbour. The appellants undoubtedly have statutory power to frame and enforce byelaws for the regulation of operations at the harbour, but such byelaws require confirmation and must satisfy an exacting standard of legality. For their present purpose the appellants have not had recourse to their delegated power of legislation, but have sought to institute at their own hand a system of licensing whereby licences to bring motor vehicles to their fish docks and quays are to be granted only to those who undertake not to use these vehicles for the conveyance of fish more than twelve miles from Lowestoft. This expedient, by excluding long-range motor vehicles, might have the result of diminishing any possible congestion; it would certainly have the result of compelling all long-distance fish traffic from the harbour to go by rail.

A It would not be proper to indicate any opinion whether the appellants could legitimately enact by byelaw such a system of licensing. They have not attempted to do so. The legality of the restriction which they have sought to impose must, therefore, be justified, if it can be justified at all, by the invocation of their inherent rights as proprietors of the harbour estate; and this, indeed, was their main contention at your Lordships' Bar.

B I have already pointed out that the appellants' proprietary rights are qualified by their statutory obligations. The harbour is to be open to all for the purpose of unshipping goods. It is manifest that this must include the consequential purpose of removing the goods unshipped and such removal necessitates the employment of the appropriate vehicles. But assuming that, subject to regulation by byelaw, there exists such a right of access with such incidents, the appellants argue that
C the fact that the fish are sold at the harbour markets before removal makes all the difference. They say that they are under no obligation to provide fish markets or permit sales on their premises, and that, if they choose to do so, they are entitled to attach such conditions as they please to the enjoyment by the public of these facilities, and in particular the conditions which they have in fact imposed by their system of licensing. The answer is that the right of access conferred by
D s. 33 of the Clauses Act includes, by virtue of the definition in s. 2, access to the authorised works connected with the harbour, and the fish markets are among the harbour works which Parliament has authorised. Indeed, if the fish markets were not either incidental to the harbour undertaking or specially authorised, it would have been ultra vires of the appellants and their predecessors to have expended their funds in providing them. Accordingly, so long as the appellants
E carry on these fish markets as part of their harbour undertaking they have no more power to restrict the access of appropriate vehicles to these markets for the removal of fish purchased there than they have to restrict the access of appropriate vehicles to the ship's side for the removal of goods unloaded, always subject, of course, but subject only, to the rights of regulation by byelaw which they possess.

Such cases as *Perth General Station Committee v. Ross* (1) afford the appellants
F no assistance in their contention. The person whose access to the station the committee were there held entitled to restrict or prohibit made

"no claim as one of the members of the travelling public, or as a person interested in goods conveyed by rail to or from the appellants' station"
(per LORD WATSON ([1897] A.C. at p. 488)). Not being on railway business, he had no right to enter the station, and if the committee chose to admit him they
G could attach any conditions they pleased to their permission. I concur in the declarations proposed to be pronounced, and I agree that the appeal should be dismissed with costs.

LORD WRIGHT.—I also agree.

Appeal dismissed.

H Solicitors: *I. B. Pritchard; Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

FITZPATRICK v. BATE MITCHELL v. PAGE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), March 21, 22, 1934]

[Reported 151 L.T. 17; 98 J.P. 215; 50 T.L.R. 309; 78 Sol. Jo. 256, 277; 32 L.G.R. 136; 30 Cox, C.C. 95]

Tobacco—Sale by unlicensed person—Automatic cigarette cabinet on unlicensed premises—Periodical supply of cigarettes by retailer—Test whether goods appropriated to contract at licensed premises—Tobacco Act, 1842 (5 & 6 Vict., c. 93), s. 13, as amended by Revenue Act, 1867 (30 & 31 Vict., c. 90), s. 8, s. 9.

Two informations were preferred alleging the unlawful sale of tobacco without licence contrary to s. 13 of the Tobacco Act, 1842, as modified by ss. 8 and 9 of the Revenue Act, 1867. In each case the supplier, who had a licence entitling him to sell tobacco at his business premises, agreed to supply customers with automatic cigarette cabinets in their private houses. In each case the contract contained a condition: "The place of delivery of the packets of cigarettes shall be place of business of the [supplier]." In each case a cabinet was delivered to the customer, and the supplier's representative visited at regular intervals the customer's house, unlocked the cabinet with a key which at all material times was in the supplier's control, removed the coins inserted in the cabinet and any remaining packets of cigarettes, for which the customer was not asked to pay, and re-stocked the cabinet. In the first case, on each occasion when the packets of cigarettes were brought to the customer's house they were done up in cartons with his name and address thereon, and the cigarettes returned were placed in the cartons and taken away by the supplier's representative. In the second case, the packets of cigarettes were brought to the house by the supplier's traveller loose in an attaché case, and were not contained in any carton or done up in a bundle.

Held: the test in each case was where the appropriation of the goods to the contract had taken place; in the first case, there was sufficient evidence that the appropriation had taken place at the supplier's licensed premises to justify the magistrates in dismissing the information; but, in the second case, all the evidence went to show that the appropriation took place at the customer's premises, and the magistrates should have found that the offence was proved.

Notes. The Tobacco Act, 1842, was repealed by the Customs and Excise Act, 1952. For offences in connection with the sale of tobacco, see now s. 189 of the later Act.

As to licences for the sale of tobacco, see 28 HALSBURY'S LAWS (2nd Edn.), 412-414, and for cases see 39 DIGEST 237. For Customs and Excise Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 800 et seq.

Case referred to:

- (1) *Pletts v. Campbell*, [1895] 2 Q.B. 229; 64 L.J.M.C. 225; 73 L.T. 344; 59 J.P. 502; 43 W.R. 634; 11 T.L.R. 454; 39 Sol. Jo. 585; 18 Cox, C.C. 178; 15 R. 493, D.C.; 30 Digest (Repl.) 87, 664.

FITZPATRICK v. BATE

Case Stated by Chester Quarter Sessions.

An information was preferred before a court of summary jurisdiction by the appellant, Fitzpatrick, against the respondent, Bate, alleging that the respondent, at 24, Sandon Road, Newton Park, Chester, unlawfully sold certain tobacco, not then and there being a licensed manufacturer of or dealer in or retailer of tobacco selling or offering for sale the tobacco on premises wherein he exercised or carried on the trade or business of a licensed dealer in or retailer of tobacco, contrary to

A s. 13 of the Tobacco Act, 1842. The court dismissed the information, and the appellant appealed to Cheshire Quarter Sessions.

The following facts were proved or admitted at the hearing before the court of quarter sessions. The respondent traded as the Chester Home Service, at 115, Tarvin Road, Chester, and was licensed to sell tobacco by retail at that address. He supplied customers with automatic cigarette cabinets in their private houses, and at the material dates had supplied about 150 cabinets at local private houses. On Sept. 26, 1932, one Calvert, a departmental clerical officer of Customs and Excise, applied to the respondent for particulars of the installation of an automatic cigarette cabinet. On Sept. 27, 1932, Mrs. Barber, a representative of the respondent, visited Calvert's house and told Calvert that all that was necessary was that an order for a stipulated supply of cigarettes on a certain day should be signed, so as to avoid taking out a licence for each house where a cabinet was supplied. On Sept. 28, 1932, Calvert signed a contract with the respondent. The contract provided for the supply each Wednesday of ten packets each containing ten Gold Flake cigarettes and ten packets each containing twenty Players cigarettes. The contract provided: "The place of delivery of the packets of cigarettes shall be the place of business of the service." A cabinet was delivered to Calvert in accordance with the terms of the contract. On Oct. 12, 1932, Mrs. Barber visited Calvert's house and unlocked the cabinet with a key, which was at all material times in the respondent's control. She took out of the cabinet the packets of cigarettes remaining therein and the sum of 10s. 6d. No request was made to Calvert to pay for those packets. Ten packets of Gold Flake cigarettes and ten packets of Players were replaced in the cabinet by Mrs. Barber. It was then orally agreed that Mrs. Barber should visit the premises fortnightly and substitute Ardath for Gold Flake cigarettes. Mrs. Barber visited the premises again on Oct. 26, 1932, and a similar procedure was followed. Upon each occasion when cigarettes were brought to Calvert's house the cigarettes were done up in cartons with his name and address thereon, and the cigarettes returned were placed in the cartons and taken away by Mrs. Barber. On Nov. 9, 1932, Calvert informed Mrs. Barber that he proposed to give up smoking on the grounds of economy. Mrs. Barber thereupon agreed to take away the cabinet, and Calvert was not asked to pay for the cigarettes which were left in it. Neither the respondent nor anyone else had a licence to sell tobacco by retail at Calvert's residence. At no time did Calvert ask for, or require, or have any key to the cabinet, which was locked at all material times, save when unlocked by Mrs. Barber.

It was contended on behalf of the appellant, inter alia, that the sale and appropriation of the cigarettes took place at Calvert's residence; that the contract between the parties was one of sale or return; that the property in the cigarettes did not pass until the money was put in the machine; and that the orders were merely colourable and not bona fide orders.

It was contended on behalf of the respondent, inter alia, that the appropriation and sale of the goods took place at the licensed premises of the respondent, and that the order form created a bona fide contract between the parties.

The court of quarter sessions dismissed the appeal.

The Solicitor-General (Sir Donald Somervell, K.C.) and George Bankes for the appellant.

Comyns Carr, K.C., and J. P. Elsdon for the respondent.

MITCHELL v. PAGE

Case Stated by Bristol justices.

An information was preferred by the appellant, Mitchell, against the respondent, Page, trading as the Bristol and District Automatic Services, at 77, Victoria Street, Bristol, alleging an unlawful sale of tobacco to one Watts, a departmental clerical officer employed by the Customs and Excise, at his residence. This case was in most respects similar to *Fitzpatrick v. Bate* (sup.), but was differentiated from it by the following findings of fact:

"The packets of cigarettes were brought to the house by the respondent in an attaché case. They were not in any special cartons or done up in bundles, but were loose in the case. After the cabinet had been refilled there were a number of loose packets of cigarettes in the attaché case brought by the respondent."

The justices held that the order given by Watts and accepted by the respondent constituted an agreement which was bona fide and not colourable, and that the appropriation of the packets of cigarettes thereunder took place at the respondent's licensed premises. They, accordingly, dismissed the information.

The Solicitor-General (Sir Donald Somervell, K.C.) and W. Bowstead for the appellant.

S. H. C. Wethered for the respondent.

In each case the question for the Divisional Court was whether the justices had come to a correct determination and decision in law.

By s. 13 of the Tobacco Act, 1842:

"No person or persons shall hawk or sell or offer for sale any tobacco or snuff of any description in any house or premises, or in or about the streets or highways or other places, or in any other manner or place whatsoever, except as a licensed manufacturer of or dealer in or retailer of tobacco in his entered premises, on pain of forfeiting all tobacco and snuff in his possession and £100."

By s. 8 of the Revenue Act, 1867:

"... so much of any Act as requires a dealer in and retailer of tobacco or snuff to make entry of any premises for storing, keeping, or selling of tobacco or snuff is ... hereby repealed. ..."

By s. 9 of that Act the expression "entered premises" shall be deemed to mean the premises wherein the trade or business is exercised or carried on.

LORD HEWART, C.J.—It may be convenient to give judgment in these two cases together. Speaking for myself, I find myself very much in agreement with the argument of the learned Solicitor-General. There is, of course, not merely some difference, but all the difference between doing an act which does not contravene a statute and doing an act which does contravene a statute, but so ingeniously as to escape the appearance of so doing. In all cases of this class, which are evidently becoming common, if they have not already so become, it seems to me that the duty of justices is to endeavour to ascertain the real substance of that which is actually done as distinguished from the appearance which, with varying degrees of ingenuity and caution, may be presented.

The real question is, as was said by WILLS, J., in *Pletts v. Campbell* (1) ([1895] 2 Q.B. at p. 232): "Where did the material elements of the transaction take place?" Again, as WRIGHT, J., said (at p. 233): "There is no sale so long as it is uncertain to what articles the contract applies." Of course, in all such cases, one expects to find a form of contract which, considered by itself, is impeccable. The provision in the contract, identical in both these cases, that the place of delivery of the packets of cigarettes shall be the place of business of the service, is well calculated to excite suspicion. I recognise that the question which we have to determine is not whether, if we had been hearing the case in the first instance, we should have come to the conclusion to which the justices came, but, where the matter is one of fact, whether there was any evidence upon which the justices could find as they did, and looking at all the facts set out in the first case—*Fitzpatrick v. Bate*—I have come, not without reluctance, to the conclusion that there was just enough material to entitle the justices to find as they did. I need not direct attention further to the many elements of suspicion in the case, beginning with the finding that Mrs. Barber, who acted for the respondent, said to Mr. Calvert, when he asked for a cabinet,

"that there was no charge for the cabinet and that all that was necessary was that an order for a stipulated supply of cigarettes on a certain day should be signed, and that the said definite form of order for supply was necessary in order to avoid taking out a licence for each house where a cabinet was supplied."

There was a further element of suspicion in that the key was at all material times in the control of the respondent. But it does appear in that case that, when the successive calls were made, not only was the residue taken out and complete new stock inserted in the cabinet, but also that that new stock was contained in a carton previously identified as something to be delivered to the particular customer. I think, therefore, as I have said, that there was just enough material to entitle the justices to come to the conclusion to which they came. But I hope that that decision will not be taken as offering carte blanche in cases of this kind, and I reiterate that it seems to me to be the duty of magistrates in all such cases to arrive, if they can, at the true nature of what is done, and not to be misled by the specious form of contract which may have been entered into.

When one comes to the second case, *Mitchell v. Page*, I think it is quite clear that the appeal ought to be allowed. Here we have, significantly enough, exactly the same terms and conditions of sale, ipsissima verba, and one of the conditions is that

"payment for the cigarettes at the usual current retail price shall be collected by the Service from the customer's residence at the time of next delivery."

There is, however, the finding of fact by the justices, that upon April 22, 1933,

"the cabinet was filled by the respondent by placing in it eight packets of ten Gold Flake and eight packets of twenty Ardath. The packets of cigarettes were brought to the house by the respondent in an attaché case. They were not in any special cartons or done up in bundles, but were loose in the case. After the cabinet had been refilled there were a number of loose packets of cigarettes in the attaché case brought by the respondent."

I cannot believe that that finding can be construed as meaning loose packets of a different brand or different brands of cigarettes, and it seems to me that the contention of the appellants was right and it was impossible for the respondent

"to appropriate the number required until he had ascertained that number at the customer's premises and the order signed by the customer was, therefore, a colourable and not a bona fide order."

In my view, both the contentions of the learned Solicitor-General in this case are correct, first, that here there was no evidence of a bona fide order—that is to say, an order which was not colourable—and, secondly, that there was no evidence of appropriation at the premises to which the licence applied. All the evidence, I think, is that the appropriation took place at the premises of the customer. In my opinion, therefore, without reiterating the facts or elaborating the matter, I think that this appeal ought to be allowed and that the case ought to go back to the justices with a direction to find that the offence which was charged has been proved.

AYORY, J.—I am of the same opinion, and I am content to rest my judgment in each of these cases upon the sole question where, in fact, the appropriation of the goods took place. The fact of putting into the order or the conditions of sale the words: "The place of delivery of the packets of cigarettes shall be at the place of business of the Service" or the vendor, does not, in my opinion, make any difference to the question which the court has to decide or which the justices have to decide. It is no use putting in an order or in conditions of sale the words "the place of delivery shall be the place of business of the vendor" if, in fact, it is not there that the transaction is carried out.

In the first case—*Fitzpatrick v. Bate*—there is a finding of fact in these words,

"upon each occasion when the cigarettes were brought to the said Calvert's house, the said cigarettes were done up in cartons with his name and address thereon, and the cigarettes returned were placed in the said cartons and taken away by the said Mrs. Barber."

In my opinion, that finding of fact was sufficient to justify the justices in saying that the appropriation had taken place at the premises of the vendor and, therefore, that no offence within the meaning of this statute had been committed.

In the second case, I agree with the judgment of my Lord that the appeal ought to be allowed on the ground that there was no evidence before the justices that the packets of cigarettes had been appropriated to the buyer at the premises of the vendor; and I need not repeat the paragraphs in that case which bear out that view. I have all through this argument been satisfied that we ought to draw the inference from the findings of fact that the traveller started out with an attaché case with a number of packets of cigarettes in it, not knowing at the time what quantity would be required to be delivered to the particular buyer. In this case the attaché case with which he started out on his journey did, in fact, contain a sufficient number to supply the needs of the customer without there having been any appropriation of any particular packets of cigarettes at the premises of the vendor. I, therefore, agree that the case should be remitted to the justices to find that the offence was proved.

TALBOT, J.—I am of the same opinion. The charge in these cases is one of selling tobacco elsewhere than in the premises wherein the accused person exercised and carried on the trade and business of a licensed dealer in tobacco, and the breach of the statute is said to be that the sales in question took place at the house of the customer. It appears clear that the transaction in *Fitzpatrick v. Bate* was a sale at the business premises of the respondent. There was an order for so many packets of cigarettes of particular brands; these were duly appropriated at the respondent's premises to the customer, and they were delivered at the customer's house pursuant to the contract. It cannot be disputed that that transaction gave the customer, Mr. Calvert, a right to consume the whole of those cigarettes, if he thought fit to do so, within the time mentioned in the contract as altered. The method of payment for the cigarettes was by putting money into the machine lent to the customer for the corresponding packets of cigarettes extracted. The case for the appellant was, and is, that this was a fictitious transaction, because the evidence shows that the practice was that on the expiration of each fortnight the seller's traveller or agent should take back what was left unconsumed without further payment—that is to say, that payment was received only for what had been then consumed. It is said that the real transaction was a sale of so much as was taken out within the fortnight, and that, as that was not and could not be ascertained except at Mr. Calvert's house, the sale was there. The court of quarter sessions, who have stated this case for our opinion, have held that no offence was proved, and the question is whether they were entitled in law so to hold on the evidence—that is, whether on the facts proved, their decision can be supported. In my opinion, the decision can be supported, and, if that is so, we have no right to interfere with it. Whether or not any particular argument was used in the court below is immaterial, because the respondent is entitled to support the decision on any ground which is good in law. The argument for the appellant, if I understand it, rests entirely on the practice of the parties which, it is said, proves conclusively a sale at the customer's house. In my opinion, the decision may be supported in two ways at least. It may be said that the tribunal of fact was entitled to infer from the practice of the parties that when the first delivery was made under the contract and the unconsumed packets taken back a new verbal contract was made for the future—that is to say, that the original contract was modified, as it might lawfully be by the parties to it, and that the new verbal contract contained the terms of the old with an added condition that, if any packets which had been sold and delivered were not taken from the machine within a fort-

A night by the customer, he was entitled to return them without further payment. Again, it may be inferred from the practice of the parties that, although the appellant was bound in law to pay for the whole consignment by the expiration of the fortnight, the respondent by way of indulgence, after a manner very familiar in retail trade transactions, with the object of persuading the customer to make further purchases, took back what was left in the cabinet when he delivered the new consignment. Either of these inferences seems to me perfectly possible and perfectly reasonable to be deduced from the practice proved; and if either of them is drawn the decision of the court of quarter sessions is justified. In my opinion, therefore, this appeal should be dismissed. I will only add that our duty and the duty of the justices is to enforce the law as Parliament has enacted it. I cannot easily be done, a form of contract were adopted which would produce substantially the same results in the way of the actual trade between the tobacco dealer and his customers but would clearly not be a violation of the Act of Parliament.

With regard to the other case—*Mitchell v. Page*—I confess I have not felt so clear about it as my Lord and my brother feel, but, on the whole, I agree with what they have said and I think, therefore, that that appeal should be allowed and the case should go back to the justices with a direction to convict the respondent of the offence with which he is charged.

First appeal dismissed.

Second appeal allowed.

Solicitors: *Solicitor for Customs and Excise; Field, Roscoe & Co., for Bate & Son, Chester; Timbrell, Deighton, & Nichols, for W. Stanley Mobberley & Son, Stourbridge.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

KNEEN (INSPECTOR OF TAXES) v. MARTIN

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.J.J.), November 26, 1934]

[*Reported* [1935] 1 K.B. 499; 104 L.J.K.B. 361; 152 L.T. 337;
79 Sol. Jo. 31; 19 Tax Cas. 33]

Income Tax—Foreign possessions—Computation of tax on “full amount of actual sums received”—Proceeds of sale abroad of securities held abroad—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Case V, r. 2.

The respondent was a citizen of, and was domiciled in, the United States, but for some years she had been resident in this country. In each of the fiscal years 1931–32 and 1932–33 she possessed securities which were lodged in America. From time to time certain of these securities were sold in America, and the proceeds of the sales were received during the years in question by the respondent in this country where she used them for living expenses. The interest and dividends arising from the respondent's securities in America were not received by her in this country, but were banked in the United States, being spent or invested in that country in accordance with instructions given by the respondent. The securities sold were not replaced by investment of the income in the same securities. The Crown sought to assess the respondent to income tax on the amounts received by her in the United Kingdom or such part of them as equalled the income from the securities which remained in the

United States and was available for remittance to the respondent in this country.

Held: Schedule D, Case V, r. 2, of the Income Tax Act, 1918, must be read as providing that tax in respect of income arising from possessions out of the United Kingdom "shall be computed on the full amount of the actual sums of income annually received; the sums received by the respondent were capital; and, therefore, the respondent was not chargeable to tax on them.

Notes. The Income Tax Act, 1918, was repealed by the Income Tax Act, 1952, s. 132 (3) (b) of which replaces Case V, r. 2, of Sched. D to the Act of 1918.

Referred to: *Hall v. Marians* (1935), 19 Tax Cas. 33; *I.R.C. v. Gordon*, [1952] 1 All E.R. 866.

As to tax chargeable under Case V, see 20 HALSBURY'S LAWS (3rd Edn.) 276 et seq., and for cases see 28 DIGEST 79-81. For Income Tax Act, 1952, s. 132, see 31 HALSBURY'S STATUTES (2nd Edn.) 128.

Cases referred to:

- (1) *Scottish Provident Institution v. Allan*, [1903] A.C. 129; 72 L.J.P.C. 70; 88 L.T. 478; 67 J.P. 341; 19 T.L.R. 432; 4 Tax Cas. 591, H.L.; 28 Digest 78, 426.
- (2) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest 79, 433.
- (3) *L.C.C. v. A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, 392.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division.

The contents of the Case was as follows: 1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on March 15, May 19 and July 26, 1933, for the purpose of hearing appeals, Mrs. Gladys Robinson Martin, hereinafter called the respondent, appealed against estimated assessments to income tax in the sum of £5,000 for each of the years ending respectively April 5, 1932, and April 5, 1933, made upon her by the Additional Commissioners of Income Tax for the Godley division of the county of Surrey under the provisions of the Income Tax Acts in respect of remittances from abroad. The following statement of the facts (embodied in paras. 2-18 inclusive hereof) was agreed between the parties.

2. The respondent is a citizen of the United States of America where she was born. She married in 1903 or 1904 James Edward Martin, who died before 1910. He was an American citizen also, and throughout his life was domiciled in America. The respondent holds an American passport.

3. During each of the years ending April 5, 1932, and April 5, 1933, the respondent was resident in the United Kingdom. She purchased the house at Sunningdale in which she has since lived in 1925.

4. The respondent possessed, during the said two years, securities, stocks and shares in a place out of the United Kingdom, namely, in America. The bonds, stock and share certificates, etc., were deposited for safe custody in New York with the Bankers' Trust Company of New York.

5. The respondent has two separate bank accounts in New York with the aforesaid company. Into one account is paid on the instructions of the respondent such income as arises to the respondent in America. This account is called and is hereinafter referred to as the "income" account. No such income is ever credited to the other account which is called and is hereinafter referred to as the "capital" account. The respondent also has a banking account in the United Kingdom with the Guaranty Trust Co. of New York, Pall Mall, London.

6. During the year ended April 5, 1931, the respondent caused the following

securities to be sold in America, and the proceeds of such sales to be sent to the United Kingdom:

Item	Date of Sale	Securities Sold	Proceeds	Length of time Securities held prior to Sale	
				Years	Months
1	May 7, 1930	\$12,000 Brooklyn United Railway 5 per cent. Bonds, 1950.	\$10,405-00	16	5
2	Aug. 1, 1930	\$5,000 Wabash Railway 5 per cent. Bonds, 1976.	5,006-25	2	2
3	Oct. 2, 1930	\$10,000 Federal Land Bank of Houston 4½ per cent. Bonds, 1954.	9,950-00	6	8
4	Dec. 26, 1930	\$5,000 Standard Gas and Electric 6 per cent. Bonds, 1935.	4,968-75	13	8
5	Do.	\$1,000 New York Railroad Corporation 6 per cent. Bonds, 1965.	477-50	4	8

The above sales were carried out, and the proceeds sent to England in the following manner:

Item 1: The bonds were delivered by the Bankers' Trust Co. (New York office) to Messrs. Barstow & Co., stockbrokers, in New York, by whom they were sold. The proceeds of the bonds, namely, \$10,405, were remitted by the said stockbrokers to the Bankers' Trust Co. (New York Office), where they were credited to the respondent's "capital" account. \$9,405 of these proceeds were at once remitted out of the said "capital" account to the Guaranty Trust Co. (New York Office), where the respondent has no account, and by that company were immediately remitted to the London office of the Guaranty Trust Co. and there placed to the credit of the respondent's account. The remaining \$1,000 was shortly afterwards remitted to the respondent in Paris.

Items 2 to 5 inclusive: The bonds were delivered by the Bankers' Trust Co. (New York office) to the said Messrs. Barstow & Co., who sold the bonds and caused the proceeds thereof to be remitted forthwith from their own account at the Chase National Bank in New York to the credit of the respondent's account at the London office of the Guaranty Trust Co.

7. During the year ended April 5, 1932, the respondent caused the following securities and shares to be sold in America and the proceeds of such sales to be sent to the United Kingdom (See Table overleaf).

These securities and shares were sold and the proceeds dealt with in the same manner as in the case of Items 2-5 of para. 6 above, except that in the case of items 10-14 inclusive a different firm of brokers was employed, namely, Messrs. J. R. Williston & Co., New York.

8. The proceeds of sale referred to in paras. 6 and 7 above were, when received in the United Kingdom, used by the respondent for living expenses. Of the amount so received during the year ending April 5, 1932, £4,500 sterling was used by the respondent to repay an overdraft upon her banking account in the United Kingdom. As security for such overdraft the respondent caused certain securities to be deposited with the New York office of the Guaranty Trust Co.

9. During the years ending April 5, 1931, and April 5, 1932, the interest and dividends arising from the respondent's securities, stocks, and shares in America (including such interest and dividends as arose before sale on the securities and shares specified in paras. 6 and 7) were banked in a separate bank account as set out in para. 5 hereof. The respondent either spent or applied in America the funds in this account or investments were made in America in accordance with instruc-

Item	Date of Sale	Securities and Shares Sold	Proceeds	Length of time Securities held prior to Sale	
				Years	Months
6	Oct. 30, 1931	\$25,000 U.S. Liberty 4½ ...	\$25,593.75	2	—
7	Nov. 7, 1931	200 shares Gillette Safety Razor Co.	3,142.00	3	10
8	Do.	10 shares ditto	155.85	3	10
9	Do.	200 shares Anaconda Copper Mining Co.	3,571.00	2	2
10	Nov. 17, 1931	500 shares Chicago Milwaukee St. Paul and Pacific Railroad.	1,442.50	2	2
11	Do.	10 shares Gillette Safety Razor Co.	143.35	3	10
12	Do.	600 shares Tobacco Prod. Corporation, Class A	15,507.60	4	—
		1,100 ditto, Class A			
		185 ditto			
13	Dec. 2, 1931	\$1,000 International Paper Co. 6 per cent. Bonds, 1955.	393.75	3	—
14		\$19,000 ditto	7,451.25	3	—

tions given by the respondent, the cost being debited to this account. The respondent purposely caused the said interest and dividends to be paid into a separate bank account and the funds in this account to be spent, applied, or invested in America and not sent to the United Kingdom, in order to avoid liability to United Kingdom income tax, which tax would have been in addition to income tax already borne in America. Such double taxation would, in the respondent's view, have made it impossible for her to reside in England.

10. The securities and shares sold as recited in paras. 6 and 7 above were neither in whole nor in part replaced by investment in the same securities or shares as the interest and dividends referred to in para. 9 above.

11. During the year ending April 5, 1931, the interest and dividends arising from the respondent's securities, stocks and shares in America were, in amount, more than the proceeds of sale of the securities referred to in para. 6 hereof.

12. During the year ending April 5, 1932, the interest and dividends arising from the respondent's securities, stocks and shares in America were, in amount, less than the proceeds of sale of the securities and shares referred to in para. 7 hereof.

13. The assessments under appeal were made on the footing that the respondent had income arising in the United States and that she was assessable in respect thereof on the basis of the remittances set out in paras. 6 and 7 hereof.

14. At the first hearing on March 15, 1933, Mr. Mellows, of the London office of the Bankers' Trust Co. of New York, attended and gave evidence on behalf of the respondent. He stated that he had looked after Mrs. Martin's affairs since 1926, and he produced a statement purporting to show the origin of the investments which had been sold and the proceeds whereof had been remitted as set out in paras. 6 and 7 above.

15. At a subsequent hearing on July 26, 1933, Mr. Mellows again attended and gave further evidence. He stated that the New York office of his company periodically sent copies of the respondent's bank accounts there to the London office for transmission to her, and these had passed through his hands since the end of 1926. He had traced the history of the investments which had been sold and the proceeds remitted to the United Kingdom in the two years under review. He had ascertained that some of the investments had been held by the respondent prior to 1925—in some cases as far back as 1914. One investment had been received by her upon a distribution of liquid assets by a company whose bonds

she had first held in 1914. The remaining investments had been purchased out of her capital account at or about the same times as investments of greater value had been sold, which latter investments she had acquired between 1910 and 1916. Other investments had been sold in America, and the proceeds paid into the capital account, but Mr. Mellows had not traced their history. He did not know the amount of the income arising to the respondent in America since 1925, or the sources of her income, whether her expenditure had exceeded her income, or to what extent her income in America had been invested, nor could he say whether any investments acquired out of income arising since 1925 had been sold, but he felt justified in stating that none of the investments referred to in paras. 6 and 7 of this case has been purchased out of income arising since 1925, the reason being that at the time of purchase of such of them as had been acquired since 1925 there had always been more than sufficient money available in the capital account attributable to the sale of investments held before 1925.

The only facts before us relative to the respondent's income were that for the years 1930-31 and 1931-32 (the basis years), the income in the first of such years exceeded the remittances and in the second year was less than the remittances.

16. It was not admitted on behalf of the Crown that the respondent had not been resident in the United Kingdom prior to 1925. There were no facts to show whether or not there were any grounds for regarding her as so resident except that she had had no fixed place of residence here and had not made any income tax return or been assessed to income tax until that year.

17. It was contended on behalf of the respondent: (a) That the respondent had not received in the United Kingdom any income arising from securities or possessions out of the United Kingdom. (b) That the sums received by her from America were remittances of capital, and were not assessable to income tax. (c) That the remittances received by the respondent were identified as proceeds of realisation of capital assets owned by her before she became resident in the United Kingdom. (d) That the existence of income arising to the respondent from securities and possessions in America was not sufficient to establish liability to income tax in respect of such remittances under the Rules of Case IV and Case V of Sched. D or otherwise. (e) That if the Crown's contentions were correct then in the case of a sale of a source of foreign income, s. 30 of the Finance Act, 1926, would operate in cases like the respondent's so as to tax the proceeds of sale of the source itself; whereas it was clear from the terms of that section that income from the source alone is chargeable. (f) That the assessments ought to be discharged.

18. It was contended on behalf of the Crown: (a) That under r. 2 of Case V of Sched. D the measure of liability to income tax in respect of the income arising from possessions out of the United Kingdom is the full amount of the actual sums received in the United Kingdom. (b) That to the extent to which a person residing in the United Kingdom has income arising from possessions (including securities) out of the United Kingdom, that person is assessable to income tax on all remittances received in the United Kingdom from such possessions. (c) That at least it must be presumed that current charges are primarily met out of income, and if it is necessary to distinguish between remittances out of capital and remittances out of income all sums expended as income must be deemed to be remittances out of income so far as there is income available, and must be included in assessment accordingly. (d) That none of the sums was remitted for or used in respect of any transaction on "Capital" account in the United Kingdom. (e) That in any event the burden of proof that sums received from possessions abroad are remittances out of capital must rest upon the person assessed, and in the present case the evidence showed that the remittances were remittances out of income. (f) That the evidence put forward on behalf of the respondent was irrelevant as it merely showed the method adopted by her in procuring funds to remit to the United Kingdom. (g) That the respondent had failed to establish that investments sold had not been replaced by investments purchased out of her "Income" account.

(h) That the Crown's contention as applied to the income as a whole applied equally to any particular source of income, thus enabling s. 30 of the Finance Act, 1926, to be applied to the income from that source. (i) That the assessments ought to be confirmed in principle, subject to adjustment of figures by reference to the amount of the remittances and of the income arising to the respondent in America and available for remittance.

19. The commissioners who heard the appeal were unable to accept the argument put forward on behalf of the Crown that where there is income arising to a person residing in the United Kingdom from possessions out of the United Kingdom r. 2 of Case V of Sched. D is sufficient to bring into computation for assessment of income tax all remittances received. They considered that in the absence of evidence to the contrary there is a presumption that to the extent to which there is income arising in any country remittances received from that country are income and come within the charge to tax, but that such presumption may be rebutted. In the present case they were of opinion that, although the evidence was not conclusive, the proper inferences for them to draw were that the actual sums remitted to the respondent were all derived from the proceeds of realisation of investments owned by her before 1925 and not from income, or the proceeds of realisation of investments acquired out of income, arising since that date, and that she was not resident in the United Kingdom before 1925. They also thought that it was a reasonable inference that the investments sold had been largely replaced by other investments acquired out of income arising in America. They were in doubt whether they ought not to hold that, to the extent to which there was income available in America for remittance and the sums remitted were used for expenditure as income, the amounts received in the United Kingdom must be regarded as being in substance remittances of income, and chargeable to income tax as such, but after considering the terms of the charging section and the rules of Cases IV and V of Sched. D, the decision in *Scottish Provident Institution v. Allan* (1) and s. 30 of the Finance Act, 1926, they did not feel that they should be justified in law in taking that view and they discharged the assessments.

20. The appellant immediately after the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law and in due course required the commissioners to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

FINLAY, J., dismissed the appeal. In giving judgment he said: The position which arises appears to me to be simply this. The respondent has got income in America. She has got investments in America. She does not, to use a phrase which has been used by judges of much authority in more than one case, in forma specifica remit any of the income. She does cause the proceeds of the sale of investments to be remitted in forma specifica. I think that the question which arises here is to a large extent a question of fact—the question whether the true view is that this was a remittance of income or on account of income. I say that deliberately, for I am bound to say, on the question of construction, I am against what I understand to be the argument of the Crown. If I rightly followed the argument of the Crown, it was that, if you found foreign income and also remittances from abroad, you could tax the foreign income, measuring it by the remittances. I cannot think that that is right. I think the words in r. 2 of Case V:

"The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances,"

refer, not to remittances, so to speak, at large, but to what may be called income remittances. The tax is an income tax, and I cannot but think that when the legislature is dealing with this subject, it means to deal with remittances of income and with nothing else. It does not seem to me that this matter touches the region

of capital at all. It is difficult to conceive how you can measure a tax on income by reference to a remittance of capital. It does not seem to me to be possible. I think that the remittance, the annual sum received in the United Kingdom, must have reference to income and to nothing else. You must have, I think, foreign income abroad, and remittances of income made to this country.

The Crown appealed.

The Attorney-General (Sir Thomas Inskip, K.C.) and R. P. Hills for the Crown. Latter, K.C., and T. Donovan for the respondent, the taxpayer.

LORD HANWORTH, M.R.—This decision must be affirmed. It raises an interesting point as to the construction which is to be placed upon r. 2 of the Rules applicable to Case V of Sched. D to the Income Tax Act, 1918. The facts are that the respondent is now resident in this country and has been resident in this country for a number of years. She bought a property at Sunningdale, where she resides. She appealed against an assessment to income tax in respect of a sum of £5,000 for each of the financial years ending in April, 1932, and in 1933. That assessment was made upon her in respect of remittances from abroad. She was the widow of a citizen of the United States who, throughout his life, was domiciled in America. She resides here, holding an American passport; her domicile is American. Persons who are resident here are subjected to income tax, and in respect of property the fruit of which they enjoy here, methods are laid down in the Income Tax Acts for determining how the measure of their liability is to be ascertained. I turn to Sched. D, which is the schedule applicable to the case of profits and gains which are derived from, inter alia, property abroad. Tax under the schedule is to be charged in respect of

“(a) the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere.”

That is the broad proposition. Clause (2) provides: “Tax under this schedule shall be charged under the following cases,” and there are two cases which are applicable to a person who receives profits or gains from a property not situate in the United Kingdom. Case IV imposes the tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Sched. C—with which we need not trouble—and Case V, r. 2, imposes the tax “in respect of income arising from possessions out of the United Kingdom.” Stopping there for a moment, it will be observed that Case IV deals with securities and Case V deals with possessions which, as has been pointed out in many cases—and in particular in *Colquhoun v. Brooks* (2)—is a wide word sweeping in all sorts of forms of possession.

I turn to consider the rules applicable to those two cases, Case IV and Case V. Rule 1 of Case IV says that:

“The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom.”

But r. 2 of Case IV says:

“The foregoing rule shall not apply—(a) to any person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom,”

and later it provides:

“The tax in any such case shall be computed on the full amount, so far as the same can be computed, of the sums which have been, or will be, received in the United Kingdom in the year of assessment without any deduction or abatement.”

Case V is split into two portions by the rules. Rule 1 deals with income which

arises from stocks, shares or rents; r. 2 deals with tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, and it provides that the tax

"shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom."

By r. 3 (a), r. 1 is not to apply to a person who satisfies the commissioners of inland revenue that he is not domiciled in the United Kingdom, "and in such cases the computation shall be made in accordance with r. 2." So, there are plain and explicit words which require the computation in a case like the present to be made under r. 2. We are told in paras. 6 and 7 of the Case Stated that the respondent sold certain stocks and securities. Some of them she had held for a very long time, some of them for a shorter time, some of them had apparently been purchased out of accumulations of income, which enabled her to make the purchase; but in respect of all of them what the commissioners find is that they were sold and the proceeds were paid into a capital account which was one of the two accounts she had in America, and then were remitted over here to her as being the result of the sales on capital account of certain bonds and securities. The commissioners say:

"The proper inferences for us to draw were that the actual sums remitted to the respondent were all derived from the proceeds of realisation of investments owned by her before 1925 and not from income, or the proceeds of realisation of investments acquired out of income, arising since that date, and that she was not resident in the United Kingdom before 1925."

The original contention on the part of the Crown was that under r. 2 of Case V of Sched. D the measure of liability to income tax in respect of income arising from possessions out of the United Kingdom is the full amount of the actual sums received in the United Kingdom. In other words, they say that r. 2 enables you to charge to tax the full amount of these sums received from a capital source but remitted to and received in this country, and that you need not inquire whether this is income; it is money received in this country, and, inasmuch as it has been received in this country, tax is to be computed on the full amount of it. The Attorney-General does not now put forward that contention, which has been negatived by the commissioners. What he does say is that, inasmuch as there was money received in this country, the assessments ought to be confirmed in principle, but that there ought to be an adjustment of figures by reference to the amount of the remittances and of the income arising to the respondent in America and available for remittance; in other words, he rejects the suggestion that the full amount received is to be deemed to be income and chargeable to tax, but, he argues that, inasmuch as there has been the remittance of these sums, one must go back and inquire what was the income that arose to the respondent in America and would have been available for remittance if the capital sums had not been remitted to her and satisfied her desire for available assets.

In short, we have to construe r. 2 of Case V. The Attorney-General says that if you look at the latter part of the rule you will find that it can be read and ought to be read in this way: The tax in respect of income arising from possessions out of the United Kingdom shall be computed on the full amount of the actual sums received from remittances payable in the United Kingdom from property imported, from money or value arising from property not imported, from money or value so received on credit or on account in respect of such remittances, from property, money or value, brought or to be brought into the United Kingdom, quite irrespective of whether those sums remitted, whether in kind or in specie or in negotiable instruments, are moneys which are income or capital. Accepting the view that there has been a remittance of capital, he says that r. 2 enables one to hold as chargeable to tax the income which is to be ascertained in the United States, and in respect of which, so to speak, this sum over here is to be held by way of pledge; it is not to be, all of it, subjected to tax, but a less sum than it is

to be held to tax if the taxpayer shows that the income which accrued to her in the United States is smaller than the amount remitted, as, in fact, it was. In other words, the Attorney-General does not limit this rule as one covering income arising from possessions. He says it covers, not only income, but also capital sums because of the later words in the rule.

I cannot accept that view. We have been told, in cases to which I have referred, that income tax is imposed upon income and not upon capital. Those are the words of LORD MACNAGHTEN in the well-known case of *London County Council v. Attorney-General* (8) ([1901] A.C. at p. 85). We are told, also, in the old case of *Colquhoun v. Brooks* (1) that, although there may be wide words which may be sufficient, as they would have been sufficient in that case, to cover the claim that was made by the Crown, one must put on them some limitation which accords with the purpose for which the Act is passed and the tax which it was designed to charge. I think that the opening words of r. 2 clearly indicate that the purpose of the rule is to deal with income. I think if you bear in mind the words I have read at the opening part of Sched. D and of the two cases, and you consider that this rule is a part of the machinery for carrying out that purpose, it must be plain from those opening words and from that purpose of the rule that it has not the wide interpretation accredited to it by the Attorney-General, but that it is dealing throughout with the income which accrues from the possessions to the person who is charged. Let me read the words of r. 2 once more :

"The tax in respect of income arising from possessions out of the United Kingdom . . . shall be computed on the full amount of the actual sums"
[we must put in the words, to my mind, "of income"] "annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported . . ."

The Attorney-General asks us to construe the rule by a different measure. He also requires some words to be put in, because he suggests, not that the full sum is to be taxed without any other consideration, but that there is to be a further inquiry, namely, by reference to the amount of the remittances and of the income arising to the respondent available for remittance. I cannot introduce those words, nor can I assume that r. 2 has that purpose or effect. To my mind, the rule is dealing with actual sums of income and not of capital, and upon that construction the Attorney-General agrees that this contention must fail. For these reasons I have come to the conclusion that the decision of FINLAY, J., is right and that the appeal must be dismissed with costs.

SLESSER, L.J.—I agree, and for the same reasons. I would only add that, in my opinion, an additional difficulty is placed in the way of the learned Attorney-General's argument by reason of the decision in the Scottish Courts in *Scottish Provident Institution v. Allan* (1), which was confirmed in the House of Lords. In that case, a question was argued, on the ancestor of the section we have here to consider, whether income which had arisen from securities in Australia, being remitted to this country, was or was not to be regarded as falling within what was then the equivalent to r. 2 of Case V of Sched. D in the 1918 Act, and it was held in that case that the sums of interest so remitted were so inter-mixed with other funds that properly the sums received were to be regarded as amounts remitted as income. It is true that the argument which has been placed before this court today was not canvassed in that case, but it is worthy of note that both in the Court of Session and in the House of Lords there was no suggestion that it was not material there to decide whether the money so remitted was in the nature of income or not. Had the Attorney-General's argument been right it would have been a matter of no importance, once it had been decided that this was income arising in Australia, to consider whether it was income or whether it was capital in the United Kingdom, because in either case the income, on his argument, arising in Australia could be gauged for the purpose of its liability to income tax in this country under the rule as being a remittance from Australia payable in the United

Kingdom. Yet the whole of the argument and of the speeches in the House of Lords go on the presumption that the essential question to be considered in application of this rule is whether the sum received is income or is capital. As I understand the Attorney-General, he is inclined to agree that, once the construction of the rule for which he contends fails and one reads in effect into the language, "the full amount of the actual sums annually received," the words "the full amount of the actual sums representing income actually received," then he cannot dispute the finding of fact of the commissioners in the present case that the sums here were all derived from the proceeds of realisation of investments owned by the respondent before 1925 and not from income. I should have hesitated long before I should have done that which I think in effect would be running counter to the presumptions underlying the decision of the House of Lords in *Scottish Provident Institution v. Allan* (1), were the argument otherwise to commend itself to me, which it does not.

There is only one other matter I would mention, and it is this. The Attorney-General has pressed upon us the consideration that the commissioners have said that they

"considered that in the absence of evidence to the contrary there is a presumption that to the extent to which there is income arising in any country remittances received from that country are income and come within the charge to tax, but that such presumption may be rebutted."

The learned Attorney-General argues that there is no such presumption. He points out that it is not a presumption merely of business practice, such as was mentioned in the case to which I have referred, but that, as a matter of presumption, as the language is there used by the commissioners, if there be any presumption at all it is in favour of the subject, and that the Crown have to prove that they are entitled to exact the tax. He goes on to argue that in so far as there is no presumption, unless the construction for which he contends is right, it would put an impossible obligation upon the Crown and make a very complicated investigation before the commissioners in any case to ascertain whether this would be capital or not. I am inclined to agree with him that there is no such presumption arising one way or the other, but I disagree entirely with the conclusion that, because there is no presumption—at any rate, no presumption that this is income—therefore, it follows that his construction is the right one. It seems to me that this matter is just such a matter of fact as the commissioners are eminently suited to inquire into. They have inquired into it in this case, and they have rebutted the presumption which is alleged.

I express no final opinion, but I would guard against it being thought that there is such a presumption in favour of this being income other than it being capital. Beyond the ordinary obligation of the Crown to show that the subject is liable to tax, for the moment I cannot see that any presumption of law arises one way or the other.

ROMER, L.J.—I agree. Considering, first of all, r. 2 of the Rules applicable to Case V, the point that has to be determined is whether, when the rule refers to the "actual sums annually received in the United Kingdom," it means sums representing income or whether it means sums whether representing income or representing capital. It is to be observed that whether we construe the word "sums" in the one way or in the other, those sums are equally capable of being sent to this country in any one of the methods that are referred to in the rule. They can be sent in the form of remittances payable in the United Kingdom, or in the form of property imported, or in the form of money or value arising from property not imported. Those words, therefore, throw no light whatsoever on the question what the meaning of the word "sums" may be. The question, therefore, which we have to determine under r. 2 of the Rules applicable to Case V is precisely the same as the question we have to determine under r. 1 of the Rules applicable to Case IV. In both cases the question is whether the sums

referred to as being received in the United Kingdom means sums representing income, or whether it means sums, whether representing income or representing capital. If the learned Attorney-General is right in his contention that the word means sums, whether representing income or capital, it plainly follows that, if a domiciled American residing in this country has an income in America of £500 a year, but in the year of assessment receives a sum of £5,000, representing the sale of real estate in America, the American is to be taxed upon £5,000 in respect of income. The Attorney-General naturally shrank from such a conclusion: and he says: "Oh, yes, but you must always remember that the Income Tax Acts are taxing income." I quite agree. I do remember it, but I remember it at an earlier stage in the argument than the Attorney-General asks me to remember it. When construing the word "sums" he asks me to forget it, and it is only when we come to consider what is the capital amount upon which the tax is to be levied that he allows us to remember it. I remember it earlier, and, remembering it, I am satisfied, and I am clearly of opinion, that the word "sums" in both rules means, and means only, sums representing income.

For these reasons, which are really the same reasons as those given by the other members of the court and by FINLAY, J., and by the First Division of the Court of Session in the case to which our attention was called, this appeal fails.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Corbould, Rigby & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

Re GARLAND. EVE v. GARLAND

[CHANCERY DIVISION (Bennett, J.), May 30, 1934]

[Reported [1934] Ch. 620; 108 L.J.Ch. 287; 151 L.T. 326; 78 Sol. Jo. 519]

Will—Gift of house of which testator "owner and occupier" at his death—"Occupier"—House furnished, but owner not resident.

A testator, who died in 1933, by his will devised and bequeathed to his wife any house of which, at the time of his death, he was owner and occupier. Shortly before he made his will he had bought a house with the intention of residing therein, but before he could take up residence in the house he became of unsound mind and was removed to a mental hospital. His furniture, however, was moved into the house soon after its purchase, and his wife was residing there at the date of his death. The executor of the will took out a summons which asked whether the testator's widow was entitled to the proceeds of sale of the house.

Held: the testator was the occupier of the house at the time of his death, and, therefore, his widow was entitled to the proceeds of sale thereof.

Observations of LUSH, J., in *R. v. St. Pancras Assessment Committee* (1) (1877), 2 Q.B.D. 581, at p. 588, applied.

Notes. As to descriptions of property in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 245 et seq., and for cases see 44 DIGEST 681 et seq.

Cases referred to:

- (1) *R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 37 L.T. 126; 41 J.P. 662; 25 W.R. 827; [1871-85] Ryde, Rat. App. 188; 19 Digest 177, 1282.

- (2) *Liverpool Corpn. v. Chorley Union Assessment Committee*, [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 29 T.L.R. 246; 57 Sol. Jo. 263; 11 L.G.R. 182; 1 B.R.A. 72, H.L.; 38 Digest 428, 36.
- (3) *R. v. Melladew*, [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 23 T.L.R. 207; 51 Sol. Jo. 169; 5 L.G.R. 177; 2 Konst. Rat. App. 530, C.A.; 38 Digest 426, 15.
- (4) *Drury v. Fitch* (1916), Hutton, 16.
- (5) *Re B.A.S.*, [1898] 2 Ch. 392; 67 L.J.Ch. 453; 78 L.T. 638, L.J.J.; 33 Digest 186, 830.

Adjourned Summons.

The facts are fully set out in the headnote.

G. P. Slade for the executor of the will.

Rink for the testator's widow. The word "occupy" has a much wider meaning than the word "reside." [He referred to *Liverpool Corporation v. Chorley Union Assessment Committee* (2), *R. v. Melladew* (3), and *Drury v. Fitch* (4).]

W. G. Hart, for a beneficiary interest in a share of the income, referred to the judgment of *LUSH, J.*, in *R. v. St. Pancras Assessment Committee* (1).

G. Trevor Roberts, for another beneficiary, referred to *R. v. St. Pancras Assessment Committee* (1) and to *Re B.A.S.* (5).

BENNETT, J., stated the facts and the questions raised by the summons and continued: There is no question but that the testator was the owner of the house at the time of his death. The question is whether he was also the occupier. In order that the widow might take the house under the terms of the devise two conditions had to be fulfilled. The testator had to be the owner and also the occupier.

It seems to be fairly plain on the rating cases cited to me that residence and occupation are not the same thing. A person can be the occupier, although he does not reside in the house, and I think that the passage in the judgment of *LUSH, J.*, in *R. v. St. Pancras Assessment Committee* (1) enables me to decide the point in question in favour of the testator's widow. *LUSH, J.*, says:

"It is not easy for me to give an accurate and exhaustive definition of the word 'occupier.' Occupation includes possession as its primary element, but it also includes something more. Legal possession does not in itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, although he may not reside in it one day in a year."

The house was furnished in August, 1930, and, therefore, until the time when the testator died it was ready for occupation whenever he recovered. I think that, on these facts, having regard to the opinion by *LUSH, J.*, I am able to come to the conclusion that the testator was not only the owner of the house in question, but also the occupier. The answer to the question is that the testator's widow is entitled to the proceeds of sale of the freehold house.

Solicitors: *Howse & Eve; W. J. Watts Miller.*

[Reported by *J. H. G. BULLER, Esq., Barrister-at-Law.*]

Re A SOLICITOR

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Swift, JJ.), July 24, 1934]

[Reported [1934] 2 K.B. 463; 152 L.T. 22; 50 T.L.R. 561; 78 Sol. Jo. 587; 103 L.J.K.B. 719]

Solicitor—Application to Disciplinary Committee of Law Society—Finding of no professional misconduct—No order made—Appeal by Law Society to Divisional Court—Competency—Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), ss. 4, 5, 7 (1) and (2), s. 8—Solicitors Act, 1957 (5 and 6 Eliz. 2, c. 27), s. 46 (1), s. 47, s. 48 (1), s. 49.

An application had been made on behalf of the Law Society to the Disciplinary Committee appointed under s. 4 of the Solicitors Act, 1932, that a solicitor should be required to answer certain allegations contained in an affidavit. The committee, in their findings of fact, said: "While not finding any professional misconduct, the committee make no order as to costs." The Law Society appealed to the Divisional Court, and a preliminary objection was taken on behalf of the respondent solicitor that no appeal lay.

Held: the preliminary objection must succeed because (i) an appeal lay only from an "order" of the committee, and a clear contrast was drawn in the statute between an order and the findings which were to be prefaced to it. In this case the committee had deliberately abstained from making any order.

(ii) even assuming that the finding of no professional misconduct amounted to an order (which the court held it did not), the words of s. 8 of the Solicitors Act, 1932, were not sufficiently definite to override the established principle that there can be no appeal against an acquittal without distinct statutory authority.

R. v. Keepers of the Peace and Justices for the County of London (1) 25 Q.B.D. 357, applied.

Per **Avory, J.** I am not prepared to say that the Law Society may not be an applicant within the meaning of the Act against a solicitor, nor am I prepared to say that the Law Society may not be an appellant against an order of the disciplinary committee.

Notes. The Solicitors Act, 1932, as amended in ways which do not affect the decision in this case, has now been repealed and replaced by the Solicitors Act, 1957 (5 & 6 Eliz. 2, c. 27). Section 46 (1), s. 47, s. 49, and s. 48 (1) of the 1957 Act respectively correspond to s. 4, s. 5, s. 7, and s. 8 of the 1932 Act. The rules now in force are the Solicitors (Disciplinary Appeals) Rules, 1942 (S.I. 1942 No. 1832).

Doubted: *Re Two Solicitors*, [1938] 1 K.B. 616.

As to when an appeal lies to the Divisional Court from the Disciplinary Committee, see 31 **HALSBURY'S LAWS** (2nd Edn.) 303, para. 327, and 306, para. 333. As to who may apply to the Disciplinary Committee, see *ibid.* 301, para. 324.

Case referred to:

(1) *R. v. Keepers of the Peace and Justices for the County of London* (1890), 25 Q.B.D. 357; sub. nom. *R. v. London JJ., Ex parte Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 39 W.R. 11; 6 T.L.R. 389, D.C.; 26 Digest 460, 1700.

Appeal from the Disciplinary Committee of the Law Society, appointed under s. 4 of the Solicitors Act, 1932.

A complaint was made to the above committee on behalf of the Law Society asking that a solicitor should be required to answer certain allegations contained in an affidavit, and that his name might be struck off the roll, or that he might be suspended from practice, or that such other order might be made as the committee should think right. The committee, after hearing evidence, issued their "findings

and order," which set out in detail certain findings of fact, and concluded with the words "while not finding any professional misconduct the committee make no order as to costs."

The Law Society appealed, and a preliminary objection was taken that no appeal lay.

The Solicitors Act, 1932, provides:

Section 5 (1): "Any application . . . (b) by another person to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit, shall be made to and heard by the Committee in accordance with rules made under the next succeeding section: . . ."

Subsection (2): "On the hearing of any such application the Committee shall have the power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates, as to suspending him from practice, as to the payment by any party of costs, and otherwise in relation to the case as they may think fit: . . ."

Section 7 (1): "Every order made by the Committee under this Part of this Act shall be prefaced by a statement of their findings in relation to the facts of the case and shall be signed by their Chairman and filed with the registrar, and as soon as it has been so filed shall be acted upon by the registrar and be enforceable in the same manner as a judgment or order of the High Court to the like effect."

Subsection (2): "Where by any such order as aforesaid the name of any solicitor is ordered to be removed from, or struck off, the roll, or any solicitor is suspended from practice, the registrar shall forthwith upon the filing of the order cause a notice stating the effect of the operative part thereof to be published in the *London Gazette*."

Section 8: "An appeal against any order made by the Committee under this Part of this Act shall lie to the High Court at the instance either of the applicant or of the solicitor to whom the application relates. . . ."

Malcolm Hilbery, K.C., and *Eagle*, for the solicitor, supported the preliminary objection.

Roland Oliver, K.C., and *W. M. Andrew* for the Law Society.

LORD HEWART, C.J.—In my opinion, this objection ought to succeed. The course of recent legislation on this matter, culminating in the Solicitors Act, 1932, is quite clear. Its object is to make the great profession of solicitors masters in their own house, and it is only in limited cases that in circumstances like those before us there is an appeal. I need not refer again to the Solicitors Act of 1888 or to that of 1919, but if it had been intended that there should be an appeal to the High Court, not merely against an order made by the committee under the First Part of the Solicitors Act, 1932, but also against any findings of the committee, nothing would have been easier than to say so. What, on the other hand, is found is a clear contrast pointed again and again between an order made by the committee and findings in relation to the facts of the case by which such an order is to be prefaced. Again and again in the sections and subsections to which our attention has been directed, the word "order" appears by way of contrast with the word "findings." The nature of the orders which can be made is set out in s. 5 (2). In like manner, by s. 8 of the Act of 1932, it is provided that an appeal against any order shall lie to the High Court, and the rules made under that section are careful to observe the same terminology: that which may be the subject of an appeal is an "order." The words used by LORD COLERIDGE, C.J., in *R. v. Keepers of the Peace and Justices for the County of London* (1) are very much in point (25 Q.B.D. at p. 360):

"Our decision must be governed by broad and well-recognised principles of construction. One of those is, that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute."

Each of these principles seems to me to apply with great force to the present case. Here, the very experienced committee of the Law Society have deliberately refrained from making an order, and they have said that while not finding any professional misconduct they will make no order as to costs. But it is not as to costs that an appeal is sought. Appeal is sought as to findings of the committee, and, in my opinion, without citing other authorities, as one might, it is quite clear that an appeal of that nature is not given under this statute, and the preliminary objection therefore succeeds, with the result that this appeal must be dismissed.

AVORY, J.—I am of the same opinion. To my mind, the question for the court really is whether the words of s. 8 of the Act of 1932 are so plain in favour of the Law Society's contention that they destroy the recognised principle that no appeal lies from an acquittal, a principle to which my Lord has referred and which was laid down in *R. v. Keepers of the Peace and Justices for the County of London* (1).

It is quite true that s. 8 in terms gives a right of appeal to the applicant. In this case the applicant was the Law Society itself. Although the position is unusual, I am not prepared to say that the Law Society may not be an applicant within the meaning of the Act against a solicitor, nor am I prepared to say that the Law Society may not be an appellant against an order of the disciplinary committee. The question is whether it can be an appellant against a refusal of the disciplinary committee to make an order; in other words, whether it can be an appellant against an acquittal by the disciplinary committee of a charge of misconduct which is made against a solicitor.

For the purpose of determining whether the Law Society can be an appellant against a refusal to make any order, I think it is material to look at s. 5 (2) of the Act of 1932, and also at s. 7, in order to see what is the nature of the order which it is contemplated may be the subject of an appeal. Section 5 (2) provides that

"on the hearing of any such application the committee shall have power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates, as to suspending him from practice, as to the payment by any party of costs, and otherwise in relation to the case as they may think fit."

I do not agree that the words "otherwise in relation to the case" mean a refusal to make an order at all. Further, s. 7 provides that every order made by the committee shall be prefaced by a statement of their findings

"and filed with the registrar, and as soon as it has been so filed shall be acted upon by the registrar and be enforceable in the same manner as a judgment or order of the High Court to the like effect."

How can an acquittal of an accused person be acted upon in the same manner as a judgment of the High Court? It seems to me impossible. Therefore, in my view, the word "order" throughout the Act does contemplate some definite order made against a solicitor, either striking him off the Roll or suspending him from practice or making some order against him to his detriment. Therefore, the words of s. 7 (2) are only intended to operate in a case where the committee has, for example, made an order merely suspending a solicitor and the applicant thinks that the offences committed are so grave that the solicitor should be struck off the Roll or at least suspended for a longer time, in which case there may be a right of appeal. I therefore agree that this preliminary objection succeeds.

SWIFT, J.—There is said here to be an appeal under s. 8 of the Solicitors Act, 1932. A preliminary point is taken that in fact no order was made by the committee. Now, it is clear and long-established law that appeal is the creature of statute. There is no appeal from one tribunal to another tribunal unless some statute gives the right to it. Is there any statute giving a right to appeal to the High Court from the findings of the disciplinary committee?

The Act of 1932 makes it quite plain that there is no appeal from anything except an order, and unless there is an order there can be no appeal. In this

case I am satisfied that there was no order. The committee made no order because they came to the conclusion that they should make no order. They might have made an order striking the solicitor off the Roll, or suspending him from practice, or subjecting him to various penalties under different sections of the Act. But they did nothing of the kind and left nothing on which there could be an appeal.

But assuming that there was an order, it was an order acquitting a solicitor of charges against him, and I am quite satisfied on the authority of *R. v. Keepers of the Peace and Justices for the County of London* (1) that unless there is distinct statutory authority for saying there can be an appeal against an acquittal of someone charged with a crime such a right does not exist. It should be a delight to everyone to know that nobody who has been charged and found innocent by the proper tribunal can be taken on to another court and vexed again for the same alleged offence. I therefore agree that this preliminary objection ought to succeed.

Preliminary objection upheld.

Appeal dismissed.

Solicitors: *C. O. Humphreys & Son.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

Re GAGE. CROZIER v. GUTHERIDGE

[CHANCERY DIVISION (Clauson, J.), March 16, 1934]

[Reported [1934] Ch. 536; 103 L.J.Ch. 241; 151 L.T. 240]

Will—Legacy—General or specific—“To E.M.G. the sum of £1,150 5 per cent. War Loan stock And to M.G. the sum of — stock now standing in my name.”

Will—Gift—General bequest of 5 per cent. War Loan stock—Redemption of stock by testator—Unredeemed stock “continued” in 3½ per cent. War Loan—Duty of executors to purchase for legatee £1,150 3½ per cent. War Loan—Finance (No. 2) Act, 1931 (21 & 22 Geo. 5, c. 49), s. 11.

The testator, by his will dated March 3, 1932, gave and bequeathed to his niece “the sum of £1,150 5 per cent. War Loan 1929–47 stock And to M.G. the sum of £500 New South Wales 5 per cent. stock now standing in my name.” He then devised and bequeathed his residuary estate to G.C. absolutely. At the date of his will the testator held £1,150 5 per cent. War Loan 1929–47 stock and £500 New South Wales 5 per cent. stock. In December, 1932, the testator redeemed his £1,150 War Loan stock and received a cash payment in respect of it. The testator died on April 23, 1933, having at the date of his death no holding of War Loan stock. At the date of the testator's death all 5 per cent. War Loan 1929–47 stock which had not been redeemed had been “continued” in 3½ per cent. War Loan under the Finance (No. 2) Act, 1931, s. 11.

Held: M.G. was entitled to have purchased for her out of the testator's estate £1,150 3½ per cent. War Loan, or to be paid such a sum as would purchase the same, because

(i) the word “And” with a capital “A” introduced a separate bequest to M.G., and the words “now standing in my name” therefore had no reference to the War Loan 1929–47 stock.

(ii) there was, accordingly, nothing to indicate that the testator intended to give by his will the very War Loan 1929–47 stock of which he was then the holder.

(iii) the bequest of this stock was, therefore, a general bequest, not a specific bequest.

(iv) the 8½ per cent. War Loan, although it had a new name and certain modified characteristics, was the same stock as the 5 per cent. 1929-47 War Loan Stock mentioned in the will.

Notes. Considered: *Re Rose, Midland Bank Executor and Trustee Co. v. Rose*, [1948] 2 All E.R. 971.

As to the distinction between "general" and "specific" legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 316, para. 609, and for cases on the subject see 23 DIGEST 384, 4546-4547; as to the construction of the words "War Loan" and "stock" in a bequest, see 34 HALSBURY'S LAWS (2nd Edn.) 260, para. 311; and as to the ademption of a specific gift by a disposition by the testator during his lifetime, see *ibid.* 127, para 164, and for cases on the subject see 44 DIGEST 405-406, 2373-2380, and 409-412, 2405-2427.

Cases referred to:

- (1) *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252; 60 L.J.Ch. 686; 65 L.T. 367; 40 W.R. 7; 7 T.L.R. 654, C.A.; 8 Digest (Repl.) 440, 1307.
- (2) *Re Gray, Dresser v. Gray* (1887), 36 Ch.D. 205; 56 L.J.Ch. 975; 57 L.T. 132; 35 W.R. 795; 44 Digest 411, 2421.
- (3) *Child v. Elsworth* (1852), 2 G.M. & G. 679; 42 E. R. 1038, L.J.J.; 44 Digest 550, 3680.

Adjourned Summons.

The testator by his will dated March 2, 1932, made the following bequests:

"I give and bequeath unto my niece Eleanor M. Raynham [now Mrs. E. M. Gutheridge] the sum of £1,150 5 per cent. War Loan 1929-47 Stock And to Marian Gissing the sum of £500 New South Wales 5 per cent. Stock now standing in my name and I direct that the said sums shall be paid free of duty."

He then gave his residuary estate to Gertrude Cunliffe. The following statement of the remaining facts is taken from the judgment of CLAUSON, J.:

At the time the testator made his will he held £1,150 5 per cent. War Loan 1929-47 and no more. Under the provisions of Part III of the Finance (No. 2) Act, 1931, the Government were empowered to give the holder of War Stock of that description (in the Act called "the Loan") an option of (a) making an application, which in the Act is referred to as "a continuance application," in accordance with the provisions of that part of the Act, to have his holding of the Loan continued therein, or, if he desired to receive on the redemption date repayment in cash in respect of his holding; (b) to make an application, in the Act referred to as "a repayment application." The testator did not make "a continuance application," but made "a repayment application," and received repayment in cash in respect of his holding of £1,150 War Loan. Soon after such repayment—namely, on April 23, 1933, the testator died without having altered his will and holding no War Loan whatever at that date.

A. C. Nesbitt for the executor.

Denis Johnston, for Mrs. Gutheridge, referred to HAWKINS ON WILLS (3rd Edn.), p. 349; *Re Tyler, Tyler v. Tyler* (1); *Re Gray, Dresser v. Gray* (2).

Grange Turner, for the residuary legatee, referred to *Child v. Elsworth* (3).

CLAUSON, J.—This is a short will, which raises a point of some interest.

[His Lordship read the will, stated the facts, and continued:]

The first question I have to decide is whether this bequest by the testator to his niece, Mrs. Gutheridge, of the £1,150 War Loan is a specific legacy or is a general legacy of that amount of the stock to be purchased for her by his executor. It is clear that, notwithstanding that the testator at the time he made his will did in fact hold that precise amount of the War Loan described in his will, I am bound, in the absence of the possessive pronoun or of some other context indicating that the stock which he intended to give by his will was the very stock of which he

was then the holder, to hold that bequest to be a general bequest and not a specific bequest. A

It was suggested by counsel for the residuary legatee that the words "standing in my name" which appear in the will immediately after the gift of the £500 New South Wales stock to Marian Gissing, apply to the bequest of the War Loan. It is to be observed that the initial letter "A." in the word "And" immediately preceding the words "to Marian Gissing" is (in the probate of the will) a capital B
letter, and in my view, that word "And" introduces a separate bequest of the New South Wales stock. In my judgment the words "now standing in my name" are appended to and qualify the latter of the two legacies only, and have no reference to the bequest of the £1,150 5 per cent War Loan, which is accordingly a general legacy.

If the view which I take of the construction of the will is the correct one, but C
there was not in existence at the time of the testator's death stock of the description mentioned in the will which his executor could purchase for the legatee, the legacy must fail; and it has been contended on behalf of the residuary legatee that no such stock as that which is bequeathed by the will was at the date of the testator's death in existence. Turning to the Finance (No. 2) Act, 1931, Part III, I find it provided in effect that if a holder of "the Loan" (i.e., the 5 per cent. War D
Loan) elects not to apply or fails in due time to apply for repayment in cash, he is treated as making "a continuance application" and thereupon his holding in the Loan is to be continued therein, subject to modifications in rate of interest and terms of repayment. This seems necessarily to involve that the holding remains a holding in the same stock, though some of the incidents of the stock are modified. If this be so, the executor, in purchasing the existing stock, usually described as 3½ per cent. War Loan, is purchasing a stock which was formerly called, and was, 5 per cent. War Loan and now (though it has a new name and certain modified characteristics) is the same stock as that which the executor was directed by the will to purchase. It is accordingly true to say that a purchase by the executor of stock forming part of the Loan or stock indicated in the will is practicable. In my view the executor's duty is to purchase the proper amount of the 3½ per cent. E
stock which is held by holders of "the Loan" who have not claimed repayment and is the 5 per cent. War Loan under another name.

I am assisted in arriving at this conclusion by the provisions of s. 14 of the Act, which in effect confer upon trustees who have power to invest in "the Loan" power to continue their holding in and to invest the trust funds in what is now called the 3½ per cent. War Loan. But that section does not apply directly to the present case, because the Finance (No. 2) Act, 1931, came into force during the testator's lifetime, and accordingly the will was not then an operative instrument. The section seems to contemplate powers in existence at the date of the coming into force of the Act.

There will be a declaration that the bequest to the defendant Mrs. Eleanor Gutheridge is a general bequest and that accordingly she is entitled to have purchased for her out of and at the expense of the testator's estate £1,150 3½ per cent. War Loan or to be paid such a sum as will purchase that amount of stock.

Solicitors: *Rooks, Wales, Godwin, & Galsworthy*, for *W. Jackson Hart*, Harlow.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

ROCHE v. WILLIS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.),
April 19, 1934]

[Reported 151 L.T. 154; 98 J.P. 227; 32 L.G.R. 286; 30 Cox,
C.C. 121]

Road Traffic—Heavy locomotive—Driving on highway by person under twenty-one—Exception of agricultural tractor—Onus of proof—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 9 (3).

By the Road Traffic Act, 1930, s. 9 (3): "A person under twenty-one years of age shall not drive a heavy locomotive . . . on a road. . . . Provided that a vehicle being an agricultural tractor shall not be deemed to be driven on a road within the meaning of this subsection while it is being so driven in the course of the internal operations of a farm."

Held: the onus of proof lies on a defendant to bring himself within the above excepting clause, and it is not for the prosecution to prove affirmatively that a defendant does not come within the clause.

Notes. Under s. 9 (3) of the Road Traffic Act, 1930, as amended by the Emergency Laws (Miscellaneous Provisions) Act, 1953, the exception from liability arises where a tractor is used "primarily for work on land in connection with agriculture." It is submitted that the present case is authority that the onus of proving such use lies on the defendant.

As to driving heavy locomotives, see 31 HALSBURY'S LAWS (2nd Edn.) 718-721, 778, 779, and for cases see DIGEST SUPPS., tit. Street Traffic, case 154a et seq.

Case referred to:

(1) *R. v. Turner* (1816), 5 M. & S. 206; 106 E.R. 1026; 14 Digest (Repl.) 494, 4781.

Case Stated by justices for the county of Durham.

An information was preferred before a court of summary jurisdiction by John Roche (the appellant) under the Road Traffic Act, 1930, against Joseph Henry Willis (the respondent), alleging that he, on Sept. 6, 1933, in the township of Staindrop, did unlawfully drive a heavy locomotive—to wit, a road roller—when under the age of twenty-one years.

On the hearing of the information the following facts were admitted or proved: (a) On Sept. 6, 1933, the respondent was driving a heavy locomotive on the public highway between Staindrop and Ingleton. The locomotive was not being driven in the course of the internal operations of a farm. (b) The respondent, when asked by P.C. McDermott to produce his driving licence, was unable to do so, but offered to produce it at his residence at Piercebridge. (c) At the same time and place the respondent informed the constable that he had celebrated his twenty-first birthday a fortnight ago. (d) Later in the course of the same day the respondent called upon P.C. Blackburn, in the village of Piercebridge, and produced his driving licence, informing him that he was nineteen years of age. (e) When asked by P.C. Blackburn why he had told P.C. McDermott that he was twenty-one years of age, the respondent replied that he had been instructed by a certain person to give his age as twenty-one if questioned about it.

On the part of the appellant it was contended that, in view of the admission by the respondent to P.C. Blackburn that he was nineteen years of age, the onus lay on the respondent of satisfying the justices that he had, on first applying for a licence after the commencement of the Road Traffic Act, 1930, satisfied the licensing authority that he was during the six months immediately preceding Jan. 1, 1930, in the habit of driving a heavy locomotive.

On the part of the respondent it was contended that, regardless of the respondent's admission as to age, the appellant must prove, in addition to the fact that the respondent was under twenty-one, that he was disqualified by reason of his

age to drive such a vehicle; that the onus lay on the prosecution to prove that the respondent had not so satisfied the licensing authority, and that the prosecution could easily discharge such onus by proof that the respondent did not in fact hold a licence to drive such a vehicle; and that, the prosecution having failed to adduce such evidence, the summons should be dismissed. A

The justices accepted contentions on behalf of the respondent and dismissed the information. The informant appealed, by Case Stated, to the Divisional Court. B

The question for the opinion of the court was whether, on the above statement of facts, the justices came to a correct determination and decision in point of law.

D. H. Robson for the appellant.

The respondent did not appear.

LORD HEWART, C.J., read s. 9 (3) of the Road Traffic Act, 1930, and continued: Here, upon the undisputed evidence, the respondent against whom the information was laid was under twenty-one years of age, in fact of nineteen years of age, and he had told the police officer that he had been instructed by a person not named to give his age as twenty-one if he was questioned about it. In those circumstances the justices were invited to hold, and did hold, C

"that it was the duty of the prosecution to prove that the respondent had committed an offence by driving when under the age of twenty-one years; that, notwithstanding his age, he might, for all we knew to the contrary, be a person entitled to drive such a vehicle; and that it was the duty of the prosecution to satisfy us that the respondent, although nineteen years of age, had not, on first applying for a licence after the commencement of the Road Traffic Act, 1930, himself satisfied the licensing authority that he was during the six months immediately preceding Jan. 1, 1930, in the habit of driving such a vehicle." D

It seems to me, when one looks at the common law and at the relevant statutory provisions, that that decision was clearly wrong. Under s. 39 of the Summary Jurisdiction Act, 1879, it is expressly provided: E

"Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act . . . creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant." F

Apart altogether from the provisions of statute, the same proposition has been maintained in a long line of cases going back at least to the year 1816, when in *R. v. Turner* (1) **LORD ELLENBOROUGH, C.J.**, said (5 M. & S. at p. 210): G

"The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended." H

BAYLEY, J., in giving judgment to the same effect, said at p. 211: I

"We cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification."

Finally, **HOLROYD, J.**, said at p. 213, in respect of the qualifications referred to in that case:

"All these qualifications are peculiarly within the knowledge of the party himself, whereas the prosecution has probably no means whatever of proving a disqualification."

It is quite true that neither the word "proviso" nor the word "exception" occurs here, but precisely the same meaning can be conferred by the word "unless."

It seems to me quite obvious that the onus of bringing himself, if he could, within the proviso or exception or exemption, rested upon the respondent, and that it was no part of the duty of the prosecution, even if by diligence they could have done so, to ascertain facts which would establish that the proviso was not in this case satisfied. I am clearly of opinion that this appeal ought to be allowed and that the case should go back to the justices with the direction that the offence charged was proved.

AYORY, J.—I am of the same opinion.

HUMPHREYS, J.—I agree.

Appeal allowed.

Solicitors: *J. E. Freeman & Son, Darlington.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

SNOWMAN (OTHERWISE BESINGER) v. SNOWMAN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), April 30, 1934]

[*Reported* [1934] P. 186; 103 L.J.P. 87; 151 L.T. 180; 50 T.L.R. 445]

Nullity—Incapacity of husband—Imperfect intercourse—Fecundatio ab extra.

Where, after a ceremony of marriage between a man and a woman, there was imperfect intercourse, the woman was impregnated ab extra with the result that on two occasions she had miscarriages, though still remaining a virgin, the woman was granted a decree nisi for nullity of marriage.

Principle laid down by DR. LUSHINGTON in *D. v. A.* (1) (1845), 1 Rob. Eccl. 279, followed.

Notes. Considered: *Grimes (otherwise Edwards) v. Grimes*, [1948] 2 All E.R. 147.

As to grounds for nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 223 et seq., and statutes there cited. For cases see 27 Digest (Repl.) 269 et seq.

Cases referred to:

(1) *D. v. A.* (1845), 1 Rob. Eccl. 279; 163 E.R. 1039; 27 Digest (Repl.) 273, 2187.

(2) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 40 T.L.R. 713; 68 Sol. Jo. 682, H.L.; 27 Digest (Repl.) 318, 2649.

Petition by wife for nullity of marriage.

The petitioner, who went through a ceremony of marriage in April, 1930, petitioned for nullity of marriage on the ground of the incapacity of her husband to consummate the marriage. At the time of the marriage she was twenty and he thirty years of age. In her evidence the wife said that conjugal relations were unsatisfactory from the beginning owing to the husband's incapacity to have complete intercourse. They were both medically examined, and nothing was found to be wrong with her. She became pregnant twice, but on each occasion miscarried. In May, 1933, she left the husband and went to her parent's home. She only knew what she was told by her medical adviser about the miscarriages. A woman doctor said in evidence that on May 10, 1933, both parties visited her. The petitioner was a virgin though she had twice had miscarriages—in October, 1931, and March, 1933. Evidence was given by a gynaecological surgeon and a medical inspector of the court that fecundation could take place ab extra.

Cotes-Preedy, K.C. (with him *H. Durley Grazebrook*), for the petitioner.—In a case like this the principles of the former ecclesiastical courts are still in force, the repealed s. 22 of the Matrimonial Causes Act, 1857, being saved by ss. 32 and 103 of the Supreme Court of Judicature (Consolidation) Act, 1925. What should be the test applied is shown in *D. v. A.* (1), in which *DR. LUSHINGTON* said, in his judgment (1 Rob. Eccl. at p. 298):

“Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all.”

DR. LUSHINGTON there pronounced a decree of nullity on behalf of the male petitioner, holding that the woman's condition rendered consummation to the full extent impossible. In the present case the same principle should be applied, in view of the respondent's condition. In *Russell v. Russell* (2) *LORD DUNEDIN* said ([1924] A.C. at p. 722):

“Fecundation *ab extra* is admittedly, by the medical testimony, as vouched by the learned judge (*HILL, J.*) in his summing up, a rare but not impossible occurrence.”

Similar evidence was given in the present case, and such a finding is justified on the facts.

BATESON, J.—I think that I can follow the definition given by *DR. LUSHINGTON*, whose statement in the case of *D. v. A.* (1) has been cited by counsel. It has been proved that the respondent was incapable of ordinary complete intercourse. On two occasions the petitioner has had a miscarriage. The medical evidence has satisfied me that she is a virgin, and that it is well known to be possible that fecundation may take place *ab extra*, as stated by *LORD DUNEDIN* in *Russell v. Russell* (2), as the result of the evidence given in that case. Therefore, though it was possible for the wife to become pregnant, as actually happened, I do not see my way to make any distinction between that which happened in this case and the “partial and imperfect intercourse” which *DR. LUSHINGTON* declined to accept as consummation of the marriage in *D. v. A.* (1). There will be a decree nisi.

Solicitors: *Rhys, Roberts & Co.*

[Reported by *WILLIAM LATEY, ESQ., Barrister-at-Law.*]

Re HILL. CLAREMONT v. HILL

[COURT OF APPEAL (Greer and Maugham, L.J.J.), June 15, 1934]

[Reported [1934] Ch. 623; 103 L.J.Ch. 289; 151 L.T. 416; 50 T.L.R. 487; 78 Sol. Jo. 446]

Solicitor—Costs—Solicitor-trustee—No charging clause—Employment by solicitor-trustee of own firm—Solicitor-trustee's profits limited to £600—These profits already secured—Right to profit costs.

A solicitor agreed with his two partners that he should only attend business in a consultative capacity and should receive out of the profits of the firm a fixed remuneration of £600 per annum. The solicitor, being a trustee appointed under an indenture which did not contain a charging clause entitling him to charge for his services in connection with the trust, took out an originating summons for the construction of certain terms of the trust, and employed his firm to do the necessary work. The judge, having given his decision, ordered that the costs of the solicitor, the plaintiff, and of the defendants be taxed as between solicitor and client and paid out of the capital of the trust fund. If an account had been taken of the profits of the firm at the date when the proceedings by way of originating summons commenced those profits would have been ample to pay the solicitor-trustee his fixed remuneration, without regard to any future costs or profits.

Held: the solicitor was not entitled to profit costs because (i) profit costs should not be allowed where the solicitor-trustee had placed himself in such a position that his judgment and his conduct of the litigation might be influenced by his interest being in conflict with his duty, although as in this case, they had not in fact been so influenced;

(ii) the results of allowing profit costs to the solicitor would have been to create an ampler fund out of which the solicitor's fixed remuneration might have been paid.

Christophers v. White (1) (1847), 10 Beav. 523, followed.

Dictum of STIRLING, J., in *Re Doody, Fisher v. Doody* (2), [1893] 1 Ch. 129, at p. 134, approved and applied.

Clack v. Carlon (3) (1861), 30 L.J.Ch. 639, distinguished.

Re Gates, Arnold v. Gates (4), [1933] Ch. 913, approved (obiter).

Notes. As to the entitlement of a solicitor-trustee to profit costs, see 31 HALSBURY'S LAWS (2nd Edn.) 127, para. 173, and for cases on the subject see 42 DIGEST 117-119, 1137-1155.

Cases referred to :

- (1) *Christophers v. White* (1847), 10 Beav. 523; 50 E.R. 683; 24 Digest 602, 6330.
- (2) *Re Doody, Fisher v. Doody*, [1893] 1 Ch. 129; 62 L.J.Ch. 14; 67 L.T. 650; 41 W.R. 49; 9 T.L.R. 77; 37 Sol. Jo. 49; 2 R. 166, C.A.; 24 Digest 602, 6334.
- (3) *Clack v. Carlon* (1861), 30 L.J.Ch. 639; 7 Jur.N.S. 441; 9 W.R. 568; 4 L.T. 361; 24 Digest 604, 6348.
- (4) *Re Gates, Arnold v. Gates*, [1933] Ch. 913; 102 L.J.Ch. 369; 149 L.T. 521; Digest Supp.
- (5) *Broughton v. Broughton* (1855), 5 De G.M. & G. 160; 25 L.J.Ch. 250; 26 L.T.O.S. 54; 1 Jur.N.S. 965; 3 W.R. 602; 43 E.R. 831, L.C.; 24 Digest 602, 6331.
- (6) *Re Harman & Son*, [1912] W.N. 111; 42 Digest 186, 2000.
- (7) *Cradock v. Piper* (1850), 17 Sim. 41; 1 Mac. & G. 664; 1 H. & Tw. 617; 19 L.J.Ch. 107; 15 L.T.O.S. 61; 14 Jur. 97; 41 E.R. 1422; 24 Digest 604, 6350.

Appeal by the plaintiff, a solicitor, from a decision of EVE, J., on a summons to vary the certificate of a taxing master.

The solicitor, Albert William Claremont, was a member of a firm of solicitors—Claremont, Haynes, & Co.—the two other partners being H. L. Stuart and G. H. R. Tildesley. In view of his advancing years the solicitor, in August, 1929, agreed with his partners that he should attend at the offices of the firm at such times as he should find convenient and that his work in the firm should be of a consultative character. It was agreed that his remuneration should consist of a fixed sum of £600 per annum, payable out of the profits of the firm.

The solicitor, Caroline Hill and Thomas Swan were trustees under an indenture dated Jan. 5, 1920, but there was no charging clause in the indenture entitling the solicitor to charge for his services in connection with the trust. On Feb. 16, 1933, the solicitor took out an originating summons to determine whether an annuity of £66 13s. 4d. payable to Caroline Hill under the said indenture was payable only out of income or, if necessary, out of the capital of the trust fund. The Atlas Assets Co., who were entitled to the property subject to the annuity, Caroline Hill, and Thomas Swan were defendants to the summons. BENNETT, J., on May 15, 1933, having given his decision on the summons, ordered the taxing master to tax as between solicitor and client the costs of the solicitor, the plaintiff, and of the defendants, and directed that such costs, when taxed, should be paid out of the capital of the trust fund. The solicitor had employed his firm, Claremont, Haynes & Co., throughout to act for him in the matters preliminary to and in the proceedings of the originating summons. The actual work of the proceedings and of the matters preliminary to the proceedings was done by the solicitor's partner, G. H. R. Tildesley, with the exception of two or three letters which the solicitor himself had written. At the time the costs of the originating summons began to be incurred, the profits of the solicitor's firm, Claremont, Haynes & Co., were such that, if at that time an account had been taken they were already ample to secure the solicitor's fixed remuneration of £600 a year, without regard to any future costs or profits which might be obtained.

The solicitor brought in his bill of costs and the taxing master disallowed all his profit costs on the ground that the solicitor, being a solicitor and a trustee with no charging clause in the instrument by which he was appointed and under which he acted, had employed a firm of solicitors, of which he was a partner, to do the work of the trust, following the decision of CLAUSON, J., in *Re Gates, Arnold v. Gates* (4). The taxing master allowed the solicitor only out-of-pocket disbursements. The solicitor appealed, but EVE, J., supported the certificate of the taxing master upon the same ground.

The solicitor appealed.

F. J. Bowyer for the solicitor.—The decision in *Re Gates, Arnold v. Gates* (4) is wrong and not in accord with the earlier decisions. CLAUSON, J., there decided that, in the event of there being no charging clause in the instrument creating the trust and appointing the trustees, a solicitor-trustee, who employs the firm of solicitors of which he is a member to do the work of the trust, will not be allowed any profit costs even though there is an agreement that the solicitor-trustee shall obtain no share in the profit costs. In *Christophers v. White* (1) the side-note is:

"Trustees can only be allowed costs out of pocket for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee."

But there it was plain that if profit costs had been allowed the solicitor-trustee would have had a share of them. The reason for the rule was given in *Broughton v. Broughton* (5) by LORD CRANWORTH, L.C., when he said (25 L.J.Ch. at p. 250):

"The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty."

In *Clack v. Carlon* (3) WOOD, V.-C., afterwards LORD HATHERLEY, decided that

where a trustee, being a solicitor, employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the court allowed the professional charges. He said (30 L.J.Ch. at p. 640):

"I apprehend that the true ground of the rule is simply that a trustee ought not to make any profit out of his trust."

[He referred also to *Re Doody, Fisher v. Doody* (2); and *MAUGHAM, L.J.*, referred to *Re Harman & Son* (6).] The decision in *Re Gates, Arnold v. Gates* (4) goes too far. If the solicitor-trustee does not do the work and does not share in the costs he is entitled to profit costs though he employs the firm of solicitors of which he is a member to do the work. He has not placed himself in a situation so that his interests may conflict with his duty, and though a partner of the solicitor-trustee is employed professionally, that is immaterial, if the solicitor-trustee has no interests in the profits. In any event, the decision in *Re Gates, Arnold v. Gates* (4) is distinguishable from this case, for there *Arnold*, the solicitor-trustee, himself did the work of the trust. In the case before the court, *Mr. Claremont* neither did the work, nor could he, in fact, receive the profit.

J. G. Strangman for the respondents. The criterion is that the solicitor-trustee must not place himself in such a position that his interest may conflict with his duty, and that is what the plaintiff has done here, if profit costs were permitted: see *Cradock v. Piper* (7).

The case of *Christophers v. White* (1) establishes that the fact that the solicitor-trustee has done no part of the work himself, but has left it to his partner or partners, does not affect the rule, and this fact is immaterial, although it appears that in the case before the court the solicitor-trustee wrote two or three letters in the matter. The decision of *Re Gates, Arnold v. Gates* (4) is correct, although that decision is not necessary to show that here the plaintiff cannot recover profit costs. By this decision it appears that the moment the solicitor-trustee employs the firm of solicitors of which he is a member to do the work of the trust, he puts himself out of court for securing profit costs and this is so although there may be an arrangement between the partners that the solicitor-trustee shall not share in these profit costs. The solicitor-trustee has then put himself in a position where his interest may conflict with his duty. Here there was no such arrangement, and a part of the £600 to be received by the plaintiff would be attributable to these profit costs. In *Clack v. Carlon* (3) the arrangement was that the partner of the solicitor-trustee was to do all the work and that he, apart altogether from the firm, was to receive the profit costs. In *Re Doody, Fisher v. Doody* (2) *STIRLING, J.*, said in commenting on the facts of *Clack v. Carlon* (3): "Nothing short of this will be sufficient." The case before the court is an attempt to extend the decision in the case of *Clack v. Carlon* (3).

GREER, L.J.—In this appeal it is contended that the judgment of the learned judge below was wrong, because he misconstrued the effect of the decisions of the courts, including that of *CLAUSON, J.*, in *Re Gates, Arnold v. Gates* (4). I have come to the conclusion that the learned judge took the right view of the decision of *Re Gates* (4).

In this case a solicitor, *Mr. Albert William Claremont*, a member of a firm of solicitors, was a trustee under a deed dated Jan. 5, 1920, and the property of which he was trustee became the subject-matter of an originating summons for the administration of the trusts. In the course of the inquiry made necessary by the originating summons, the firm of which he was a partner acted as solicitors for the trustee plaintiff, the solicitor.

It has been established now for many years that a solicitor-trustee, unless the deed which appoints him to be such a trustee contains a clause entitling him to a charge for his services, has got to perform his duties as a trustee without making any charge therefor. He cannot as a solicitor charge any profit costs; he is entitled to charge the sums which he has to pay out of his pocket. That rule has been extended to the case of a trustee who is a member of a firm when the firm

acts as solicitors in the matters relating to the trust, and the firm claims to be entitled to charge profit costs. Costs of that kind have been disallowed. There are a number of cases, but I need not refer to any of them beyond *Christophers v. White* (1) and *Re Gates* (4). In *Christophers v. White* (1) it was decided that

"trustees can only be allowed costs out of pocket for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee."

That was a case in which there was no limitation, such as there was in this case, of a fixed amount of the profits of the business to which the trustee solicitor was entitled. In my judgment that makes no difference. The situation at the time these costs were incurred was, as appears by a document which has been handed up to us and which was before the learned judge in the court below, that the solicitor continued to be a partner and was a partner at the time the profit costs in question were incurred. The solicitor continued to be a partner in the firm, but at that time there was a limitation as to the demands that his co-partners could make on him with regard to the work that he had to do for the partnership, and a limitation as to the amount he was to receive out of the profits of the partnership. The limit as to the amount of his profits was £600 per annum, but he was still receiving a share of the profit costs limited to £600 per annum. Theoretically it is conceivable that the business might not be so profitable as to make his share of the profits a sum of £600, but in fact at the time that these costs began to be incurred the profits had up to that time been such as would, if the accounts were taken at the time, give him £600. I think that that also makes no difference. The solicitor was interested in the profits made by the firm, and his position was such, not that he would in fact be influenced by the fact that his firm, of which he was a partner, was entitled to the profits, but that his judgment might be influenced by that fact. It is sufficient if he was in a position in which his judgment and his conduct of the litigation might be influenced. In this case I think clearly they were not so influenced.

A trustee who is a solicitor is not prevented from doing what any other trustee might do, namely, employing an independent solicitor to act for him. The independent solicitor who acts for him would be entitled to his profit costs and the trustee would be entitled to his proper disbursements besides the amount he paid to an independent solicitor. There have been cases in which it has been held that he may make one of his partners an independent solicitor. It must be clear that the partner is being paid, as was said in *Clack v. Carlon* (3) quoad the business in question not in partnership with the trustee who desires to make a charge. In those circumstances the trustee can treat the payments he has to make to his partner, who is for this purpose regarded as not being his partner, as the amount of his out-of-pocket expenses which he, the trustee, has incurred by reason of the bill presented to him by the partner in a matter which, for the time being, the partner is treated as being entitled to.

It is not necessary in this case to determine whether *Re Gates, Arnold v. Gates* (4) was or was not correctly decided. My impression is that if the firm is employed, then it is unnecessary to inquire into the question as to whether any profits made by the firm are going into the pocket of the trustee. I gather that was the view taken by the learned judge in *Re Gates, Arnold v. Gates* (4), namely, that in fact the firm, one of the partners of which was a trustee, acting on behalf of the trustee, cannot be allowed their profit costs. However, whether that is right or wrong, I do not think that arises in the present case, although I am inclined to think that, if it were necessary, I should come to the conclusion that the decision of CLAUSON, J., was right. For these reasons I think the appeal must be dismissed.

MAUGHAM, L.J.—In this appeal from EVE, J., the material facts to bear in mind are the following: The plaintiff, Mr. Claremont, is a solicitor, his firm consisting of himself and two other members, one of them a Mr. Tildesley. He

happens to be a trustee of an indenture dated Jan. 5, 1920. As plaintiff he took out an originating summons entitled "In the matter of the trusts," of that indenture, for a certain declaration as to construction which was ultimately obtained, and it was ordered in a very well-known form that the costs of all parties as between solicitor and client should be taxed and paid out of the fund, subject to the trusts of the indenture. When the matter came before the taxing master, as regards the plaintiff solicitor's bill he disallowed all the profit costs on the ground that the solicitor was a trustee, without power to charge under the indenture, who had employed his firm to do the necessary work. In fact the solicitor, although a member of the firm, has of late, for reasons which need not be discussed, preferred to do a very small amount of work in consideration of a salary of £600 a year. He remains a partner. The firm was employed on behalf of the solicitor to do the work, but, in fact, Mr. Tildesley, one of the members of the firm, did practically the whole of the business which was involved. The taxing master having disallowed all the profit costs of the solicitor, the matter came before EVE, J., who, following a recent judgment of CLAUSON, J., in *Re Gates, Arnold v. Gates* (4), dismissed the summons to review the taxation with costs. I think this court is not concerned at all with the question whether the case is a hard one or not, because these cases depend upon rules to which it is quite necessary to adhere.

The general rule, no doubt, is this, that neither a solicitor who is a trustee, nor a firm of solicitors in which that trustee is a member, can receive out of the trust estate the profit costs for transacting the legal business in connection with the trusts. There are, no doubt, some exceptions. In particular, there is an exception which was the result of a decision by WOOD, V.-C., in *Clack v. Carlon* (3). In that case the defendant, Carlon, was the trustee under a deed which the suit was instituted to carry into effect. He was a solicitor, and he was astute enough to employ his partner, Haynes, in the trust matter under an arrangement, which was satisfactorily proved, by which it was agreed that Haynes should in all the matters connected with the trust, act as solicitor for Carlon, and should alone be entitled to receive, for his benefit, any costs and charges which might be incurred in carrying on the trust. Be it observed that there are two material facts there: one that Haynes was to act as solicitor in doing this work, and secondly, that he alone could receive the whole of the costs and charges which he incurred in so doing. The result was that Carlon was wholly disinterested in the solicitor's work done by Haynes. WOOD, V.-C., after referring to the rule on which the denial of costs to a solicitor-trustee is founded as one resting mainly, but not entirely, on the ground that the trustee shall not make a profit out of his trust, and after referring to the fact that this extends to the case of a partner, proceeded to deal with the case before him in which it was proved that no profit was either received or receivable by Mr. Carlon in any way in connection with the business. Then he dealt with an argument which had been put forward on behalf of those who objected to the solicitor, Haynes, getting any profit costs in this way (30 L.J.Ch. at p. 640).

"It was said that the partners might make an arrangement that each should take the other's trustee business, and thus a door for fraud be opened. I confess I see no reason why such an arrangement should not be made, or why a trustee should not be able to say to his partner: 'quoad this transaction we are not in partnership.' He may then employ his partner in the same way as he might employ his town agent, and the partner would stand in the same position as anybody else."

That common-sense decision, if I may venture so to describe it, has been followed ever since. It has not been doubted, but, so far as I know, it has never been extended. In *Re Doody, Fisher v. Doody* (2) a decision of STIRLING, J., which afterwards went to the Court of Appeal, STIRLING, J., stated the general result of the decision of WOOD, V.-C., in *Carlon's Case* (3). He said ([1893] 1 Ch. at p. 184):

"A solicitor-trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient."

The question here is whether this last observation is wrong, and whether a solicitor-trustee who employs the firm of which he is himself a partner, to act in trust affairs, an employment which necessarily places some obligation on himself as a member of the firm, and who derives some benefit from the employment and from the charges earned by his firm inasmuch as there is an ampler fund from which his salary of £600 a year may be paid, is within the doctrine as laid down in *Clack v. Carlon* (3). The question is whether that doctrine, an exception to the general rule, may be extended to the present case, because it is established here on the facts that the profits of the firm were such that the £600 a year could easily have been paid without any reference to these profits at all. I am of opinion, like my brother GREER, that it is impossible to extend the rule to the circumstances of this case. I do not think it is at all a reasonable extension to allow a solicitor-trustee to employ his firm in such a matter for profit costs. That seems to me to be omitting to realise what Wood, V.-C., declared should be done, that is that the solicitor-trustee should take the step of ceasing to be, quoad the transaction in question, in partnership with the person who is to do the work. On the other hand, I think the suggested extension of the rule as it was laid down by Wood, V.-C., might lead to very great difficulty in a case where the profits of the firm were such that the salary might be in danger of not being paid, unless the profit costs of the transaction were brought into it. In a word, I agree with what STIRLING, J., said in *Re Doody, Fisher v. Doody* (2), that nothing short of the conditions mentioned by Wood, V.-C., in *Clack v. Carlon* (3) will be sufficient to entitle a partner in the firm of the solicitor-trustee to charge his profit costs.

It will be observed that in coming to that conclusion I have not thought it necessary to rely on the decision of CLAUSON, J., in *Re Gates, Arnold v. Gates* (4), which has been referred to. Whilst I do not think that the decision of *Re Gates, Arnold v. Gates* (4) is precisely in point, I do not wish to suggest in any way that the decision is wrong, because, in my opinion, it is correct. In those circumstances the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Claremont, Haynes, & Co.; Warren, Murton, Foster, & Swan.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

Re SHEE. TAYLOR v. STOGER

[CHANCERY DIVISION (Clauson, J.), January 11, 1934]

[Reported [1934] Ch. 345; 103 L.J.Ch. 188; 150 L.T. 451]

Settlement—Apportionment between capital and income—Damnosa hereditas—Leasehold property—Money expended by trustees on ground rents in excess of income received—Payment out of capital to assignees of leases as consideration for undertaking by them of liability thereunder.

A testatrix gave her real and personal property to trustees for sale and conversion with power of postponement upon trust to pay the income thereof to her sister, and after her death to the testatrix's nephew for his life, and after the death of the survivor to the nephew's children as therein mentioned with remainders over. Part of the testatrix's estate consisted of two leasehold houses held upon short terms with heavy ground rents payable by the lessees and other liabilities, which resulted in their being a liability and not an asset to the estate. During the executor's year the trustees expended £353 on outgoings in respect of these leaseholds and then assigned them to assignees who accepted the liabilities relative to them in consideration of a payment to them by the trustees of £600 out of the capital of the estate.

Held: the total sum of £953 which had been expended on the leaseholds must be borne on the principle that a sum be ascertained which, when added to the interest on it at the rate produced by the estate for the time being over the period from the death of the testatrix to the date of actual expenditure, would amount to the sum expended, and that that sum must be borne out of capital, the difference between it and the £953 being charged to income.

Principle laid down in *Allhusen v. Whittell* (1) (1867), L.R. 4 Eq. 295, applied.

Notes. As to apportionment of burdens between tenant for life and remainderman see 29 HALSBURY'S LAWS (2nd Edn.) 653 et seq., and for cases see 40 DIGEST 677 et seq.

Cases referred to:

- (1) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest 464, 5358.
- (2) *Honywood v. Honywood*, [1902] 1 Ch. 347; 71 L.J.Ch. 174; 86 L.T. 214; 40 Digest 691, 2269.
- (3) *Re Owen, Slater v. Owen*, [1912] 1 Ch. 519; 81 L.J.Ch. 337; 106 L.T. 671; 56 Sol. Jo. 381; 40 Digest 699, 2335.
- (4) *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444; 79 L.J.Ch. 748; 103 L.T. 134; 23 Digest 466, 5371.

Adjourned Summons. The facts are set out in the judgment of CLAUSON, J.

A. H. Droop for the plaintiffs.

C. G. Wright for the remaindermen.

H. O. Danckwerts for the tenant for life.

CLAUSON, J.—This application raises a curious and interesting point. The testatrix, by a perfectly simple will, after certain specific bequests and legacies, gave all her real and personal property upon trust for sale and conversion, and after payment thereof and out of her ready money of her debts, funeral and testamentary expenses and the legacies, the trustees were to invest the residue of the moneys in authorised investments and to stand possessed of such investments and of all parts of her estate for the time being unsold upon trust to pay the income thereof to her sister during her life and after her death to pay such income to her nephew during his life, and after the death of the survivor of her sister and her nephew to divide the estate among the children of the nephew attaining twenty-one, and so forth. Clause 6 is in the familiar form authorising the trustees to

postpone the sale, calling in or conversion of all or any parts of the residuary estate for so long as they should think fit, and providing that the trustees should not sell or convert any reversionary interest until it should fall into possession, unless they should see special reason to the contrary; and the testatrix declared that the whole of the income from the unconverted parts of her estate should:

“(whatever be the nature of the property from which the same proceeds and whether such property is of a permanent or wasting character and as well during the first year from my death as afterwards) be applied in the same manner in all respects as if the same were income proceeding from investments hereby authorised no part thereof being liable to be retained as capital but that no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will.”

Then there was an investment clause which did not in fact authorise investments in short leaseholds.

The testatrix was entitled at the date of her death to two comparatively short leaseholds for terms expiring in each case in 1944 or 1945. These leaseholds carried heavy ground rents and other liabilities, and there is no doubt that at the date on which the testatrix died, these leaseholds, so far from being an asset, were a liability. The executors had to make certain payments in respect of these leaseholds, and during a period of about nine months from the testatrix's death they made such payments amounting to £353, but there was a receipt of income below the £353. At the end of December, 1932, that is to say, about nine months after the death of the testatrix, the executors (and nobody questions the propriety of their action in the matter) were able to arrange for this *damnosa hereditas* to be taken over by persons in consideration of such persons being paid £600. We are all assuming for the moment that that transaction was effective and that the persons who took over the leaseholds will bear the liability of indemnifying the testatrix's estate, and that, in effect, that payment of £600 put an end to the liability of the testatrix's estate in respect of those leaseholds. In due course the debts and funeral expenses, and so forth, were paid, and there was an ascertained residue which was to be held by the executors, who thereupon became trustees in trust for the successive tenants for life and the remaindermen.

There can be no doubt, I think, that, if these leaseholds had not been sold, but the tenant for life had been content to accept the position of tenant for life under the will on the footing that these leaseholds were still retained, the tenant for life could not have objected to the obligations arising from time to time under the leases being met out of the income of the estate of which she was tenant for life. I speak of the first tenant for life only. I do not propose to complicate the matter by considering what would have happened had the income of that tenant for life been insufficient to meet the liabilities and had she died at a time when some liabilities accruing during her life had not been met.

In the course of clearing the estate during the executors' year, these liabilities were put an end to in the way that I have stated, and the remaindermen are now suggesting that in some shape or form these obligations should be thrown upon the tenant for life. They point out, quite correctly, that this £600 has, in effect, purchased an increase of income for the tenant for life because it has put an end to certain income obligations which would have operated to reduce the income which the tenant for life would get in respect of the settled estate. That is perfectly true, but the question is whether that justifies me in directing some recoupment to be made which would throw the £600, spent in the manner I have mentioned, upon the income of the tenant for life. There is no authority produced for the proposition that that £600 can be thrown as such upon the income of the tenant for life—and having regard to certain authorities, which will be found cited in a decision of *BYRNE, J.*, of *Honywood v. Honynood* (2), I confess I am not surprised to find that no authority has been produced which would justify me in throwing that £600 upon the tenant for life—merely because it would appear that

the course which the executors properly took in putting an end to their testatrix's obligation by paying this £600 has in fact operated, or will in fact operate, for the benefit of the tenant for life.

As regards the £353 properly spent during the nine months that the executors did retain these leaseholds, it is suggested that that sum must be treated as an obligation to be borne by the tenant for life and recouped out of the income which accrued during that nine months from other parts of the estate, and, in so far as that income is insufficient, must be recouped out of subsequent income of the tenant for life; and for that purpose, and in support of that contention, *Re Owen* (3), a decision of NEVILLE, J.'s is referred to. That decision does not seem to me to meet the case, because it deals with the position where a tenant for life has been put into possession, if I may so express it, of his life tenancy on the footing that he is tenant for life of a total which includes the *damnosa hereditas*. In the present case the tenant for life was not put into possession of any income until the *damnosa hereditas* had, within the due period of one year from the testatrix's death, been cleared away.

In my opinion, counsel for the tenant for life is right in suggesting that the matter must be dealt with by applying the principle of *Allhusen v. Whittell* (1) on the lines indicated by PARKER, J. in *Re Poyser* (4). It was suggested in that case that the principle of *Allhusen v. Whittell* (1) should be applied only in the case of debts which were at the testatrix's death actual and not contingent, but to that contention PARKER, J. refused to give effect. PARKER, J. applied the *Allhusen v. Whittell* (1) principle to a future debt which was contingent upon the continuance of being an annuity, and, in my view, I ought to follow that decision and apply it when dealing with the discharging of liabilities which were contingent upon certain periods for payment of rents, and so forth, occurring before surrender of the leaseholds. In my view, counsel is right in his suggestion that that is the principle to be applied, and, accordingly, the total sum, namely, £953, which has been expended upon these leaseholds ought, in my view, to be borne upon the principle that a sum is to be ascertained which, when added to the interest upon it at the rate produced by the estate for the time being over the period from the death of the testatrix to the date of actual expenditure, will amount to the sum expended. Treating that figure as x , x will be borne out of capital, and the difference between x and £953, the total sum expended, will be treated as charged against income. Having regard to the details of the payments, the actual calculation might be complicated and difficult, but I think that the tenants for life will have no difficulty in fixing a figure which will adequately give effect to the decision that I am pronouncing, without going into details, the figures in this particular case being as regards those payments quite small.

Order accordingly.

Solicitor: *Taylor & Humbert.*

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

VERSICHERUNGS UND TRANSPORT AKTIENGESSELLSCHAFT DAUGAVA v. HENDERSON

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.J.J.), June 12, 18, 1934]

[Reported 151 L.T. 392; 78 Sol. Jo. 503; 39 Com. Cas. 312]

Insurance Re-insurance—Foreign insurer and English re-insurer—Payment by insurer under original policy in foreign currency—Date of conversion into English currency of liability of re-insurer.

An English underwriter re-insured the Latvian insurer of a building at Riga against fire. A fire damaged the building, and, after dispute, the insurer agreed with the assured the amount due on the policy and paid that sum to the assured. In an action by the insurer against the underwriter on the contract of re-insurance, the question arose whether the sum to which the insurer was entitled was to be converted from Latvian into English currency as at the date of the fire, April, 1930, or as at the date of the settlement between the insurer and the original assured, January, 1932.

Held: a policy of re-insurance was a contract of indemnity and the re-insurer was not liable to pay the re-assured until the amount of his liability under the policy of re-insurance was ascertained, and, therefore, the rate of exchange applicable was that ruling in January, 1932.

Notes. As to re-insurance see 18 HALSBURY'S LAWS (2nd Edn.) 227 et seq., and for cases see 29 DIGEST 47, 48, 339.

Cases referred to:

- (1) *Chippendale v. Holt* (1895), 65 L.J.Q.B. 104; 73 L.T. 472; 44 W.R. 128; 12 T.L.R. 50; 40 Sol. Jo. 99; 8 Asp. M.L.C. 78; 1 Com. Cas. 197; 29 Digest 118, 719.
- (2) *Western Assurance Co. of Toronto v. Poole*, [1903] 1 K.B. 376; 72 L.J.K.B. 195; 88 L.T. 362; 9 Asp. M.L.C. 390; 8 Com. Cas. 108; 29 Digest 120, 731.
- (3) *Beauchamp v. Faber* (1898), 14 T.L.R. 544; 3 Com. Cas. 301; 29 Digest 318, 2622.
- (4) *Street v. Royal Exchange Assurance* (1914), 111 L.T. 235; 30 T.L.R. 495; 12 Asp. M.L.C., 496; 19 Com. Cas. 339, C.A.; 29 Digest 120, 729.
- (5) *Gurney v. Grimmer* (1932), 38 Com. Cas. 7, C.A.; Digest Supp.
- (6) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423; 61 L.J.Ch. 362; 66 L.T. 370; 40 W.R. 441; 8 T.L.R. 393; 36 Sol. Jo. 308; 7 Asp. M.L.C. 107; 29 Digest 117, 718.
- (7) *Home Insurance Co. of New York v. Victoria Montreal Fire Insurance Co.*, [1907] A.C. 59; 76 L.J.P.C. 1; 95 L.T. 627; 23 T.L.R. 29, P.C.; 29 Digest 339, 2739.

Appeal from an order of ROCHE, J.

The plaintiffs, *Versicherungs und Transport Aktiengesellschaft Daugava*, who were an insurance company carrying on business in Latvia, by a policy dated Feb. 28, 1930, insured the *Gesellschaft de Russische Französischen Gummi Guttapercha und Telegraphenwerke* in *Firma Prowodnik* against the risk of damage by fire to their building, *Weidendamm*, near the water-front at Riga, from Feb. 17, 1930, to Feb. 17, 1931, in the sum of 2,446,696 lats. The policy provided that the assured must make their claim within fifteen days, and the insurers complete their examination within thirty days, of a fire. If the assessors of the two sides disagreed there was to be an arbitration, and, if arbitration were impracticable, legal proceedings. Provision was made that the insurers must pay the assured within one month of the agreement of amount or its ascertainment by legal decision.

By a contract of re-insurance contained in a brokers' slip a group of Lloyd's underwriters, of whom the defendant was one, re-insured the plaintiff company

against this risk in the sum of 489,340 lats. The building was re-insured "as per original policy, full re-insurance clause." That clause was in these terms:

"Being a re-insurance of and warranted same gross rates, terms and conditions as and to follow the settlements of Daugava Insurance Co."

On April 11, 1930, the building insured was damaged by fire. Two assessors were appointed, but they failed to agree, and in January, 1932, the plaintiff company settled the claim of the Prowodnik company for 659,292,48 lats, less than was claimed. This was embodied in a legal decision and paid within a month of that decision. The plaintiff company then claimed against the underwriters, represented by the defendant, and brought this action. ROCHE, J., entered judgment for the plaintiff company against the defendant for the proportion of the amount for which he was liable of the loss payable by the re-insurers under the slip. The question then arose as to what date should be taken to fix the rate of exchange as between Latvian and English currency: April, 1930, the date of the fire, or January, 1932, the date when the plaintiff company settled the claim of the original assured.

On this issue ROCHE, J., gave judgment on Jan. 25, 1934, as follows:—The question is at what date ought one to fix the rate of exchange as between the Latvian currency called lats and the English currency. In January, 1932, the lat was 17·19 to the pound, and the plaintiffs contend that this is the correct date, the date of the settlement, when more pounds will be necessary to satisfy the judgment. In April, 1930, the lat was 25·32 to the pound and the defendant contends that this is the correct date, that of the fire, when fewer pounds would be necessary to satisfy the judgment. The pound in 1930 was, and in 1932 was not, a gold pound. I have arrived at a conclusion in favour of the plaintiffs that the second date suggested, namely, January, 1932, the date of the settlement of the claim of the Prowodnik company is that which should be taken to fix the time for the exchange from Latvian into English currency. I say nothing about the general rights of assured under policies of insurance. It may well be, as some of the cases seem to show, that the right to indemnification, and, therefore, the cause of action, accrues as soon as there is a loss, that is to say, as soon as the subject-matter of the insurance perishes or is affected by the perils insured against. The question I have to determine here is: What is the right of the plaintiff company under this particular contract of insurance which they have entered into with their assured, the Prowodnik company, and what is the meaning of the re-insurance cover which they have secured from the defendant. In my view, since the obligation of the defendant was to follow the settlements of the plaintiff company—I am paraphrasing the effect of the cover note—the defendant never came under any liability at all until there was a settlement to follow, and there was no settlement to follow before some date in January, 1932. Accordingly I hold that the exchange from Latvian into English currency must be calculated as at that time.

The defendant appealed on this issue as to the correct date for the calculation of the exchange into English currency.

Sir Norman Raeburn, K.C., and W. L. McNair for the defendant.

S. L. Porter, K.C., and H. G. Robertson for the plaintiffs.

Cur. adv. vult.

June 18. **SCRUTTON, L.J.**—This appeal raises a short point of construction on a short statement of facts which are agreed, and the point has been dealt with by ROCHE, J., in a short judgment. The question at issue is this. An English underwriter has re-insured a Latvian insurance company against their liability on a fire insurance policy on buildings in Riga. The English court has given judgment against the re-insurer, ordering him to indemnify the insurer against a sum which has been ascertained by agreement or settlement between assured and insurer, embodied in a judgment of the Latvian courts. The amount of the settlement is, of course, expressed in lats, the Latvian currency. Is the sum for which the plaintiffs have recovered judgment to be turned into English currency at the

rate of exchange existing at the date of the fire, or at the rate existing at the date of the settlement of the insurer's liability? A

As between assured and the Latvian insurer, their policy provides (cl. 27 and 28) that the assured must make his claim within fifteen days, and the insurer complete his examination within thirty days of the fire. If the assessors of the two sides disagree (cl. 30), there must be an arbitration, and if arbitration is impracticable, legal proceedings. The insurer must pay (cl. 38) within one month of the agreement of amount, or its ascertainment by legal decision. The two assessors did not agree, and the amount was settled between insurer and assured, the amount being embodied in a legal decision, and paid within one month of that decision. The defendant, the re-insurer, had initialled a slip which re-insured "buildings as per original policy, full re-insurance clause." That clause read: B

"Being a re-insurance of and warranted same gross rates, terms and conditions as and to follow the settlements of Daugava Insurance Co." C

The fire was on April 11, 1930; the settlement and payment by the insurer in January, 1932.

I am of opinion that the latter is the date at which the rate of exchange must be applied. I do not understand how the re-insurer can be liable to pay an account till it has been fixed between insurer and assured. It is then that the insurer pays, and it is then that the re-insurer is bound to indemnify him. If the rate of exchange is fixed as at a date before the insurer's liability to pay is quantified and satisfied, the insurer may, as in the present case, recover more than an indemnity, which is contrary to all principles of insurance. D

This view leads to the same result as that reached by ROCHE, J., but he appears to have reached his result by virtue of the words in the re-insurance clause "to follow the settlements of Daugava Insurance Company." It is not necessary to decide whether this is correct or not, and I should wish to reserve the question. Underwriters have always desired to bind their re-insurers by their settlements, the business transaction resting on mutual confidence. One usual term is "to pay as may be paid thereon": see *Chippendale v. Holt* (1). MATHEW, J., held this to mean "to be properly paid thereon," "to pay on proved or agreed liability." This decision has not, as far as I know, been questioned since it was given. Another clause is "to follow the settlement of." BIGHAM, J., thought in *Western Assurance Co. of Toronto v. Poole* (2) that that meant that liability must be proved, but if proved then an honest settlement of the amount by the insurer would bind the re-insurer, and he repeated this statement in *Beauchamp v. Faber* (3), where he said: E

"it was a condition precedent to the plaintiff's right to recover on the Lloyd's policy that there should have been a settlement of the claim by the company, and that condition precedent has not been performed." F

If this is correct, it would determine this case, as it would be a condition precedent of the re-insurers' liability that the amount should be settled, and he would not be liable till it was settled. But I have never been clear from what authority BIGHAM, J., derived his distinction between liability and amount of liability, and the questions which arise in practice are so troublesome that I do not wish to give any decision before it is necessary to do so. The re-insurer frequently insures only total and constructive total loss, leaving the insurer to bear partial loss. What is to happen if the insurer on a claim for total loss settles for an amount less than the claim for total loss? Is it a partial loss or a settlement of a claim for total loss to be followed by the re-insurer? *Street v. Royal Exchange Assurance* (4) and *Gurney v. Grimmer* (5) show the difficulties which arise. There is no privity between the original assured and the re-insurer. The liability of the latter is only to indemnify the insurer, the re-assured, in respect of a loss for which he is liable to the assured by reason of the insurance policy. If the insurer is so liable, and the amount of his liability is ascertained, he can recover against the re-insurer though he has not paid the assured, for he is liable for an ascertained amount and the re-insurer must indemnify him: see *Re Eddystone Marine Insurance Co.* (6). G

But the insurer is not liable to pay the assured till the amount of his liability has been ascertained in accordance with the terms of the policy; so the re-insurer is not liable to pay the re-assured until the amount of his liability is ascertained under the terms of his policy, which may or may not be the same as the terms of the original policy. In the present case they were the same, but the time for payment did not come till liability and amount were agreed or settled. The appeal must be dismissed with costs.

GREER, L.J.—I agree.

MAUGHAM, L.J.—I agree. A policy of re-insurance is an agreement by way of complete or partial indemnity to the insurer. That has long been settled, and has been stated in more than one case. Like every contract of indemnity, it can only operate if the liability of the debtor, the insurer, is established, and it is necessarily contingent on that liability being established. It follows that the insurer has no cause of action against the re-insurer until the loss for which the former is liable (if any) has been ascertained. I observe there is a passage in the speech of LORD MACNAGHTEN in the *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.* (7) which seems to me to recognise what I have stated to the full. It was a case where there was a clause in a contract of re-insurance purporting to prohibit an action on the contract unless commenced within twelve months next after the fire, and the question was whether that was a reasonable provision as between the insurer and the re-insurer. LORD MACNAGHTEN in his speech observed ([1907] A.C. at p. 64):

“In a case of re-insurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene.”

The law with regard to settlements does not in the least, at any rate, diminish the force of that contention; and, agreeing as I do with the whole of the judgment to which we have just listened, I concur in the view that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Simmons & Simmons.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

VELASCO v. CONEY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 15, 1934]

[Reported [1934] P. 143; 103 L.J.P. 76; 151 L.T. 807; 50 T.L.R. 444; 78 Sol. Jo. 431]

Conflict of Laws—Will—Revocation—Testatrix domiciled in Italy—Act of purported revocation legal under Italian law, but illegal under English law—Wills Act, 1837 (1 Vict., c. 26), s. 20.

An Englishwoman who married an Italian subject and became domiciled in Italy made, in July, 1910, a will in which she exercised a power of appointment over English assets in favour of her husband. The will was in English form, and also conformed to the Italian testamentary law. Later she purported to revoke the will by writing from Italy to her solicitor in London asking him to destroy it. The solicitor destroyed the will, but, the plaintiff being in Italy, the destruction was not done by her "or by some person in her presence" as required by the Wills Act, 1837, s. 20, if it was to constitute a valid revocation by English law. On the death of the testatrix her husband propounded the will of 1910 and claimed a grant of administration with a copy of the will annexed on the ground that there had been no valid revocation.

Held: in a probate action the court always leaned towards giving effect to the intentions of the testator and in the present case the intentions of the testatrix were beyond dispute; she was an Italian subject and under Italian law the will would have been legally revoked; in the circumstances reason and justice pointed to the will propounded not being admitted to probate; and, therefore, the husband's action failed.

Notes. As to the law applicable to the succession to movables of persons domiciled abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 53 et seq., and for cases see 11 DIGEST (Repl.) 393 et seq. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

- (1) *Murphy v. Deichler*, [1909] A.C. 446; 78 L.J.P.C. 159; 101 L.T. 143; 25 T.L.R. 719; 53 Sol. Jo. 671, H.L.; 11 Digest (Repl.) 681.
- (2) *Pouey v. Hordern*, [1900] 1 Ch. 492; 69 L.J.Ch. 231; 82 L.T. 51; 16 T.L.R. 191; 11 Digest (Repl.) 414, 677.

Probate Action.

The plaintiff, Francesco Giuseppe Maria Cavaliere de Santiyan y Velasco, of Ostiglia, Mantova, Italy, propounded a will of his late wife, Thekla Florence de Santiyan y Velasco, of Via Baferno, Rome, who died without issue on Oct. 19, 1931, aged seventy years, giving him a life interest in certain English assets of the value of about £10,000. The will, dated July 25, 1910, was made in English form by the testatrix, who, before her marriage in 1905, was an Englishwoman, and in it she exercised a special power of appointment under a will made in January, 1893, by her uncle, Alfred Ames, who died in April, 1910. On May 29, 1914, the testatrix wrote from Italy to her solicitor in London saying:

"Please destroy my will in your possession, dated the 25th day of July, 1910, which will I desire to revoke."

That letter was endorsed by the solicitor (since deceased): "Destroyed, June 2, 1914." The plaintiff claimed a grant of letters of administration, with a copy of the will annexed, and said that it had not been destroyed *animo revocandi* in the presence of the testatrix, as required by s. 20 of the Wills Act, 1837. The defendant, Gerald Beadon Coney, who was one of several residuary legatees under the will of the testatrix's uncle and would benefit in default of the exercise of the power of appointment by the testatrix, said that the will of July, 1910, had been duly revoked. The other residuary legatees had been cited.

The contents of the destroyed will having been proved, an expert in Italian law, called by the defendant, gave evidence that the will, being holograph, was valid in Italian law, and that the letter of the testatrix of May, 1914, was a "mandate" effective in Italian law to revoke the will, and that such revocation was complete on the receipt by the solicitor of the mandate, without any necessity to destroy the will.

Victor Russell for the plaintiff.

Bayford, K.C. (with him *H. W. Barnard*) for the defendant.

Cur. adv. vult.

May 15. **LANGTON, J.**, read the following judgment.—This case raises a novel and not unimportant point. The facts are hardly likely ever to be repeated, but the principles involved may have importance in other fields. Signora Thekla de Santiyan y Velasco, was of English birth, but she married an Italian gentleman, who is the plaintiff in this action. The marriage took place in April, 1905, and the lady (although thereby acquiring a peculiarly Spanish name) became in consequence an Italian subject. She appears to have spent the greater portion of her life in Italy, and there is no suggestion that she acquired any but an Italian domicile.

By a will dated Jan. 31, 1893, and proved on April 28, 1910, Signora Velasco's uncle, Mr. Alfred Ames, left to her, by a series of complicated provisions, a power of appointment to certain personal property. On July 25, 1910, she exercised this power by means of a will, drafted in England, but executed in Rome, which she took considerable pains to secure should be valid both according to English and to Italian law. In exercise of her power she appointed her husband to succeed to the whole of the property named in her uncle's will. On May 29, 1914, she signed an authority to the English solicitor who prepared this English will to destroy her will of July 25, 1910. This document, which in Italian law is called a mandate, bears upon its face in the handwriting of the solicitor, since deceased, the words: "Destroyed, June 2, 1914." There is no doubt at all that the will of July 25, 1910, was thereupon destroyed by the solicitor, and there is equally no doubt that it was not destroyed in the presence of the testatrix, who, at the time in question, was still in Italy. On Oct. 19, 1931, the testatrix died, leaving no issue and without purporting to make any fresh exercise of her power of appointment.

It is not disputed that, if the power was not exercised by the testatrix, the property falls to be divided among certain beneficiaries under the will of Mr. Alfred Ames. The defendant in this action is one of these beneficiaries. Accordingly, the dispute centres upon the single point whether the intended revocation by the testatrix in 1914 of the will which she executed in 1910 was or was not effectual.

Counsel for the plaintiff contended that since the will was an English will, made according to English law, and dealing with English property, it could only be revoked by a process effectual in English law. The plaintiff, he said, comes to the English court and asks for probate of an English document which has never been revoked according to English law. Section 20 of the Wills Act, 1837, lays down in the clearest language the requirement that a will can only be revoked by destruction if destroyed by the testatrix herself, or by someone else in her presence and by her direction. The will of July, 1910, had been destroyed in the absence of the testatrix, and had, therefore, never been revoked. The plaintiff proved in evidence the completed draft of the will of July, 1910, and asked that a presumption should be drawn that it was a valid exercise of the power of appointment in the circumstances. Counsel cited two authorities to show that a power of appointment by will can be exercised by a foreign national by means of an English will notwithstanding difficulties as to domicile. He submitted that the exercise of the power of appointment constituted an exception to the general rule and English law had always been specially generous in admitting the exercise of powers of appointment by will: see *Murphy v. Deichler* (1). In *Pouey v. Hordern* (2), FARWELL, L.J., sitting in Chancery, explained the reason upon which this exception to the general

rule is founded. The power of appointment is not in reality a disposition of property at all, but merely a nomination to one or more out of a given number of persons to succeed to property which has already been disposed of or settled.

Counsel for the defendant did not challenge those general propositions, and did not dispute that the will of July, 1910, could properly be admitted to probate if it stood unrevoked. His case was that Signora Velasco, who was an Italian subject, had, in July, 1910, made a will which was valid both by English and by Italian law. Having done this with no little circumspection, she had, in 1914, done everything within her power to revoke this will. The revocation was by Italian law completely effectual. It failed in English law only because, by the provisions of the Wills Acts, of which she was no doubt ignorant, the will had been destroyed in her absence. A distinguished Italian lawyer, Signor Palliccia, gave clear and, I imagine, incontestible evidence concerning the Italian law. The evidence was not challenged on behalf of the plaintiff. The Italian lawyer said, and I find as facts, upon his evidence (i) that the will of 1910 was a good will in Italian law, because it was written in its entirety by the testatrix herself; and (ii) that the letter of May, 1914, is effective in Italian law to revoke the will, and, indeed, would have been effective so to do even if the solicitor to whom it was addressed had not actually destroyed the will, provided that he had duly received the letter.

I have to determine in these circumstances whether I ought to apply the Italian or the English law to this question of revocation. Counsel on either side were unable to produce any authority to assist my decision, nor have I been able to discover any authority for myself. Assuming, therefore, that the question is bare of authority, I have no hesitation in applying the Italian law. The testatrix was an Italian subject. Her will of July, 1910, was made and revoked in accordance with Italian law. It is writ large in the English law of probate that the court will lean always towards giving effect to the intentions of the testator. The intentions of Signora Velasco in this instance are beyond cavil or dispute. The very exception which would have enabled her will in this case to be admitted to probate is in itself an example of the court's indulgence towards testamentary intentions. It appears to me that it would be little short of absurd to impose upon a person thus favoured by English law the full rigour of a requirement to be found only in an English statute which was not otherwise binding upon her. Furthermore, none of the authorities which I have consulted seems to make it imperative upon the court to admit a document such as the will in this case to probate. As I understand the matter, such document may be admitted to probate if the court is of opinion that the reason and justice of the case require it. In my view, reason and justice in the present case point in the opposite direction, and, therefore, this action fails, and the defendant succeeds.

Judgment for defendant.

Solicitors : *Albert M. Oppenheimer, Burch & Co.*

[*Reported by WILLIAM LATEY, Esq., Barrister-at-Law.*]

GASKELL v. ST. HELEN'S COLLIERY CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.) February 27, 1934]

[Reported 150 L.T. 506; 27 B.W.C.C. 32]

Workmen's Compensation—"Arising out of and in the course of the employment"—*Colliery fireman*—*Baths provided near colliery by welfare society*—*Instruction to miners to take bath*—*No dismissal on refusal*—*Accident while about to take bath*—*Workmen's Compensation Act, 1925* (15 & 16 Geo. 5, c. 84), s. 1 (1).

The workman was employed by the employers as a fireman in their mine. In 1929 the welfare society constituted under the statutes relating to coal mining erected baths for the use of the miners on land forming part of the colliery undertaking and leased to the society. The employers instructed their firemen to tell the men that they must take a bath after a shift and if any workman did not take a bath he must give a reason to the under-manager, but any man who did not do so was not dismissed. On Nov. 26, 1931, the workman was preparing to have a bath at the welfare society premises after his shift when he slipped and injured his knee, with the result that he became totally incapacitated from osteo-arthritis and he claimed compensation under the Workmen's Compensation Act, 1925. On the question whether the accident arose out of or in the course of the workman's employment,

Held: the test was whether or not it was a term of the workman's contract of employment that he should take a bath at the end of a working shift; in the present case it appeared that, while the men were strongly persuaded to use the baths, so to do was not a duty imposed on them by their contracts; and, therefore, when the workman was preparing to take a bath he was not in the course of his employment, and he was not entitled to compensation.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases, see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see *ibid.*, 797.

Cases referred to:

- (1) *St. Helen's Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59; 93 L.J.K.B. 177; 130 L.T. 291; 40 T.L.R. 125; 68 Sol. Jo. 163; 16 B.W.C.C. 230, H.L.; 34 Digest 280, 2364.
- (2) *London and North Eastern Rail. Co. v. Brentnall*, [1933] A.C. 489; 102 L.J.K.B. 488; 148 L.T. 530; 49 T.L.R. 229; 77 Sol. Jo. 116; 26 B.W.C.C. 225, H.L.; Digest Supp.
- (3) *Sir W. G. Armstrong, Whitworth & Co. v. Redford*, [1920] A.C. 757; 89 L.J.K.B. 495; 123 L.T. 114; 36 T.L.R. 451; 64 Sol. Jo. 388; 13 B.W.C.C. 68, H.L.; 34 Digest 314, 2579.
- (4) *Newton v. Guest, Keen and Nettelfolds, Ltd.* (1926), 135 L.T. 386; 70 Sol. Jo. 689; 19 B.W.C.C. 119, H.L.; 34 Digest 281, 2366.

Appeal by employers from an award dated Oct. 10, 1933, and made by His Honour Judge William Procter, sitting as an arbitrator under the Workmen's Compensation Act, 1925, in the St. Helens (Lancashire) County Court. In his award the learned county court judge said: Respondents are the lessees

of two adjoining pits known as the Ravenhead Colliery. Applicant was a fireman A or deputy employed by respondents in No. 10 Pit. His average weekly earnings were £4 5s. 6d. On Nov. 26, 1931, he was engaged on the night shift which finished at 6.45 a.m. He then attended a consultation underground between the under-manager and all the firemen. The consultation finished at 7.45 a.m. Extra wages are paid to firemen for time spent at the consultations which are held at the end of each shift. Then applicant went to the pit head and delivered his B explosive tins at the fireman's cabin. From there he went to the pit head baths to take a bath. He stood upon a corrugated iron form to place his dirty working clothes in his locker. Heat is passed through the dirty clothes lockers to dry the clothes. He slipped on the form and his right knee struck it. It was a severe blow and he felt faint. He rested till the pain decreased, then had his bath, put on his clean clothes from his clean clothes locker, and returned to the fireman's C cabin, where he signed his report in the dust book that all his area in the pit was free from coal dust. His bicycle was in the fireman's cabin, and he had to return from the baths to the cabin to get the bicycle, otherwise he would have made the entry in the dust book before he went to the baths. He cycled home, found his knee was swollen, and bathed it. Next day he saw his panel doctor. On the same day he wrote a letter to respondents' under-manager, Mr. Webster. Applicant's D wife delivered the letter at the colliery on the same day to Mr. Webster and told him that Dr. MacRae (applicant's panel doctor) wanted to know whether he or Dr. Lomax (the colliery doctor) had to attend to applicant's injury. Mr. Webster said that he would send word by applicant's brother, Fred, who was also a fireman at the pit. Later that day, Mr. Webster handed to Fred Gaskell a letter which, Webster said, had been brought by applicant's wife. Mr. Webster told Fred E Gaskell to take the letter to Mr. Day (the colliery manager). This was done. Mr. Day read the letter and said: "An accident at the pit! It's the same as one below or on the surface. If Vince Williams saw it tell him to report it. When the report is in you can come to me for a note, and he can then go and be doctored by Dr. Lomax." On Nov. 28, 1931, Fred Gaskell told the fireman, Vince F Williams, that if he saw applicant's accident he had to put in a report. This was done. The colliery accident report book contains a report of the accident. On the following Monday, Mr. Day gave Fred Gaskell a doctor's note for applicant, and thereupon applicant went to Dr. Lomax and was treated by him. There was a dispute at the hearing of the arbitration whether applicant's letter of Nov. 27, 1931, was received by respondents. Mr. Webster said he had no recollection of it. He said there was a letter about wages, but no such letter was produced. Mr. Day said he did not remember the letter, but he also said he would not be definite and say he had not had it. I am satisfied that the letter was written and delivered to the under-manager and later handed to the manager. On Dec. 12, 1931, applicant went to respondents' office and was there paid £3 10s. by respondent's cashier and chief clerk, Mr. Rigby. Mr. Rigby is also secretary to the management committee of the pit head baths. I refer to that body later. Applicant signed a receipt for compensation under the Workmen's Compensation Act. It is for £2 10s. only. Applicant says he received £3 10s., and I believe him. No explanation was given to me as to what the other £1 was paid for. The receipt states that the compensation is payable by 'The Trustees of the Ravenhead Colliery Pit Head Baths,' and the payment purports to be in respect of 'the accident I met with when engaged in my employment on Nov. 26, 1931.' I accept applicant's statement that he did not read the receipt, and did not know that it was for a payment by the trustees of the pit head baths. Prior to the accident applicant had osteo-arthritis in both knees. It did not prevent him from doing his work. The accident aggravated the condition and caused him incapacity.

On Dec. 13, 1931, applicant returned to work. He suffered great pain. On April 18, 1932, he was obliged to give up his work. He went into the Northern Hospital, Liverpool, and remained there till the end of May, 1932. Since then he has been attending regularly as an out-patient. He was totally incapacitated to

the end of May. Thereafter he was, and still is, partially incapacitated. I accept this surgeon's and doctor's evidence, and find that the incapacity was caused by the accident of Nov. 26, 1931. But for the accident he would have been fit for this pre-accident work. He is, and has been from May 31, 1932, fit for light surface work, at which he could have earned 30s. per week. If he is entitled to compensation the amount from April 18, 1932, to May 31, 1932, is £1 10s., and thereafter £1 7s. 8d. per week. On June 10, 1932, the Union secretary wrote to respondents on applicant's behalf applying for compensation. After such correspondence there was, on July 27, 1932, a denial of liability, not from respondents, but from the trustees of the Ravenhead Colliery Pit Head Baths. These proceedings were then commenced against respondents.

The baths and drying rooms at which applicant was injured are known as the Ravenhead Colliery Pit Head Baths. They were erected and are maintained in the following circumstances: [His Honour referred to the Coal Mines Act, 1911, s. 77; Mining Industry Act, 1920, s. 20; Mining Industry Act, 1926, ss. 14, 16, and 17.] In April, 1928, a ballot of the men employed at respondents' two pits was taken. There was a two thirds majority in favour of the provision of accommodation for taking baths and drying clothes. The baths (including facilities for drying clothes) were erected in 1929 at a cost of £18,061. The royalty levy fell short of that sum by the sum of £1,500, and respondents contributed this sum in order to get preference from the welfare fund. The baths were built on land forming part of the respondents' colliery undertaking, and leased by respondents. A sub-lease was granted by respondents to the trustees of the Ravenhead Colliery Pit Head Baths. There are four trustees, two appointed by respondents and two by their workmen. The baths were opened and handed over to the trustees in February, 1930. The baths are managed and controlled by a committee known as the management committee of the Ravenhead Colliery Pit Head Baths. The committee is composed of the four trustees already mentioned and four other members, two appointed by respondents and two by their workmen. The baths are maintained from a fund into which respondents pay 3d. per week per man employed, and into which each workman pays 3d. per week. The latter contribution is deducted by respondents from each man's wages. All the men who use the baths are employed by respondents at their two pits. Each man has a locker for storing and drying his working clothes and another locker for his clean clothes. About 1,000 men out of 1,100 men employed by respondents use the lockers. The trustees of the baths obtained a Lloyd's insurance policy. Clause 4 of that policy (which was put in by respondents at the hearing) states that in the event of injuries by accident fatal or otherwise occurring to authorised person (therein declared to mean any person entitled to use the pit-head bath installation as a colliery employee) whilst in the bath premises the assured (i.e., the Pit Head Baths Trustees) intend to pay them or their dependants such sums for compensation (if any) as would have been payable by the employer of such authorised persons under the provisions of the Workmen's Compensation Act, 1925, if the presence of such authorised persons on the premises arose out of and in the course of their employment and any requirements of the said Act as to notice of accident and claim to compensation had been fulfilled. After the baths were opened claims by workmen at the colliery in respect of incapacity originating from slight injuries decreased in number. Men working in collieries are specially liable to small cuts and abrasions. These are revealed by a bath and are treated in the baths ambulance room, and they are thus prevented from becoming septic and causing incapacity. It was to the advantage of the respondents and their workmen that the baths and the drying facilities should be used by the men. Respondents took steps to ensure as far as possible that their men should use the baths. There was a conflict of evidence at the hearing as to what those steps were. I accept the evidence of applicant and his brother (also a fireman in No. 10 Pit) as to what actually took place. It was the custom of the men employed in respondents' No. 10 Pit to have a bath after each shift. But there were

exceptions. Some men did not like baths, and some complained of rheumatism and colds. A few months before applicant's accident the pit overseer (Vincent Williams) instructed applicant and the other firemen to tell all their men that they must use the baths after each shift, and that if they did not use the baths they must see the under-manager. The under-manager (Mr. Webster) also told the firemen at a pit consultation that all their men must use the baths. This order applied to firemen as well as to the other men. The firemen were expected by respondents to set a good example to the other men. Applicant repeated the order to the 60 men working under him. His brother did likewise. Another under-manager told applicant that the men who did not use the baths should bring a doctor's certificate. This order was passed on by applicant to the men. The pit manager (Mr. Day) periodically obtained the tally numbers of the men who did not carry out the orders that had been given to them to use the baths, and he interviewed these men. He said at the hearing that he was keen that the men should use the baths, but not so keen as the men's representatives, and that it was at their suggestion that he interviewed the men. He says he tried to persuade the men, but not to compel them to use the baths. That may well be so. It is difficult to see how men who did not want to use the baths could be compelled to do so. The men who still failed to use the baths were not dismissed. The fact remains that a definite order was given to the men on respondents' instructions that they must take a bath after each shift. In the circumstances and by reason of the nature of the work the order was a reasonable one, and one which the employers were entitled under the contract of service to give. It was the duty of the applicant to obey the order, and it was while performing the duty that his employers had placed upon him that he was injured.

I now propose to deal with respondents' contentions at the hearing. They first said that the incapacity was not caused by the accident, that the aggravation of the osteo-arthritis was merely temporary and that the aggravation soon passed away leaving the osteo-arthritis to pursue its normal course. I did not accept respondents' medical evidence. My findings of fact dispose of this point. Secondly, it was contended that no claim had been made within six months and that there was nothing to excuse the failure. It was said that the first claim was the union official's letter of June 10, that the applicant's letter of Nov. 27, 1931, was not received; and if it was received it was not a claim for compensation. I have already found that applicant's letter was delivered to respondents. I think the letter was an intimation to respondents that applicant required compensation to be paid to him if, as he puts it, 'the baths come under the colliery rules for compensation,' and that it constitutes a claim. There was no evidence before me as to what became of the letter after it had reached respondents, but I draw the inference that they passed it on to the bath trustees. From the receipt produced by respondents it would appear that the compensation was paid by the trustees of the Ravenhead Colliery Pit Head Baths. The respondents and the baths trustees do not appear to have been in doubt as to the letter constituting a claim. Although the baths committee had had no claim from applicant direct they paid compensation. Applicant had no claim against the baths trustees under the Workmen's Compensation Act. He was not employed by them. From the policy it would appear that the baths trustees were willing to undertake respondents' liability for accidents at the baths. If I am wrong in holding as I do that the letter constitutes a claim I think that the failure to make a claim was occasioned by mistake, and, further, that there was reasonable cause for failure to make a claim. Mr. Day on receipt of the letter had, to applicant's knowledge, given instructions that Williams the fireman was to report the accident, he had given applicant's brother a doctor's note, the colliery doctor had treated applicant, and this was followed by payment of compensation to applicant at respondents' office by respondents' cashier. Applicant had no knowledge of any arrangement between the colliery company and the baths trustees for payment of compensation by the trustees, the respondents were the only persons who were liable to him for

compensation, and he believed that the respondents were paying him compensation, and thus admitting his claim for it. In view of what had happened it was a reasonable belief. He was mistaken in his belief, and he did not discover the mistake until after the six months had expired. Further, I think the same circumstances constitute reasonable cause for failure to make the claim within six months. I therefore hold that the failure, if there was failure, to make the claim within six months was occasioned by mistake and by reasonable cause.

Respondents' third point was that the accident did not arise out of or in the course of the employment. They contended that when applicant left the fireman's cabin he left his employment, and when he was in the baths he was doing nothing which under his contract of service he was obliged to do and doing nothing directly or indirectly imposed upon him by his contract of service. They relied upon *St. Helen's Colliery Co., Ltd. v. Hewitson* (1). In my view, the accident arose both out of and in the course of the employment. The exceptionally dirty nature of the work and the danger of septic infection from cuts and abrasions made it reasonable and necessary that applicant should use the drying and washing facilities provided and maintained at the pit head under the statutes and in the circumstances already referred to. When he was injured applicant was doing something which was incidental to and within the sphere of his employment. The employment did not end when applicant had finished his work below or even when he handed in his explosive tins at the fireman's cabin. It was still continuing while he was doing something connected with his employment which he had been ordered to do. Respondents had given a definite order that the men employed below ground must use the bath at the end of each shift. It was a reasonable order connected with the employment and it was applicant's duty to obey the order. The fact that some men who did not obey the order were merely interviewed by the pit manager and persuaded to use the baths and were not dismissed because of their disobedience does not affect my view that applicant owed a duty to respondents to obey their reasonable order. Nor, in my opinion, does the fact that the baths had been handed over to trustees and were being controlled by the baths committee defeat the claim. The baths had been erected at the pit head at great expense for the use of respondents' workmen, the use of the baths was rendered necessary by the nature of the employment, the respondents were contributing a weekly sum per man employed for the maintenance of the baths, it was in respondents' interests that the men should use the baths and if in these circumstances they order the men to use the baths the position seems to me to be the same as if the baths were in respondents' possession and were controlled by them. I think this case is covered by the decision of the House of Lords in *London and North Eastern Rail. Co. v. Brentnall* (2). I hold that the accident arose out of and in the course of the employment. I think there is good ground for the contention raised on applicant's behalf that the taking of the bath was a legitimate interruption of the employment which had not terminated because applicant had to return to the fireman's cabin to sign his dust report, but in view of what I have already held it is not necessary for me to say anything further about this point. My award is for the applicant for £1 10s. per week from April 19, 1932, to May 31, 1932, and thereafter for £1 7s. 8d. per week.

The employers appealed on the following grounds: (i) That the finding of the county court judge that the accident to the workman arose out of and in the course of his employment was against the weight of evidence and (or) wrong in law; (ii) and his finding that a definite order was given to the applicant on the instructions of the employers that he must take a bath after each shift was against the weight of evidence; (iii) and his finding that the applicant made a claim for compensation against the employers within the time prescribed by the Workmen's Compensation Act, 1925, was against the weight of evidence and (or) wrong in law; (iv) and his finding that the failure of the workman to make a claim for compensation against the employers within the time prescribed by the Act was due to mistake and (or) reasonable cause was against the weight of evidence and (or) wrong in law; (v) and

his finding (if he did so find) that the accident to the workman occurred during a legitimate interruption of his employment which was not terminated was against the weight of evidence and (or) wrong in law.

*Sir Walter Greaves-Lord, K.C., and F. G. Pritchard for the employers.
Lynakey, K.C., and Basil E. Nield for the workman.*

LORD HANWORTH, M.R.—This is an appeal from the decision of the county court judge, who found in favour of the workman who suffered an injury at a time when he was about to have a bath after his service in the pit. He was a fireman, and he was engaged in a responsible position. He had to look after the men, and, more than that, he had, after the shift was over, to spend time—in the particular case an hour—in entering into some discussion with other managers and some under-managers of the mine with regard to the working of the mine. However, he came up from the mine at 7.45 a.m., he being on a night shift. Then he went and deposited the charges which are fired in the mine at a proper place, and after that he went to have a bath. Just before he took the bath he slipped and suffered an injury to his knee, for which he claimed the compensation. After he had the bath he went back again to the place where he had deposited the charge, where his bicycle was, and, as he said, at that time when he was clean he signed, or made an entry which he was able all the better to do by reason of the fact that he had had a bath, but which he could have done before he had had the bath if necessary. In other words, his return to the cabin on the surface was no indication or not whether his employment was continuing at that time. The baths are under the control of the welfare committee. They are, of course, a most important and valuable adjunct to the amenities provided for the miners, and the miners, for the most part, enjoy this amenity, and are glad to have the baths. The provision of baths is made under the terms that the men themselves contribute, I think I am right in saying, 3d. a week for the support of the bath, and the bath is managed by a committee, in respect of which the workmen, the miners, as well as their employers, are represented. In other words, the bath is not wholly provided by the employers. It is not upon their premises, it is upon the premises which belong to the welfare committee, and is managed by the welfare committee, and managed by those persons who are drawn as well from the miners as from the employers.

The workman suffered an accident while about to have this bath, and the short point in this case is: Was there evidence by which the county court judge could reach the conclusion which he has done? He has said this:

“The men who failed to use the bath were not dismissed, but the fact remains that a definite order was given to the men on the respondents’ instructions that they must take a bath after each shift. In the circumstances, by reason of the nature of the work, the order was a reasonable one, and one which the employers were entitled under the contract of service to give. It was the duty of the applicant to obey the order, and it was while performing the duty his employers had placed upon him that he was injured.”

Was there evidence which would support that finding? Was this accident suffered while the workman was still continuing in the employment, while he was doing something in his employment which he had been ordered to do? Confusion, to my mind, arises from the use of the word “order.” It is not a question of discipline and obedience to a superior; it is a question whether or not there was a term of the employment which compelled the workman to have the bath, and to respond to what I shall call an appeal by the employers. The workman called it an instruction. He says: “Williams, on the instructions of the under-manager, instructed me and the other firemen to instruct all the men under us that they must use the bath at the end of each shift. I gave those instructions.” There is no doubt he called it an instruction.

In cross-examination he admits that no order was posted in the cabin. The order was if they did not use the bath that they were to see Mr. Harrison, but it is found by the county court judge that the men were not subject to dismissal if they disobeyed the so-called instruction or order, and the evidence by the secretary of the Collieries' Deputies' Association of Lancashire and Cheshire, Sir William Thomas Miller, is important. Sir William says this: "If the employers insisted that they should wash and that their jobs would be in peril if they did not, I would object to the latter part of the statement." Then he goes on: "I should be surprised if any members complained of the use of the baths, because I know the value of the bath." Then he says that there had been no order that the men of this colliery must use the bath. "I would like them to do so. It is not a condition of the employment, and I try to persuade the men." Going back to the test which counsel for the workman propounded, although the county court judge finds there was an order and obedience to that order, was it such an order as was a term of the contract of employment of the applicant?

I need not trouble to refer to more than two or three of these cases. LORD FINLAY, L.C., in *Sir W. G. Armstrong, Whitworth, & Co., Ltd. v. Redford* (3) points out the difficulty of these cases. Indeed, what is the sort of test? Whether it is satisfied in the one case or the other does not matter. What was under consideration there was the use of the canteen which the employer had provided at some distance from the works. He says ([1920] A.C. at p. 767):

"Where the employer has provided a canteen where his employees may have their meals comfortably, does that extend the operation of the Workmen's Compensation Act to any premises on which the employer has made provision for the comfort of his employees at any distance from the works? Such a principle could not be confined to the case of a canteen. It would be just as applicable to any provision made by the employer for the recreation of his work-people. It would apply to a bathing place in the river, it would apply to a cricket or football field, and to a library."

But in *St. Helen's Colliery Co., Ltd. v. Hewitson* (1), we get what I think is established and remains as the true case. I am reading from the speech of LORD ATKINSON. He says ([1924] A.C. at p. 76), quoting LORD DUNEDIN in *Sir W. G. Armstrong, Whitworth, & Co. v. Redford* (3) ([1920] A.C. at p. 773):

"The test seems to me to be, not the situation of the premises, but whether resort to the premises is a part of the duty owed to the employer."

Both of these noble Lords rest their judgment on what, in my opinion, the decisions of this house establish as the true test, namely, the duty of the employee to the employer. Finally, in *Newton v. Guest, Keen, and Nettlefolds* (4), LORD CAVE says, quoting the words of LORD ATKINSON in *St. Helen's Colliery Co., Ltd. v. Hewitson* (1) ([1924] A.C. at p. 71):

"A workman is acting in the course of his employment when he is engaged in doing something he was employed to do; or what is, in other, and I think better words, in effect the same thing, namely, when he is doing something in the discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service."

Here, call it instruction, call it an order, call it what you will, it was a term which was not enforced by a dismissal if there was disobedience to it on the part of the workman. It was of a nature that if it had been that the workmen's jobs were in peril if they did not conform to it, such a term would have been objected to by the secretary of the Collieries' Deputies' Association. In other words, it means that, however strong the moral suasion was to get conformity to bathing, it was left outside the terms of the contract. It was not a disobedience between the employee and the employer if the employee did not conform to it, and that is

illustrated and emphasised by the fact that there were some 100 out of 1,100 men A who went their way without bathing and were not dismissed. Nor was any effort made to put any imposition upon them in consequence of disobedience of what is suggested is an order. In these circumstances it appears to me that it is misleading to call it an instruction or an order. It was not a term of the contract between the parties, and, therefore, when the workman in the present case was preparing to bathe in this case he was no longer in the course of his employment, B with the result that the employer is not liable and the appeal must be allowed with costs and the award discharged.

SLESSER, L.J.—I agree. I think that in this case the learned county court judge applied the right test when he asked himself whether what this man was doing in going to the bath was a duty to the employer imposed upon him by his contract of service. There was a dispute whether certain persuasions or directions which were given to the men by certain officials did or did not amount to what were called orders, and the learned judge has found that orders were given, and on that finding I do not think there is a conflict of evidence. I for one am not prepared to say that he was not entitled so to find. But where the learned judge, in my judgment, is in error is in assuming that when he has found that an order is given by the employer to a man, that necessarily makes a change in the contractual relations between the two. There are certain contracts of service where certain orders may properly be given within the contract. A domestic servant is bound to obey the reasonable orders of a master within the scope of his or her work, and so with other contracts of service, but there is not suggested here that there is anything in the contract of service of working in a coal mine which necessarily involves obedience to an order to take a bath on premises outside the coal mine, or, indeed, within the area owned by the coal owner. In order, therefore, to show that it is directly or indirectly a term of the contract, and that a duty was owing to the employer under the contract to do it, it is necessary to show that some special term was imported into this contract placing upon the men working in this colliery, in addition to their duty diligently and faithfully to work for coal, an obligation to take baths in the prescribed places. I can find no such evidence at all. The evidence which the learned judge has accepted is no more than that these men were given orders. Mr. John Day, the manager of the colliery, said in terms that it was not a condition of the employment that they should take a bath, and I cannot see that that statement is in any way contradicted. I think the learned judge discloses the error into which he has fallen when he says in his judgment: "In the circumstances, and by reason of the nature of the work, the order was a reasonable one." Then he goes on: "And one which the employers were entitled under the contract of service to give." With every respect to the learned judge that seems to me entirely a non sequitur. Whether the order was reasonable or not is not the question, but whether the order was given under the original contract of service, or whether the workman acquiesced so as to enlarge the contract of the service. There is no evidence that there was any enlargement of the contract of service, and assuming in the workman's favour that an order was given, it seems to me an order without standing, which he could properly dispute without breaking the terms of his contract, which, indeed, many of the men did. Therefore, there was no duty, and it is conceded by counsel for the workman that, if there was no duty of the workman to obey the employer in this matter, then the accident did not arise in such circumstances that it can properly be said in the words of Lord Atkinson, "that the workman was doing something in discharge of the duty to his employer directly or indirectly imposed upon him by his contract of service."

ROMER, L.J.—I agree. The question that the learned county court judge had to decide was whether, when the workman was about to take the bath, in the course of which the accident happened, he was doing something in discharge of a

duty to the employers directly or indirectly imposed upon him by his contract of service.

The learned county court judge has not found, nor could he have found on the evidence, that it was a term of the workman's employment that he should take a bath daily or otherwise. What he does appear to have held is, that it was a term of the man's employment that he should take a bath if and when ordered to do so by his employers. If the learned county court judge was right in so finding, necessarily it follows that the workman, if he disobeyed that order, could be dismissed from his employment and dismissed without notice. The evidence as regards that is all one way. The manager, in giving evidence, said in reference to the instructions given by the under-manager to tell the firemen and others to use the baths: "There has never been any compulsion, and it is not a condition of the employment." In cross-examination, after referring to what he calls his advice to the men to bathe, he says: "If they did not take my advice their refusal to take the bath would not result in any interference with the employment." Mr. Henry Webster, the under-manager, in reference to this so-called order to bathe, said: "If they had not done so they would not have been interfered with." And there is no evidence to the contrary. In those circumstances there was not, in my opinion, any evidence on which the learned county court judge could come to the conclusion that there was a term of the applicant's employment that he should have obeyed this order to use the bath.

For these reasons I agree with the reasons of the other members of the court that this appeal should be allowed.

Appeal allowed.

Solicitors: William Pingree Ellen, for Peace & Darlington, Liverpool; Kingsley Wood, Williams & Co., for G. J. Lynskey & Co., Liverpool.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

WARING (LORD) v. LONDON AND MANCHESTER ASSURANCE CO., LTD., AND OTHERS

[CHANCERY DIVISION (Crossman, J.), November 21, 22, 1934]

[Reported [1935] Ch. 310; 104 L.J.Ch. 201; 152 L.T. 390; 78 Sol. Jo. 860]

Mortgage—Sale—Contract for sale by mortgagee—Time of extinction of equity of redemption—Undervalue—Grounds for restraining completion or setting aside sale—Law of Property Act, 1925 (15 and 16 Geo. 5, c. 20), s. 101 (1) (i), s. 104 (1) and (2).

If a mortgagee has, in the exercise of his power of sale, contracted to sell the mortgaged property, the court will not restrain the completion of the sale upon tender of the money under the mortgage unless the contract was made in bad faith. The mere fact that the sale is at an undervalue does not show bad faith.

Dictum of KAY, J., in *Warner v. Jacob* (1) (1882), 20 Ch.D. 220 at p. 224, applied.

In 1929 a mortgagor charged certain property in favour of a mortgagee to secure £180,000 and interest. In 1930, the mortgagor having made default in payment of interest, the mortgagee appointed a receiver of the mortgaged property, who endeavoured to sell the property under the power of sale conferred upon the mortgagee by s. 101 (1) (i) of the Law of Property Act, 1925. In July, 1934, the mortgagor was informed that negotiations were then being carried on for the sale of the property, and that the intending purchaser was pressing for an exchange of contracts. At this time the mortgagor was negotiating with a potential lender for a fresh loan of £200,000, which would discharge the sums due to the mortgagee. The mortgagor from time to time requested the mortgagee to postpone the sale in order to allow the negotiations for the fresh loan to be completed. The sale was consequently postponed, but, ultimately, on Oct. 3, 1934, as the receiver had no definite statement from the potential lender that it would make the advance, the mortgagee exchanged contracts with the purchaser for the sale to him of the property for £186,000, completion to take place on Dec. 24, 1934. The mortgagee was expressed to sell as mortgagee. On motion by the mortgagor for an injunction to restrain the mortgagee and the purchaser from completing the contract of Oct. 3, 1934, on the grounds that until completion there was no sale which bound him, and that the sale was at a gross undervalue, and for leave to redeem the property,

Held: the mortgagor was not entitled to the relief claimed because (i) s. 101 (1) (i) of the Law of Property Act, 1925, empowered the mortgagee to bind the mortgagor by a contract for sale; if he did so the equity of redemption did not remain in force pending completion of the sale by conveyance; and the mortgagee, therefore, no longer had any right to redeem; (ii) there was no evidence of lack of good faith on the mortgagee's part, and so the mortgagor was not entitled to have the sale set aside,

Notes. As to when a mortgagee may be restrained from exercising his power of sale after he has contracted to sell the mortgaged property, see 23 HALSBURY'S LAWS (2nd Edn.) 434, 435, para. 639; as to grounds for setting aside a sale, see *ibid.* 436, para. 640, and for cases on the subject see 35 DIGEST 507-509, 2388-2408.

For the Law of Property Act, 1925, s. 101 (1) (i), s. 104 (1), (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 655 and 665 respectively.

Case referred to:

- (1) *Warner v. Jacob* (1882), 20 Ch.D. 220; 51 L.J.Ch. 642; 46 L.T. 656; 46 J.P. 436; 80 W.R. 731; 35 Digest 507, 2381.

Motion in an action in which the plaintiff, a mortgagor, sought (inter alia) an injunction to restrain the mortgagee and an intending purchaser from completing by conveyance a contract which had been entered into for the sale of the mortgaged property and leave to redeem.

By an instrument of charge (hereinafter called "the charge"), dated July 12, 1929, the Right Honourable Samuel James Baron Waring of Foots Cray (hereinafter called "the mortgagor") demised certain property to the London and Manchester Assurance Co., Ltd. (hereinafter called "the mortgagee") by way of mortgage to secure the repayment to the company on Nov. 12, 1929, of the principal sum of £180,000 and interest.

The mortgagor made default on May 12, 1930, in payment of the interest then due, and on Aug. 6, 1930, the mortgagee, in exercise of the powers conferred on it by the charge, appointed a receiver. An offer to purchase the property for £200,000 was received in December, 1930, but from the evidence it appeared that the mortgagee refused this offer at the mortgagor's request. In July, 1932, the property was put up for sale by auction on the mortgagor's instructions, but no bid approaching £220,000, the reserved price, was received. The receiver subsequently made every effort to sell the property, but without success.

In July, 1934, negotiations were opened by the mortgagee for the sale of the property to an intending purchaser (hereinafter called "the purchaser"), one of the defendants to the action. The mortgagee kept the mortgagor informed of these negotiations, and on Aug. 2, 1934, wrote telling him that the purchaser was pressing for an immediate exchange of contracts. The mortgagor had entered into negotiations with the Yorkshire Insurance Co. for a loan of £200,000 on the property. The mortgagee knew of these negotiations, and was informed by the mortgagor that the insurance company could not complete the matter before Sept. 5, 1934. The receiver then wrote to the mortgagor on Aug. 14, and again on Aug. 20, 1934, informing him that unless he received a letter direct from the insurance company stating that it had definitely agreed to the loan of £200,000, subject only to title, the sale could not be postponed until Sept. 5. No such letter was received from the insurance company. At an interview on Aug. 30, the receiver told the mortgagor the terms upon which the mortgagee would delay the sale. These terms not having been complied with, the receiver wrote to the mortgagor on Sept. 27 informing him that the mortgagee was proceeding with the sale, and expected to exchange contracts on Oct. 1. On the next day the mortgagor wrote to the receiver saying that the insurance company had agreed to lend to him £200,000, and would be communicating with the mortgagee's solicitors. On Sept. 29 the receiver was informed by the mortgagor's solicitors that a director of the insurance company would call on him on Oct. 1 to discuss the repayment of the money due on the charge. The director did not call, but the receiver was informed on Oct. 2 that the director would call on that day, and subsequently that he would call in the morning of the 3rd. The director did not call then or at any other time, and in the afternoon of the 3rd contracts for the sale of the mortgaged property for £186,000 were exchanged with the purchaser, completion being fixed for Dec. 24, 1934, and the mortgagee being expressed to sell as mortgagee. The mortgagor's solicitors were verbally told of the contract, and on Nov. 9 they wrote informing the mortgagee's solicitors that the mortgagor was in a position to pay off the mortgage. The mortgagee refused to give an undertaking not to complete on Dec. 24.

By this motion the mortgagor asked for an injunction to restrain the mortgagee and the purchaser from carrying into effect the contract of Oct. 3, 1934, and asking that the mortgagor might be given leave to redeem the property.

F. R. Evershed, K.C., and A. P. Vanneck for the mortgagor.—The first contention of the mortgagor is that the mere entering into a contract for the sale of property comprised in a mortgage does not exclude the mortgagor's equity of redemption; secondly, on the evidence it appears that in this case the sale is at a gross undervalue. On the first point, this is a case not of sale but of a contract of sale, and there is nothing in the Law of Property Act, 1925, to shut out the equity of redemption until conveyance. The purchaser knows that he is buying from a mortgagee and the contract is subject to the risk of the mortgagor redeeming before completion. It is only completion which bars the equity. [They referred to ss. 89, 101, and 104 of the Law of Property Act, 1925.]

J. M. Gover, K.C., and H. F. F. Greenland for the mortgagee.—If the mortgagor's contention is correct, the mortgagee's power of sale would be a mere fiction. The power to sell has been confused with the power to convey. As to the contention that the contract was entered into at a gross undervalue, the court will only stop a sale by a mortgagee if it has been brought about by want of good faith on his part. The mortgagee acted honourably here, and in good faith.

R. W. Goff for the purchaser.

G. D. Johnston for a second mortgagee.

CROSSMAN, J. [stated the facts and continued:] The contract is an absolute contract, not conditional in any way, and the sale is expressed to be made by the company as mortgagee. If, before the date of the contract, the mortgagor had tendered the principal with interest and costs, or had paid it into court in proceedings, then, if the mortgagee had continued to take steps to enter into a contract for sale, or had purported to do so, the mortgagor would, in my opinion, have been entitled to an injunction restraining it from doing so. After a contract has been entered into, however, it is, in my judgment, perfectly clear (subject to what has been said to me to-day) that the mortgagee (in the present case, the company) can be restrained from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside. Counsel for the mortgagor, who has argued the case most excellently, submitted that, notwithstanding that the mortgagee exercised its power of sale by entering into the contract, the mortgagor's equity of redemption has not been extinguished, as there has been no completion by conveyance, and that, pending completion, the mortgagor is still entitled to redeem, that is, to have the property reconveyed to him on payment of principal, interest, and costs. Counsel is relying, to some extent, on the provisions of the Law of Property Act, 1925, which creates a statutory power of sale. In my judgment, s. 101 (1) (i) of that Act, which gives to a mortgagee power to sell the mortgaged property, is perfectly clear, and means that the mortgagee has power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor. If that were not so, the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract, liable at any time to be set aside by the mortgagor's coming in and paying the principal, interest, and costs. Such a result would make it impossible for a mortgagee, in the ordinary course of events, to sell unless he was in a position to promise that completion should take place immediately or on the day after the contract, and there would have to be a rush for completion in order to defeat a possible claim by the mortgagor.

It seems to me impossible seriously to suggest that the mortgagor's equity of redemption remains in force pending completion of the sale by conveyance. The only effect of the conveyance is to put the legal estate entirely in the purchaser: that follows from s. 104 (1) of the Law of Property Act, 1925, which provides that a mortgagee shall have power to convey the legal estate; and the whole legal

estate can be conveyed free from all estates, interests, and rights to which the mortgage has priority. Section 104 (2), upon which also counsel for the mortgagor relied, does not seem to me to affect the question at all. Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title on taking the conveyance.

The result in the present case is that the sale effected by the contract, assuming, for the moment, that there is no objection to it on any other ground, binds the mortgagor, and that it is too late after the sale for him to tender the mortgage money and become entitled to have the property reconveyed to him.

A second point taken by counsel for the mortgagor is that the sale, considered as a pending sale, cannot be allowed to stand because it was made at a gross undervalue, an undervalue which would entitle the plaintiff, as mortgagor, to have it set aside. I do not want to go through all the evidence again. After having gone through the evidence of the four years between the date of the mortgage and the date of the contract, I can find no evidence showing anything like lack of good faith in the mortgagee's conduct with regard to the sale. The law, as stated by KAY, J., in *Warner v. Jacob* (1) (20 Ch.D. at p. 224), is perfectly clear. The learned judge there says:

"A mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud."

In my judgment, it is impossible on the facts of this case to conclude that the price is so low as in itself to be evidence of fraud. It is true that there is some suggestion that the Yorkshire company is willing to advance on mortgage an amount larger than that of the purchase money, which implies, presumably, that the value which the Yorkshire company puts upon the property must also be considerably larger.

I do not consider, however, that that in itself is evidence of fraud. There must be something far beyond the mere fact of undervalue.

For at least three years the mortgagee has been trying to find a purchaser for the property: it has made every possible effort, and the mortgagor has himself put the property up for auction and obtained no effective bid. There were negotiations throughout the whole period and, at some time at the beginning of the summer of 1934 a purchaser was found who was likely to enter into a binding contract. Immediately afterwards, as I understand (I think it was in July), the mortgagee informed the mortgagor that there were negotiations with a purchaser, who was in fact the purchaser who entered into the contract, and the mortgagor was in effect warned that that purchaser would have to be accepted if nothing else could be done. Opportunities were given him to find the money in other ways, but in fact nothing was done, and, at the last moment, on Sept. 29, the mortgagor informed the mortgagee that an insurance company (the Yorkshire company) had agreed to advance an amount larger than that of the purchase money. Both the mortgagor and his solicitors informed the mortgagee that somebody would be coming to its registered office to make the matter quite clear. Nobody, however, did come to the mortgagee's registered office, and it was not unreasonable that the

mortgagee's board of directors should conclude, when they met (I think, on Oct. 3), that they must enter into the only firm contract before them. In that way the contract was entered into.

In my judgment, it is impossible for me to accept the suggestion that there has been a lack of bona fides in the present case, and that being so, the contention that the mortgagor is entitled, on the ground that the sale was made at a gross undervalue, to an injunction restraining the mortgagee and the purchaser from completing, also fails.

In the circumstances I do not think I can make any order on the motion.

Solicitors: *Biddle, Thorne, Welsford & Gait; W. H. Matthews & Co.; Hicks, Arnold, & Bender; Joynson-Hicks & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

ASSAM RAILWAYS AND TRADING CO., LTD. v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Blanesburgh, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Wright) June 12, 14, 15, July 24, 1934]

[Reported [1935] A.C. 445; 103 L.J.K.B. 583; 152 L.T. 26; 50 T.L.R. 540; 18 Tax Cas. 509]

Income Tax—Relief—Dominion income tax—Tax paid in Dominion on smaller sum than liability to tax in United Kingdom—“The same part of his income—On which amount relief assessed—Finance Act, 1920 (10 and 11 Geo. 5, c. 18), s. 27 (1).

A limited company incorporated and registered in England carried on its business in India. Almost the whole of its income arose in India, and was charged to income tax in England under the Income Tax Act, 1918, Sched. D, Case I, in the sum of £186,750 for the tax year 1928–29. The same profits were assessed in India for the purpose of tax there at £129,365. The difference in the two assessments was due in the main to the facts that in India an allowance in computing the taxable profits was made in respect of debenture interest amounting to £42,500, while in England no such allowance was made, and that in India profits from a tea garden run by the company there were not taken into account. The company nevertheless claimed that the allowance in respect of Dominion income tax under the Finance Act, 1920, s. 27 (1), should be computed on £186,750.

Held: the words “the same part of his income” in s. 27 (1) involved a comparison between two sums of money which proved to be the same, and “the same part” in the present case was £129,365, to which sum, therefore, the allowance under that subsection was limited.

Rolls Royce, Ltd. v. Sharp (1) 133 L.T. 759, distinguished.

Per **Lord Wright**: Counsel for the appellants sought to introduce into his argument certain recommendations from a report of a Royal Commission on Income Tax in 1920. . . . But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible.

Notes. The Finance Act, 1920, s. 27, was repealed by the Finance Act, 1950, s. 36 (5), except in its application to the Republic of Ireland. The relevant provisions were replaced by the Income Tax Act, 1952, Sched. 18, Part II.

Considered: *I.R.Comrs. v. National Mortgage and Agency Co. of New Zealand, Ltd.*, [1938] 2 All E.R. 88. Referred to: *Liversidge v. Anderson*, [1941] 3 All E.R. 338; *Magor and St. Mellons R.D.C. v. Newport Corpn.*, [1951] 2 All E.R. 839.

For the Income Tax Act, 1952, Sched. 18, Part II, see 31 HALSBURY'S STATUTES (2nd Edn.) 549.

Cases referred to:

- (1) *Rolls-Royce, Ltd. v. Short* (1925), 94 L.J.K.B. 849; 133 L.T. 759; 41 T.L.R. 620; 69 Sol. Jo. 726; 10 Tax Cas. 59, C.A.; 28 Digest 94, 557.
- (2) *I.R.Comrs. v. Dalgety & Co.*, [1930] A.C. 527; 99 L.J.K.B. 342; 143 L.T. 191; 46 T.L.R. 349; 15 Tax Cas. 216, H.L.; Digest Supp.
- (3) *R. v. West Riding of Yorkshire County Council*, [1906] 2 K.B. 676; 95 L.T. 248; reversed sub nom. *A.-G. v. West Riding of Yorkshire County Council*, [1907] A.C. 29.
- (4) *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks*, [1898] A.C. 571; 67 L.J.Ch. 628; 79 L.T. 195; 47 W.R. 152; 14 T.L.R. 527; 15 R.P.C. 476, H.L.; 42 Digest 642, 464.
- (5) *Heydons' Case* (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.) on a Case Stated under the Finance Act, 1921, s. 28, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts, for the opinion of the King's Bench Division of the High Court of Justice. The Case Stated was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Jan. 8, 1932, the Assam Railways and Trading Company, Ltd. (hereinafter called "the company") claimed relief in respect of Indian income tax under the provisions of s. 27 of the Finance Act, 1920, for the two years ended April 5, 1929, and April 5, 1930.

2. The company was a company incorporated in England under the Companies Acts with an authorised share capital of £1,160,000, the whole of which had been issued. The company had also issued in the United Kingdom £500,000 4½ per cent. mortgage debenture stock and £400,000 5 per cent. debenture stock. The interest paid on these debenture stocks for each of the years under appeal amounted to £42,500.

3. The business of the company was that of running a railway and working coal mines, timber concessions, saw mills, veneer mills and brickworks in Assam, and it also carried on a plantation business there. The whole of the company's income arose in India with the exception of the dividends on certain English investments which were taxed at the source and certain interest on moneys lying in England with regard to which no question arose.

4. The company was controlled by its board in England, and was accordingly taxed under Case I of Sched. D of the Income Tax Act, 1918, on the whole of the profits arising from its business in India. In computing the profits for assessment under Case I no deduction was allowed in respect of the debenture stock interest, amounting to £42,500, and this interest is consequently included in the assessment to United Kingdom income tax. The debenture stock, which was secured by English trust deeds, was issued in the United Kingdom, and the interest was paid by the company in the United Kingdom.

5. Indian income tax and super tax were charged for the two years in question on the profits of the company arising in India under the provisions of current Indian Finance Acts and of the Indian Income Tax Act, 1922. The Indian Income Tax year ended on March 31.

6. The company made up its accounts annually to March 31, so that the profits forming the basis of assessment for United Kingdom income tax and Indian income tax for the two years to which the appeal related were the same, namely, the profits of the years ended March 31, 1928, and March 31, 1929, respectively.

7. The following are the material provisions of the Indian Income Tax Act, 1922:

"3. Where any Act of the Indian legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to, the provisions of this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.

"4. (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in s. 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

"6. Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter appearing, namely: (i) Salaries. (ii) Interest on securities. (iii) Property. (iv) Business. (v) Professional earnings. (vi) Other sources.

"8. The tax shall be payable by an assessee under the head 'Interest on securities' in respect of the interest receivable by him on any security of the Government of India or of a local government, or on debentures or other securities for money issued by or on behalf of a local authority or a company.

"10. (1) The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.

"(2) Such profits or gains shall be computed after making the following allowances, namely:

(iii) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid.

"18. (1) Income tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of payment in respect of income chargeable under the following heads: (i) 'Salaries'; and (ii) 'Interest on securities.'

"(3) The person responsible for paying any income chargeable under the head 'Interest on securities' shall, at the time of payment, deduct income tax on the amount of the interest payable at the maximum rate.

"(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received.

"(5) Any deduction made in accordance with the provisions of this section shall be treated as a payment of income tax on behalf of the person from whose income the deduction was made, or of the owner of the security, as the case may be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act:

"Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted no credit shall be given for the amount of such refund.

"(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery.

"19. In the case of income chargeable under any other heads than those mentioned in sub-s. (1) of s. 18, and in any case where income tax has not

been deducted in accordance with the provisions of that section the tax shall be payable by the assessee direct.

"55. In addition to the income tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income tax (in this Act referred to as super tax) at the rate or rates laid down for that year by Act of the Indian legislature :

"Provided that, where the profits and gains of an unregistered firm have been assessed to super tax, super tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share.

"Rule 24. Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent. of such income shall be deemed to be income, profits and gains liable to tax."

8. Under the provisions of s. 10 (2) (iii) of the Indian Income Tax Act, 1922, a deduction was allowed in computing the profits for the purpose of assessment to Indian income tax for the interest paid on the debenture stocks of the company, the money raised by the issue of the debenture stocks being capital borrowed for the purpose of the business, and the interest thereon not being in any way dependent on the earning of the profits. The company did not deduct Indian income tax on payment of the interest under s. 18 of the Indian Income Tax Act, 1922.

The figures shown as £10,708 and £2,365 against the items Bogapani Tea Garden account and Bogapani Tea Garden expenditure respectively in exhibit "B" hereinafter referred to for the year 1928-29, and the figures of £311 and £2,460 against the same items for the year 1929-30 were not included in the net revenue account of the company and were not brought into the computations for the assessments for Indian income tax. These sums were respectively included in the computations for the assessments to United Kingdom tax for these years, being arrived at in the manner shown in note (b) to the said exhibit.

The computations of profits for assessment to United Kingdom and Indian income tax differed in several other material respects. Thus for the year 1928-29 the assessment to United Kingdom income tax under Case I of Sched. D was in the sum of £194,168 less £4,995 wear and tear, the £42,500 debenture interest not being allowed as a deduction in computing the profits, and the item "Bogapani Tea Garden Account" being included. For the same year the assessment to Indian income tax was in the sum of £129,365, the debenture interest being allowed as a deduction, and the item "Bogapani Tea Garden Account" not being included. There were also several other differences between the two computations.

9. The inspector of taxes claimed that in the allowance of relief to the company under s. 27 of the Finance Act, 1920, both the debenture interest and the item "Bogapani Tea Garden Account" should be deducted in arriving at the amount on which relief should be allowed. Thus for the year 1928-29 the inspector computed the relief allowable as follows (the figures being given as subsequently adjusted):—

Assessment to United Kingdom income tax under Case I of Sched. D	£191,803
Less wear and tear	4,995
	£186,808
Less English income	£58
Debenture interest	£42,500
Bogapani Tea Garden Account	8,343
	50,901
	£185,907

Relief on £185,907 at 2s. in the £=£18,590 14s.

The company claimed that relief should be allowed on the sum of £186,808 less £58 English income only, and that no deduction should be made for the debenture interest or the item "Bogapani Tea Garden Account."

10. It was contended on behalf of the company:

(1) That the relief should be based on the amount of the income as computed for the purpose of the United Kingdom tax, and that the method by which the Indian assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2) That accordingly the fact that the debenture stock interest had been allowed as a deduction and that the Bogapani Tea Garden item had not been included in computing the Indian assessment should not be taken into account, and the relief should be allowed on the amount of the United Kingdom assessment without any deduction for these two items.

11. It was contended on behalf of the Commissioners of Inland Revenue, *inter alia*, (1) that the debenture interest and the Bogapani Tea Garden profits had been excluded from the subjects of taxation on the company in India; (2) that on those parts of the company's income it had not paid Dominion income tax, and consequently no relief was due from United Kingdom income tax on such parts.

12. The cases of *Rolls-Royce, Ltd. v. Short* (1) and *I.R. Comrs. v. Dalgety & Co., Ltd.* (2) were referred to.

The Special Commissioners, having considered the arguments, gave their decision as follows:

"The main question in this case is on what part of the income of the appellant company has Indian income tax been paid.

"The appellant company contends that it has paid Indian income tax on the whole of its profits arising from its business in India, while the Crown contends that it has only paid Indian income tax on its profits from its business in India less the profits applied in payment of its debenture interest for which allowance has been made in computing its business profits under s. 10 (2) of the Indian Income Tax Act, 1922.

"It was argued on behalf of the appellant company that the whole of the Indian income was income from one source, and that in determining the part of the income on which relief is allowable regard must be had to the source from which it is derived and not to its amount. In support of this argument reliance was placed on a dictum of WARRINGTON, L.J., in *Rolls-Royce, Ltd. v. Short* (1). It must, however, be observed that in that case the court was only concerned with English income as a whole and Indian income as a whole, and no question arose as to whether Indian income tax had been paid on different parts of the Indian income.

"It seems clear to us that where under Dominion income tax law different parts of the Dominion income are separately treated as regards the liability to Dominion income tax, we are bound to discriminate between those different parts and see whether Dominion income tax has been paid in respect of each of those parts or not.

"In this case the income applied in payment of the debenture interest has been specifically excluded from the profits on which the appellant company has been assessed to Indian income tax, and consequently no Indian income tax has been in fact paid in respect of the part of the profits so applied.

"Moreover, under s. 18 of the Indian Income Tax Act, 1922, debenture interest is made the subject of a separate charge to Indian income tax, though in the case of the appellant company no tax has been paid under the provisions of that section.

"In view of the specific separation of the income applied in payment of the debenture interest from the rest of the income, we are of opinion that the income so applied must be regarded as a separate part of the appellant com-

pany's income, and as no Indian income tax has been paid on this part of its income, no relief can be allowed thereon and the appeal fails on the main question.

"On the subsidiary question of the profits of the Bogapani Tea Garden, it appears on the evidence before us that these profits have not been made liable to Indian income tax, and that no Indian income tax has been paid in respect thereof. We hold, therefore, that no relief can be granted in respect of these profits.

"On the figures being agreed, we will give our final decision."

Relief was subsequently granted in accordance with this decision.

14. The appellant company immediately upon the determination of the appeal declared its dissatisfaction therewith as being erroneous in point of law, and in due course required the Special Commissioners to state a Case for the opinion of the High Court pursuant to the Finance Act, 1921, s. 28, and the Income Tax Act, 1918, s. 149, which Case the Special Commissioners stated and signed accordingly.

15. The question for the opinion of the court was whether in computing the amount on which relief was due to the company under s. 27 of the Finance Act, 1920, in respect of Indian income tax the interest on the debenture stock and the Bogapani Tea Garden item as adjusted were to be deducted.

The Court of Appeal held, affirming the decision of FINLAY, J., that so much of the taxable profits in the United Kingdom as had borne Indian income tax was entitled to relief under s. 27, and in arriving at the amount on which Indian income tax had been paid it could not be said that that amount included the interest on the debenture stocks, and accordingly no relief in respect of that interest could be allowed. The statement of principle in the judgment of the Master of the Rolls in *Rolls-Royce, Ltd. v. Short* (1) applied. *Dalgety & Co. v. I.R. Comrs.* (2) distinguished. The income applied in payment of the debenture interest was excluded from the profits assessed to Indian income tax and consequently no Indian income tax was in fact paid in respect of the part of the profits so applied. The company appealed.

A. M. Latter, K.C., and Cyril King for the appellants, the company.

The Attorney-General (Sir Thomas Inskip, K.C.) and Reginald P. Hills for the respondents, the Inland Revenue Commissioners.

The House took time for consideration.

July 24. LORD BLANESBURGH.—I have found that the more the question raised by this appeal is considered the greater is the difficulty it presents. It is only after close examination that the ambiguities of the Finance Act, 1920, s. 27 (1), become apparent. The section suggests no serious problem when the "part" of the assessee's income brought into charge for the year of assessment to United Kingdom income tax is, in its amount, equal to "the same part" of his income brought into charge for the same year to Dominion income tax. Nor is the difficulty serious when the section has to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion income tax is in its amount greater than that brought into charge in the United Kingdom. The extent of the relief from United Kingdom income tax given by the section is in each of these cases not doubtful. The assessee in respect of the whole of the sum representing the "part" of his income which has been brought into charge in the United Kingdom is entitled to the relief given by the section, and that relief will operate to discharge him to the prescribed extent from the burden of a double taxation, one in the Dominion and the other in the United Kingdom.

So far, the relief granted is relief from a double taxation, and nothing more. The real difficulty of the section arises, when it has to be ascertained as in this instance it has, whether that still remains its purpose and result when its provisions have to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion income tax is in amount less than that brought into charge in the United Kingdom. Is the section, in this

case also, effective only to relieve the assessee from payment of double income tax to the prescribed amount and to the extent to which he would otherwise be required to make it? or is the section, in this instance alone, operative in quite a different way, so that when the assessee has met every claim in respect of the "part" of his income charged to Dominion income tax, however small in amount that "part" may be, he is, by the section, relieved in respect of the whole amount, however large, which represents the same "part" of his income brought into charge in the United Kingdom? In other words, are the appellants here entitled, as they contend, to relief under the section in respect of the whole of their business income brought into charge in the United Kingdom irrespective of what is brought into charge in India, or, as the Attorney-General contends, only in respect of so much of that income as has been or will be charged to income tax there?

On this point I feel constrained, on consideration, to say that the actual language of the section is not unfavourable to the appellants' contention. Not advertg for the moment to the question whether the word "part" as used in the section does or does not connote a sum of money brought into charge both in the United Kingdom, and, in this case, in India, that word does certainly, I think, point to the source from which the income is derived, "the part" and "the same part" being brought in the section into relation with each other by their identity of source. The word appears to me to denote what may be described as a "compartment" of the assessee's total income, if I may select as a more pregnant term one suggested by its similarity in sound. Then again, it is not, I think, unfavourable to the appellants' contention that, in order to entitle an assessee to relief, it is in terms enough that he has paid Dominion income tax "in respect of" that same "compartment" of his income. While there is nothing to indicate that the effective compartment must correspond in amount to the United Kingdom counterpart, rather the reverse, yet the extent of relief is, so far as words are concerned, expressed to be invariable. It is always relief at a prescribed rate "from United Kingdom income tax paid or payable by him on that part of his income." That is, may it not be said, from the whole of that tax.

I have been moved by these considerations which seem to me to have weight. But they are not to my mind final, nor do they, I think, outweigh the reasoning which leads to the conclusion that the section in every case where it has to be applied is really directed against a charge pro tanto of double income tax on any portion of any "compartment" of the assessee's total income and that there is no sufficient indication in the language employed necessitating the conclusion that any further relief is contemplated or provided for.

Accordingly while conscious of difficulty, I am ready to accept the construction in that sense placed on the section by my noble and learned friends LORD WARRINGTON and LORD WRIGHT in their judgments which I have had the advantage of reading and which I accept.

With them I agree that this appeal should be dismissed and I move your Lordships accordingly.

LORD WARRINGTON (read by LORD ATKIN).—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ.) dated July 11, 1933, dismissing an appeal by the present appellants from an order of the King's Bench Division (FINLAY, J.) dated Feb. 14, 1933, which affirmed a decision of the Special Commissioners on a claim by the appellants for relief from United Kingdom income tax.

The question depends on the true construction and effect in the events which have happened of s. 27 of the Finance Act, 1920. That section so far as it is material to the solution of the question is as follows:

"(1) If any person who has paid by deduction or otherwise United Kingdom income tax for the year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled

to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows :—

There follow provisions for the determination of the rate as to which no question arises in the present case.

Subsection (8) contains the following definitions :

“(b) The expression ‘United Kingdom income tax’ means income tax chargeable in accordance with the provisions of the Income Tax Acts.

“(c) The expression ‘Dominion income tax’ means any income tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax.”

The Dominion income tax in the present case is that charged under the law of India, and there is no question that it falls within the above-mentioned definition. The appellants are an English company incorporated and resident in England. They carry on a composite business in India. With some immaterial exceptions of trifling amount the whole of their income for the two years ending April 5, 1929, and April 5, 1930, arose in India and were charged to United Kingdom income tax as profits of trade under Case I of Sched. D. The claim to relief was made in respect of several years, but the year ending April 5, 1929, may be taken as typical of the rest, and in fact has alone been the subject of actual decision in the courts below.

The appellants were charged to United Kingdom income tax for that year on their profits from India with £186,750. For the same year they were charged to Dominion income tax with £129,365 only. The difference arises from the fact that in India certain debenture interest was allowed as a deduction from the gross profits, and the profits from certain tea gardens were excluded from the account. This course was not allowed in England. There were other divergencies in the two systems of taxation which combined to make up a further excess of £6,542 in the United Kingdom profits which when also so excluded reduced the amount of £186,750 to £129,365, the amount assessed to Indian income tax.

The Court of Appeal has held that on the true construction of the section relief from United Kingdom income tax can be allowed on £129,365 only, that being, in their opinion, that part of the appellants’ income in respect of which they have paid Dominion income tax. The question depends on the true construction of the section in question, read of course in connection with and as part of the Income Tax Act as a whole, and in accordance with the usual rules of construction.

Counsel for the appellants indeed insisted that he was entitled to support his argument on construction by referring to the Report of the Royal Commission on Income Tax published in 1920. On this point I have read and considered the opinion about to be delivered by my noble and learned friend LORD WRIGHT. With his opinion I concur and have nothing to add to what he has said.

On the question of construction the contention of the appellants was that “part of the income” refers only to the source from which the income is derived. The source in this case was the Indian business of the company, and it was contended that inasmuch as the whole of that income was taxed to United Kingdom income tax in the sum of £186,750 it is in respect of that sum that relief should be given. I cannot agree with this contention. The word “part” is not in any sense a word of art with a peculiar meaning derived from the subject-matter in connection with which it is used. We are here dealing with a sum of money referred to as income. “Part” of a sum of money means in its ordinary signification so many pounds, shillings, and pence out of a larger amount. If the income is £100, a smaller sum, say £50, would properly be described as a part thereof.

In the present case the part of his income on which the taxpayer has paid tax in England is £186,750. In India he has paid tax on a smaller part numerically of the same income. To obtain relief he has to prove that he has paid Dominion tax on the same part of his income as that on which he paid United Kingdom tax. He can only prove this in respect of the smaller sum. I can see no reason why for

the purpose of identification any other meaning should be given to the word "part" A than the numerical meaning. "Double taxation" is not in terms mentioned in the section, but it is obvious that the object of the provision is to obtain pro tanto the avoidance of that result. The taxpayer has paid Dominion income tax in respect of £x of his income; he is entitled to relief in respect of £x part of the same income and to no more.

Some criticism was directed to the use of "on" in relation to United Kingdom B income tax and "in respect of" in relation to Dominion income tax, but I see no point in this; the two expressions mean virtually the same thing.

Rolls-Royce, Ltd. v. Short (1) was referred to by the appellants' counsel, who C relied on certain observations of my own as supporting his present contention. I do not see that this is so. Those observations, which I have read, must be understood as referring to the case then before the court, and so read they have no bearing on the present case. I may add, however, that I can detect in them no divergence between my own view and those of my learned brethren in the Court of Appeal.

The present case is a simple one. Others may arise in which further complications will have to be dealt with. That is no reason why the simple solution in the present case should not be the right one.

On the whole I agree with the conclusion of the Court of Appeal, and am of opinion that this appeal should be dismissed. D

LORD ATKIN.—I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend LORD WRIGHT and I agree with that opinion and with the opinion I have just read. E

LORD WRIGHT.—I am authorised to say that my noble and learned friend LORD THANKERTON agrees with the opinion I am about to read.

The question to be decided in this appeal is what is the extent of relief in respect of income tax to which the appellants are entitled under s. 27 (1) of the Finance Act, 1920, as amended by s. 46, and Sched. 5, Part II, 2 (1), to the Finance Act, 1927. The facts are simple: the appellants are a joint stock company incorporated F and registered in England; their business is carried on in Assam and consists of running a railway, working coal mines, timber concessions and other undertakings, including a tea plantation. Not the whole but almost the whole of their income for the two years which are here in question, having been taken as typical, i.e., the years ending April 5, 1929, and April 5, 1930, arose in India. That income was duly charged to United Kingdom Income Tax under Case I of Sched. D in Sched. I G to the Income Tax Act, 1918.

It will be sufficient in order to illustrate the point at issue to take the figures for 1928-29. No difficulty arises in this case in comparing the figures for the United Kingdom tax and for the Indian tax respectively. In both assessments the computation of profits is based on those of the preceding year, the period taken in the accounts being that ending on March 31, 1928. A trifling sum of £58 was earned by the appellants in England for transfer fees: this having been deducted, the assessment of profits for income tax in the United Kingdom came out at £186,750; but the same profits were assessed to income tax in India at £129,365. The appellants claimed relief at 2s. in the pound on the former sum; the Special Commissioners granted relief in respect of £135,907; the difference between the latter figure and £129,365 is £6,542. The Court of Appeal in confirming (in substance) the ruling of the Special Commissioners, took the view (rightly as I think) that the true amount on which relief should be given was £129,365, and I shall proceed on the basis of that figure, though no claim is made by the respondents to have the figure of £135,907 altered. In effect the position is that the appellants have paid or become liable to pay for United Kingdom income tax for 1928-29 on an assessment on part of their income of £186,750; but in respect of the same income for the same year have paid in India on an assessment of £129,365.

The difference between the two assessments is in the main due to the fact that in India the sum of £42,500 for debenture interest was allowed as a deduction from the tax, whereas in the United Kingdom no such deduction was allowed; in addition in India profits from a tea garden, owned by the appellants, were for some reason not taken into account, whereas these profits were included in the profits under the United Kingdom assessment. As already indicated, there were other similar but minor differences in the assessments, which it is not necessary here to consider.

The rival contentions may be thus summarised. The appellants claim that though the Indian assessment is only at the figure of £129,365 it is an assessment on the whole amount of the profits of £186,750; in other words, it exhausts the taxable capacity in India of the whole of those profits, so that the appellants have paid Indian income tax on the whole of that sum and hence are on that footing entitled to income tax relief under s. 27 of the Act of 1920 on the whole of that sum. The respondents, on the other hand, contend that double income tax has only been paid on £129,365, and no more, within the meaning of the section, and hence that it is only on that sum that relief is claimable.

The question, which is by no means free from difficulty, depends on the true construction of the words of the section, read in connection with the Income Tax Acts as a whole, and in accordance with the usual rules of construction. Counsel for the appellants sought to introduce into his argument certain recommendations from a report of a Royal Commission on Income Tax in 1920; he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the legislature in enacting the section. It would, perhaps, in this case be sufficient ground for rejecting, as your Lordships did, this contention and refusing to look at the report, that it had not been used or referred to either before the Special Commissioners or before FINLAY, J., or the Court of Appeal. But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate; as to this I agree with FARWELL, L.J., in *R. v. West Riding of Yorkshire County Council* (3) ([1906] 2 K.B. at p. 717), where he says

"that the true rule is expressed with accuracy by LORD LANGDALE in giving the judgment of the Privy Council in the *Gorham Case*, reported by E. F. Moore (1852 Edn.), p. 462: 'We must endeavour to attain for ourselves the true meaning of the language employed'—in the Articles and Liturgy—'assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate and the meaning of the words employed.' "

In this House, where the judgment of the Court of Appeal was reversed (*Attorney-General v. West Riding of Yorkshire County Council* (3)) no reference was made to this point. It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted. Counsel for the appellants relied on certain observations of LORD HALSBURY, L.C., in *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade Marks* (4) ([1898] A.C. at p. 575). The Lord Chancellor was there referring to the report of a commission that had sat to inquire into the working of the earlier Act, which had been superseded by the Act actually being construed by the House; but LORD HALSBURY refers to the report not directly to ascertain the intention of the words used in the Act, but because, as he says,

"no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."

LORD HALSBURY, it is clear, was treating the report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used and which came within the principle stated by LORD LANGDALE. The rule is in principle analogous to the rules laid down in the four resolutions of the Barons of the Exchequer recorded in *Heydons' Case* (5).

On the facts of the present case, I am of opinion that the appellants fail in their contention. The section requires that the taxpayer should prove (i) that he has paid tax in the United Kingdom for any year on a certain sum which is part of his income; in this connection I do not think that the word "part" is used to exclude the whole but merely to point to an ascertainable sum of income which is brought into question; (ii) that he has paid tax in the Dominion "in respect of" the same part of his income for that year: here the words "in respect of" as contrasted with "on" do not, I think, involve any latent distinction, since the word "on" would be inapplicable to the "same income" which becomes a separate taxable subject in the Dominion. The taxpayer then becomes entitled to relief. It seems clear that there must be a definite part of income brought into question, and that can only be expressed in a sum of money. As income *ex viatermini* must be expressed in a sum of money the words "the same part of his income" must involve a comparison between two sums of money, which prove to be the same. The contention of the appellants is to the contrary; it is said on their behalf that the words "the same part of his income" refer solely to what is called the source, and that identity of amount is immaterial and does not come into question except for the purpose of ascertaining the rate of tax to be allowed for. I cannot agree with this argument. No doubt questions of source, as it has been called, that is, such questions as where the income comes from, are essential to identify, so far as that aspect goes, what is taxed in the United Kingdom with what is taxed in the Dominion; but in addition the income itself, that is, the amount of money, must also be identified. I think the words "the same part of his income" are apt to include both elements of comparison and identification. The facts here may be peculiar in that they present none of the complications which will often prevent a clear identification and comparison of the income on which the United Kingdom tax is paid with that on which the Dominion tax has been paid. There may, for instance, be differences in regard to the year of charge, or in the method of computing the income for tax purposes; thus in *Rolls-Royce, Ltd. v. Short* (1) the part of the company's income there in question paid no tax in the United Kingdom because such part was not taxable as the law then stood, no profits having been made by the company on their Indian business on the average of the three preceding years, whereas in India, as now both in India and the United Kingdom, tax was payable on the basis of the preceding year's income which by itself showed a profit; hence though tax had been paid on the profit in question in India, the foundation of a claim under s. 27 failed because the company had not paid or become liable to pay tax on those profits in the United Kingdom. Certain observations in that case are to be read in reference to its special facts. But there is no such discrepancy in the present case; the appellants having paid tax in the United Kingdom on £186,750 have not paid tax at all in India on two definite and separable amounts, parts of that sum of £186,750, namely, £42,500, the debenture interest and the sum representing the profits of the tea garden. On the words of the section it seems that the appellants can only show double taxation in regard to £129,865, which is a part of the £186,750. In other words, I think that in such a case as this where definite amounts are in question, "paid" means paid in fact and cannot be applied in truth to these definite amounts, which are simply in India deducted from the profits assessable, as not being liable to tax at all. Accordingly, on the facts of this case, I do not think it is correct to say that the appellants have paid in India tax on the whole sum of £186,750 so as to be able to claim relief on the whole. I reject the contention made on behalf of the appellants and based by them on the ground that the whole sum has been taxed to its full taxable capacity according to Indian law; the admissible deductions, it is said, amount simply to a

method of assessment or computation of the entire profits, and not a mere immunity of certain items. No doubt there may be cases in which a reduction in the amount of the assessment in the Dominion may be consistent merely with a difference in computation, so that it may be said that the larger sum taxed in the United Kingdom ought to be regarded as taxed in toto in the Dominion by the smaller assessment, and that the taxpayer in that event has paid tax on the same part of his income taken at the larger figure both in the United Kingdom and in the Dominion. But I think that on the true view of the facts of the present case certain definite parts of income which are taxed in the United Kingdom are excluded from taxation altogether in India, so that the element of double taxation does not exist at all in regard to those parts of the appellants' income.

In other words, in my judgment the same part of their income on or in respect of which the appellants have paid double tax is not £186,750 but £129,365, and it is on that part alone of their income that they are entitled to relief.

In the result, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Taylor & Humbert; Solicitor of Inland Revenue.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

MILLER v. LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (du Parcq, J.), May 30, 31, June 1, 20, 1934]

[*Reported 151 L.T. 425; 50 T.L.R. 479*]

Building Contract—Extension of time—Engineer empowered to grant extension of time for completion "either prospectively or retrospectively"—Delay by contractor—Extension granted ex post facto when work completed.

Building Contract—Payment—"No . . . money . . . due and owing . . . unless the engineer . . . shall have certified"—Half retention money payable on issue of certificate of completion—No certificate by engineer.

A building contract, the material clauses of which were in a common form, provided that the whole of the work should be completed by Nov. 15, 1931. Clause 31 provided that "it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time for completion of the work and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable." Clause 37 provided that in case the builder should fail in the due completion of the work at the time limited for completion, whether original or as extended under the above clause, the builder should pay liquidated damages for delay at a certain rate. The work was not completed till July 25, 1932. After the completion of the work, on Nov. 17, 1932, the engineer issued a certificate granting an extension of time to Feb. 7, 1932, and subsequently certified a sum of £2,625 as payable by the builder to the building owner as liquidated damages under cl. 37 for the delay from Feb. 7 to July 25, 1932.

Held: the words "either prospectively or retrospectively" did not give the engineer a right to fix a new date for completion ex post facto after the entire work had been completed. They only empowered him, if a delay occurred during the progress of the work, to wait until the cause of the delay had ceased

to be operative, and then within a reasonable time after the delay had come to an end "retrospectively" with regard to the cause of the delay to assign to the contractor a new date for completion. The power to extend the time had, therefore, not been exercised within the time limited by the contract, and so the building owner had lost the benefit of the clause, there was no date from which penalties could run, and no liquidated damages could be recovered.

By cl. 41 of the contract it was provided that one-half of the retention money should be paid to the builder on the issue of the certificate of completion. By cl. 42 it was provided that "no sum or sums of money shall be considered to be due and owing to the [builder] . . . unless the engineer shall in writing under his hand have certified or recommended the amount to be paid as such instalment or balance to the" builder. The certificate of completion had been issued, but no such certificate as was provided for by cl. 42 had been issued by the engineer.

Held: on a claim by the builder for half of the retention money the money claimed was either an "instalment" or a "balance," and, as the condition precedent to payment imposed by cl. 42 had not been fulfilled, the builder's counter-claim must fail, as being premature.

Notes. Considered: *Amalgamated Building Constructors, Ltd. v. Waltham Holy Cross U.D.C.*, [1952] 2 All E.R. 452.

As to the extension of time for completing a building contract, see 3 HALSBURY'S LAWS (3rd Edn.) 490, para. 961, and for cases on the subject see 7 DIGEST 343-345, 52-55; as to damages where there is no extension of time, see 3 HALSBURY'S LAWS (3rd Edn.) 490, para. 962; as to retention money, see *ibid.* 471, para. 908; and as to certificates conditions precedent to payment, see *ibid.* 459, para. 878, and for cases on the subject see 7 DIGEST 350-352, 73-81.

Case referred to:

(1) *Anderson v. Tuapeka County Council* (1900), 19 N.Z.L.R. 1; 7 Digest 348.

Action tried by DU PARCQ, J., without a jury, by a builder for payment over of one-half of the retention money, counter-claim by the building owners for damages for the late completion of the building contract.

The material clauses of the contract and the facts which gave rise to the dispute are summarised in the above headnote and appear fully in the judgment.

E. J. Rimmer for the builder, the plaintiff.

Tristram Beresford for the building owners, the defendants.

Cur. adv. vult.

June 20. **DU PARCQ, J.**, read the following judgment.

The plaintiff is a builder who trades under the firm name of Mears Bros. He sues the defendant owners, the London County Council, for the sum of £880 3s. 2d., alleged to be payable under a building contract dated July 7, 1931, and for interest on that sum. The owners say that the builder is not entitled to maintain the action, and counter-claim a sum of £2,625 (or alternatively, if the amount of the plaintiff's claim is to be set off against their counter-claim, £1,508 9s. 10d.) as liquidated damages alleged to be payable under the contract by reason of delay on the part of the builder.

The material facts are not in dispute, and no evidence was called before me.

It is convenient to deal first with the owners' counter-claim. The work, the subject of the contract, was executed in connection with alterations at the Deptford Pumping Station. Clause 12 of the specification provided that the whole of the work should be completed within seven months from the date of the engineer's order to commence. This order was given on April 16, 1931. Clause 12 further provided that three several portions of the work should be completed as specified in a programme which is set out therein.

I proceed to refer to such provisions of the general conditions as appear to be relevant. The builder was to do the work agreed, and all extra work which might

be ordered under the powers contained in the contract, for the sum of £18,268 8s. 7d. Clause 5 contained provisions for the issue or requisitioning of further drawings. Clause 11 provided that non-delivery of the use of a site or any part thereof, or any delay in giving a written order to commence the works, or in delivery of plans, drawings, or sections, or orders, or any other delay from whatever cause alleged against the owners, the defendant council, or any of its officers, should not vitiate or affect the contract or any provision therein or entitle the builder to any allowance in respect of money, time or otherwise, except such extension of time (if any) as the engineer might grant to the builder under the provisions of cl. 31. Clause 21 provided that the builder should commence, execute, and carry on all the work with due diligence to the satisfaction of the engineer, and empowered the owners to take the work out of the builder's hands and employ other contractors if the engineer certified that the builder was not proceeding with the work with that diligence which would ensure completion by, or had failed to complete the work, or any portion or portions thereof within, the respective times limited by the contract or by or within such extension of such time as the engineer might have granted under cl. 31.

Clause 31, upon which the argument chiefly turned, is as follows :

"The contractor shall complete and deliver up to the council the whole of the work comprised in this contract, and shall complete the removal of all temporary works, plant, and surplus materials within a period of seven calendar months from the date of the engineer's order to commence, and shall complete the several portions of the work mentioned in clause No. 12 of the first schedule hereto within the respective periods set forth therein. The whole of the works shall be delivered up complete in every respect in a clean and perfect condition. Provided always that if by reason of additional work or enlargements of the work or for any other just cause arising with the council or the engineer or in consequence of any strikes or combination of workmen or for want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes or differences whatsoever, and howsoever occasioned, the contractor shall in the opinion of the engineer have been unduly delayed or impeded in the completion of the work or any part of it, it shall be lawful for the engineer, if he shall think fit, to grant from time to time, and at any time or times, by writing under his hand such extension of time for completion of the work, and that either prospectively or retrospectively, and to assign such other time or times for completion as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the rates or prices included in the second schedule; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for and in respect of any loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the council for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of any delay continued beyond the time or times mentioned in such writing or writings respectively. For all the purposes of this clause the decision of the engineer shall be final."

Clause 37 provided for the payment of damages, in the following terms :

"In case the contractor shall fail in the due completion of the work to be executed under this contract, by and at the respective times hereinbefore limited for completion as aforesaid, whether original or extended under the power hereinbefore given in that behalf, the contractor shall on demand pay to the council, as and for liquidated damages for each and every week which may elapse between the appointed and the actual times of completion as certified by the engineer the sum of £100 as regards default in completing the whole

of the said work, and the sum of £75 as regards default in completing any of the said portions thereof. Provided that if and when the said damages in respect of the whole of the said work become payable the said damages (if any) in respect of the said portions shall cease to be payable. And such payment shall not in any degree release the contractor from any further or other obligations and liabilities under this contract, or from the complete execution and performance of this contract. Any certificate or certificates of the engineer as to the matters referred to in this clause shall be final."

These being the material terms of the contract, the owners, the defendant council, counter-claim for damages in the following circumstances. As the work proceeded, complaints of delay were made by the engineer from time to time. The builder contended that he was not responsible for it. It is not in dispute that extra work was ordered by the engineer. It was not necessary for me to consider, still less to decide, whether or not the builder was to blame for any of the delay, but it is certain that the works were not completed till long after the date originally contemplated. On July 19, 1932, the builder wrote to the owners' resident engineer at Deptford to say that the whole of the works would be completed during that week, and to ask for the completion certificate as soon as the job was finished. On July 28, 1932, the engineer certified for the eighth advance to the builder, stating that the builder had duly executed and completed to his satisfaction works, the value of which he estimated to be £14,413 8s. 1d., including £934 8s. 1d. for extras. As will presently appear, the whole of the work was in fact completed by July 25, 1932. On Sept. 5, 1932, the engineer wrote to the builder as follows:

"In connection with the issue of the certificate of completion in respect of the above contract, I have under consideration the question of extending the time for completion and the damages incurred for delay in completion, and I desire to afford you an opportunity of placing before me any observations you may wish to submit with regard to the period taken in carrying out the work in relation to the period for completion stipulated in the contract. On this subject your attention is directed to cls. 31 and 37 of the contract."

The builder accepted this invitation and wrote two letters, dated Sept. 6 and 19, 1932, in which he sought to explain or excuse the delay. On Oct. 12, 1932, the engineer wrote this letter to the builder:

"In reply to your letter of 19th ultimo, I regret to find that neither it nor your previous letter of 5th ultimo is of much assistance to me in fixing any extension of the period provided by the contract for completing this work. I agree that after the junction to the Southern Outfall No. 2 was completed there was short delay before the 3 ft. 6 in. diameter pipes could be broken into, and that there were some minor further delays for which you were not responsible, but I cannot agree with the other statements made in your letters. I find that the different sections of the contract were completed on or about the following dates: work inside West Engine House: contract date of completion, July 15, 1931; approximate date of completion, Aug. 4, 1931." (There was a footnote, which I need not read.) "Strengthening and lining delivery culvert for West Engine House: contract date, Sept. 15, 1931; approximate date of completion, Oct. 31, 1931. Alterations to Penstock and Screening Chamber: contract date, Sept. 15, 1931; approximate date of completion, Oct. 26, 1931. Completion of contract: contract date, Nov. 15, 1931; approximate date of completion, July 25, 1932. I propose now to report to the appropriate committee of the council, stating the extension of the contract time which might, in my opinion, be granted in view of the delays above mentioned, and the damages incurred for delay in completion. Before doing so, however, I would ask if you have anything further to add to your previous letters on this matter."

At this point in the history of events it may be convenient to consider the contention of the plaintiff builder as to the counter-claim of the defendant owners. The builder relies upon the fact that extra work was ordered, and that there were admittedly delays for which the builder was not responsible and for which the owners were responsible. It follows, he says, that the owners, by their own act, had rendered the performance of the contract by the builder within the stipulated time impossible. No doubt the contract met the difficulty which might thus arise, by providing that the engineer might grant extensions of time, and if such extensions had been granted, and a new time for completion assigned, the owners would have been entitled to claim liquidated damages for any delay. But after July 25, 1932, there was nothing left for the builder to do, and at that date, and for a long time thereafter, the engineer had neither granted nor purported to grant any extension of time. In these circumstances, counsel for the builder founded his submission upon the proposition of law stated in HUDSON ON BUILDING CONTRACTS (6th Edn.) at p. 359:

"Where there is power to extend the time for delays caused by the building owner, and such delays have in fact taken place, but the power to extend the time has not been exercised, either at all or within the time expressly or impliedly limited by the contract, it follows (unless the builder has agreed to complete to time notwithstanding such delays) that the building owner has lost the benefit of the clause. The contract time has in such case ceased to be applicable, there is no date from which penalties can run, and therefore no liquidated damages can be recovered."

Counsel for the defendant owners did not challenge the accuracy of that statement of the law, and it is, in my view, a correct statement. It was the owners' case, however, that extensions of time had been granted within the time limited by the contract, and they relied on acts of the engineer subsequent to those which I have so far narrated.

On or about Nov. 17, 1932, the engineer issued a certificate which bore the date of July 25, 1932, and not the true date of its issue. It was in these terms:

"I, Thomas Peirson Frank, of the Old County Hall, Spring Gardens, S.W.1, in the County of London, the chief engineer of the council, do hereby determine, find and certify as follows, that is to say: (1) That all the work contracted for and directed to be executed under the above-mentioned contract has been completed to my satisfaction, and is in a sound, watertight, workmanlike, complete and useable condition, and that the contractor has, in my opinion, reasonably fulfilled and completed the contract and undertaking, except so far as relates to maintenance of the work as provided by cl. 34 of the contract. (2) That the appointed times of completion and the actual times of completion of the whole of the work comprised in the said contract and the respective portions of such work referred to in cl. 12 of the specification contained in the first schedule to the said contract are as follows."

Those are then set out, and I think I need only refer to the dates under (d):

"The whole of the work comprised in the said contract: appointed time of completion, Nov. 15, 1931, being seven calendar months after the date of my said written order to commence; actual time of completion, July 25, 1932."

Then:

"(3) That under the powers conferred upon me by cl. 31 of the said contract I grant to the contractor the following extensions of time for completion";

and then those are set out, but I need only read the one under (d):

"(d) As regards the whole of the work comprised in the said contract, an extension of twelve weeks making the extended time for completion thereto Feb. 7, 1932."

There is no reason to suspect that there was any improper motive for ante-

dating this certificate. I was told that the object of doing so was to meet the difficulty which would have arisen by reason of the terms of cl. 34 if the certificate of completion had borne its true date.

On Feb. 3, 1933, the engineer further certified that a sum of £2,625 was payable by the builder as liquidated damages under cl. 37. I understood counsel for the owners to agree that if cl. 31 of the contract had not contained the words "prospectively or retrospectively," he would not have been able to contend that extensions of time had been granted within the time limited by the contract. He submitted, however, that the meaning of cl. 31, if due effect is given to the word "retrospectively" in its context, is that the engineer may grant extensions *ex post facto* after the whole of the work is done, and that provided he grants them within a reasonable time, these consequences follow which the contract provides shall follow if extensions are duly made.

The question of construction with which I am faced is not a simple one. "Prospectively" means, "as one looking forward," "retrospectively" means, "as one looking backward." It is plain that the engineer is entitled to defer the grant of an extension of time to a stage when he is looking backward at something. The question is—at what? Counsel for the owners says: "At the completion of the work, or that portion of it which is in question." Counsel for the builder says that it is wrong, or at least unnecessary, to give that meaning to the word, and suggests as a possible and more reasonable construction, that the intention of the clause is to empower the engineer, instead of granting an extension of time when he orders extra work, or when, to take another case, a strike begins; to wait if he chooses until the cause of the delay has ceased to be operative, and then, looking back upon the acts or events which have caused the delay, to assign a new time for completion. He contends, however, that cl. 31 does nothing to deprive the builder of the right to have the date to which he must work fixed in advance, and that it was not the intention of the parties that the builder should work in the dark and be told some months after he has completed his task what time the engineer allowed him within which to finish it.

I have come to the conclusion that the words of cl. 31 do not give to the engineer the power for which the owners contend. The words "to assign such other time or times for completion as to him may seem reasonable" are not, in my opinion, apt to refer to the fixing of a new date for completion *ex post facto*. I should rather paraphrase them in such some words as "to fix a new date by which the builder ought to complete the work." If I am right, this phrase, coming after the word "retrospectively," throws some light upon its meaning. Next, it is important to observe that without words in the contract to make the matter clear it might be a matter of dispute whether the engineer was or was not bound to grant each extension of time at the time of the delay. The following passage occurs in HUDSON ON BUILDING CONTRACTS (6th Edn.) at p. 360:

"The extension of time need not necessarily, it would seem, be granted before the contract date for completion. If, for example, a strike were to last over the contract date, the extent of the delay might not be known, nor the necessary extension of time be granted, until after the contract time had expired. But each extension of time should, it would seem (depending always, however, upon the terms of the particular contract), be granted at the time of the delay, or, where the cause of delay is continuing and its extent uncertain, within a reasonable time after the delay has come to an end."

My attention was called to a case decided in 1900 in the Court of Appeal of New Zealand—*Anderson v. Tuapeka County Council* (1). In that case the court was considering a building contract which, after stipulating for the payment of liquidated damages if the works were not completed on a day fixed, went on to provide that in the event of any alterations, deviations, additions or extra work being required, the engineer should allow such an extension of time as he should think adequate in consequence thereof, and that any sum to become payable by

way of damages for non-completion should be computed from the expiration of such extended time. The court held that an alleged extension was ineffective because it was not allowed when the extra works occasioning it were ordered. SIR ROBERT STOUT, C.J., said (19 N.Z.L.R. at p. 11) that the extended time should have been fixed when giving the orders for the extras, and the other judges took the same view. In my judgment the word "retrospectively" may well have been intended to make it clear that an extension granted (in the words of HUDSON) "within a reasonable time after the delay has come to an end," is a valid extension. It may also be read as empowering the engineer to grant an extension after the contract date for completion has gone by, but I do not read it as meaning that the engineer may fix a new date for completion and grant extensions of time at some date subsequent not only to the contract date, but also to the substituted date. In my opinion, cl. 34, which clearly contemplates that the engineer will be in a position to give a certificate of completion as soon as or very shortly after the work is complete, supports the view that it was the intention of the parties that all extensions of time should be granted before the substituted date for completion arrived. The language of cl. 37 is more consistent with the view which I have adopted than with that put forward on behalf of the owners. I should perhaps add here that I also agree with counsel for the builder's contention that cl. 11 of the contract does not apply to delays caused by the ordering of extra work or by lack of expedition on the part of other contractors. I deal briefly with this point, as I do not understand from his argument that counsel for the owners places any reliance upon cl. 11, although it is pleaded in a rejoinder.

If I am wrong in thinking that the clause cannot properly be interpreted in the sense contended for by the owners, it is, in my judgment, at least ambiguous, and reasonably capable of the construction which the builder asks me to put upon it. I agree with counsel for the builder's contention that upon this view it must be construed according to that one of two possible meanings which is more favourable to the builder, on the ground that it was the owners who prepared and put forward the contract. It follows from the view which I have expressed that the power to extend the time was not in this case exercised within the time limited by the contract, and that the owners are not in a position to claim liquidated damages.

The builder further relied upon a contention that cl. 37, upon its true construction, in the light of the surrounding circumstances, provided for the recovery of penalties and not of liquidated damages. The fact that I have decided the question of construction in the builder's favour makes it unnecessary for me to decide, or express any opinion upon, this contention.

It remains to deal with the builder's claim. This is based upon cl. 41 of the general conditions of the contract, which contains the words:

"One-half of the retention money shall be paid on the issue of the certificate of completion, and the balance after the expiration of the period of maintenance."

The certificate of completion was issued before the commencement of the action, and counsel for the owners does not dispute that the builder would be entitled to the sum claimed but for a provision in cl. 42 of the contract, upon which he relies on behalf of the owners. This provision is as follows:

"No sum or sums of money shall be considered to be due and owing to the contractor, nor shall the contractor make or enforce any demand whatsoever upon or against the council for or on account of any work executed . . . [I leave out part of the clause which is not material to the present question] unless the engineer shall, in writing under his hand, have certified or recommended the amount to be paid as such instalment or balance to the contractor and that the contractor is reasonably entitled to such instalment or balance respectively; nor shall any such sum or sums of money be considered payable to the contractor until the expiration of fourteen days from the date of such certificate."

Apart from set-off, this is the only defence pleaded to the builder's claim. I agree

with counsel for the owners' submission that the engineer has not certified in writing that one-half of the retention money is payable. Counsel for the builder sought to rely upon the certificate for the eighth advance, to which I have already referred, but in my judgment this was not intended to be, and cannot be construed as, a certificate under cl. 42 that any part of the retention money was to be paid.

I should have arrived at this conclusion even without the final proviso of cl. 42, but this proviso, in my view, affords a further answer to counsel for the builder's contention. Those words in cl. 42 are,

"provided further that no certificate or recommendation for payment or payment on general account shall be taken to be an admission of the due performance of this contract, or any part thereof, or of the accuracy of any claim, nor shall it conclude or prejudice the powers of the engineer, or the settlement of the contract, or the determination of the sum or sums, or balance of money to be paid to or received from the contractor, or in any other way vary or affect this contract."

Counsel for the builder further argued that, while cl. 41 in terms made the amount claimed payable on the issue of the certificate of completion, cl. 42, upon its true construction, did not refer at all to the first half of the retention money. It is to be observed that cl. 41 begins with the words: "Subject to the provisions of this contract," and in my judgment it is a condition precedent to the builder's right to recover any sum of money under the contract, that the provisions of cl. 42 shall have been complied with. It is not clear why the draftsman has introduced into cl. 42 the words "as such instalment or balance," and the limb of the clause upon which the owners rely is, I think, open to criticism as being cumbrous and ungrammatical, but it seems to me to be impossible not to read it as including within the scope of the phrase "instalment or balance" the payment of the first half of the retention money. Counsel for the builder argued that this was the payment neither of a balance nor of an instalment. Retention money is money which is kept in hand as not being immediately payable although due. When the date for its payment arrives, that payment must, in my view, fall within one of the two named categories; it is either instalment or balance. It may be called a balance in the sense that it adjusts the accounts between the parties as at that date. It may be called an instalment, because what the contract calls the "final balance" still remains to be paid. It must, in my view, be one or the other, and I do not feel called upon to say which is its more appropriate name. I am thus compelled to come to the conclusion that the builder, having failed to show the fulfilment of that which the contract makes a condition precedent to payment of the amount claimed, cannot recover in this action, which is at best premature.

It follows that neither party recovers anything against the other. Both claim and counter-claim must be dismissed.

Claim and counter-claim dismissed.

Solicitors: *Kenneth Brown, Baker, & Baker; Howard Roberts.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

ELLIOTT (INSPECTOR OF TAXES) v. BURN

[HOUSE OF LORDS (Lord Blanesburgh, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Wright), June 7, 8, 11, July 19, 1934]

[Reported [1935] A.C. 84; 103 L.J.K.B. 578; 151 L.T. 526; 50 T.L.R. 556; 78 Sol. Jo. 550; 18 Tax Cas. 595]

Income Tax—Easement—Right to let down surface—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. A, No. I, No. II, r. 7, Sched. D, Case III, Case VI.

The respondents owned the surface of land, the minerals under which were worked by a colliery company. The surface was at all material times let by the respondents to a farmer at a rack rent, on the basis of which rent, as being the annual value of the land under r. 1 of Sched. A to the Income Tax Act, 1918, the tenant as occupier was assessed to tax under that schedule. Under an agreement dated Dec. 21, 1922, the respondents (called "the lessors") let to the colliery company (called "the lessees") "full liberty in working any mines or seams of coal" under the said land "to withdraw from [the said land] any support . . . whether vertical or lateral. . . . To hold the liberties granted . . . from May 1, 1933, until Oct. 30, 1948. . . . Yielding and paying therefor the yearly certain rent of £150. . . . And also . . . the rent of 1½d. for every ton of coal worked by the lessees underneath" the said land. The agreement also provided for compensation for all damage caused by letting down the surface. Assessments were made on the respondents for income tax in respect of their receipts under the said agreement during the years 1924–30, the claims being made under r. 7 of No. II of Sched. A, or under Case III or Case VI of Sched. D.

Held: (i) the claim under r. 7 of No. II of Sched. A failed because the receipts did not constitute profits arising from lands within r. 7, for, if they arose from the right of support which the respondents had, they arose from the ownership of the land itself and would fall within rule No. I and be covered by the assessment on the annual value under that rule; and they did not arise from an easement vested in the colliery company, viz., a right to let down the surface, because (a) on the true construction of the agreement, no such right was granted, and (b) such a right would be a detriment to the respondents as owners of the surface, and money received as consideration for granting the right to inflict that detriment would not be profits or gains arising from the right itself.

(ii) so far, if at all, as the payments represented a profit of the respondents, they were received in respect of their property in the land itself, and, tax having been assessed on the annual value under rule No. I of Sched. A, the present claim was covered; and it followed that the alternative claim under Sched. D also failed.

Fry v. Salisbury House Estate, Ltd. (1), [1930] A.C. 432, followed.

Notes. The Income Tax Act, 1952, s. 180, provides for the charging to tax under Sched. D of receipts of the nature of those considered in this case: see also *Earl Fitzwilliam's Collieries Co. v. Phillips (Inspector of Taxes)*, [1943] 2 All E.R. 346.

The provisions relating to Sched. A and Sched. D of the Income Tax Act, 1918, were replaced by Part III and Part V of the Income Tax Act, 1952, respectively.

Considered: *Stewart v. Normandy Estates Co., Ltd.* (1933), 18 Tax Cas. 244. Distinguished: *I.R.C. v. New Sharlston Collieries Co.*, [1937] 1 All E.R. 86. Considered: *Croft v. Sywell Aerodrome, Ltd.*, [1942] 1 All E.R. 110. Referred to: *I.R.C. v. New Sharlston Collieries Co.*, [1936] 1 All E.R. 802; *Fitzwilliam's Collieries Co. v. Phillips*, [1942] 1 All E.R. 648, [1943] 2 All E.R. 346.

For the Income Tax Act, 1952, Part III and Part V, see 31 HALSBURY'S STATUTES A (2nd Edn.) 80 et seq. and 112 et seq.

Cases referred to:

- (1) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266, H.L.; Digest Supp.
- (2) *Bonomi v. Backhouse* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 17 Digest (Repl.) 87, 75.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.), reported 149 L.T. 481; [1934] 1 K.B. 109, on a Case Stated by the commissioners for the general purposes of the Income Tax Acts for the Division of Chester Ward in the county of Durham pursuant to s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

The Case stated as follows:

1. At a meeting of the general commissioners for the Division of Chester Ward held at the Town Hall, Gateshead, on Tuesday, Oct. 6, 1931, Messrs. J. H. and F. H. Burn, of 32, Mosley Street, Newcastle-upon-Tyne (hereinafter referred to as "the respondents"), appealed against certain assessments made on them under Sched. D of the Income Tax Acts for the years shown below and alternatively under Sched. A for the years 1924-25, 1925-26 and 1926-27, in respect of certain payments made to them under the circumstances hereinafter set out.

2. The assessments against which the respondents appealed were as follows:

For the year ending April 5, 1924	...	£75	0	0
do. 1925	...	£155	0	0
do. 1926	...	£432	0	0
do. 1927	...	£526	0	0
do. 1928	...	£778	0	0
do. 1929	...	£288	16	0
do. 1930	...	£694	0	0

3. The following facts were admitted or proved:

(a) The respondents are the surface owners of certain lands at North Follingsby in the county of Durham. The minerals under the said lands belong to and are worked by Messrs. John Bowes and Partners, Ltd., colliery owners.

(b) By an agreement dated Dec. 19, 1906, and made between the respondents of the one part and Messrs. John Bowes and Partners, Ltd., of the other part, the respondents granted to Messrs. John Bowes and Partners, Ltd., the surface liberties required in the working of the coal subject to the conditions set out in that agreement.

(c) By a further agreement, dated Dec. 21, 1922, and made between the same parties, the respondents, therein referred to as "the lessors," granted to the said John Bowes and Partners, Ltd., therein referred to as the "lessees," by cl. 5 thereof,

"full liberty in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands of the lessors at North Follingsby aforesaid (which lands are hereinafter referred to as 'the said lands hereinbefore described') to withdraw from the said lands hereinbefore described or any part thereof any support for such lands whether vertical or lateral but subject as to such parts of the said lands hereinbefore described or any other lands as may be affected thereby or subject thereto to the provisions of the Railway Clauses Consolidation Act, 1845, and it is expressly declared that nothing in these presents shall be deemed to authorise the lessees to cause any damage or injury to any lands adjacent to any of the said lands hereinbefore described or any buildings, railways, works or erections on such adjacent lands whether belonging to the lessors or to any other person."

The consideration for the said grant as set out in cl. 7 and cl. 8 of the said agreement was as follows:

"7. Yielding and paying therefor the yearly certain rent of £150, and so in proportion for any less period than a year. 8. And also yielding and paying the rent of 1½d. for every ton of coal worked by the lessees from underneath the said lands hereinbefore described."

These payments are the subject of the assessments in dispute.

It was also agreed by cl. 14, cl. 15, cl. 16 and cl. 17 of the said agreement that any actual damage caused to crops, drains, pipes, or other injury to the said lands referred to or to any buildings thereon should be compensated for in addition to the payment of the said certain and tonnage rents referred to in cl. 7 and cl. 8 of the agreement; also by cl. 18 the respondents were indemnified against claims by third parties in respect of damage to adjoining lands. No such payments for actual damage were, however, included in the assessments under appeal. Up to the date of the hearing of the appeal no sums had been expended by the respondents in restoring the damage to lands caused by the colliery workings.

(d) The amounts paid on certain rent or tonnage under cl. 7 and cl. 8 of the said agreement and received by the respondents were :

For the year ended April 5, 1923	...	£75	0	0
do. 1924	...	£155	0	0
do. 1925	...	£432	0	0
do. 1926	...	£526	0	0
do. 1927	...	£778	0	0
do. 1928	...	£288	16	0
do. 1929	...	£694	0	0

The amounts had been paid to the respondents in full without deducting income tax. The surface of the said land was let by the respondents and was in the occupation of a farmer at an annual rack-rent of £296, and this was taxed under Sched. A accordingly.

4. It was contended on behalf of the respondents (inter alia) :

(1) That the respondents were not in occupation of the said land.

(2) That if the said rents were profits arising from lands they were profits liable to deduction and not chargeable on the owner thereof.

(3) That income tax had already been charged under Sched. A of the Income Tax Act, 1918, on the full annual value of the said land, and no further charge could be made under Sched. A in respect of the said land.

(4) That the said rents were not annual profits or gains in respect of any trade, profession, employment or vocation carried on by the respondents.

(5) That if the said rents were not profits arising from lands they were annual payments made by virtue of a contract, namely, the agreement dated Dec. 21, 1922.

(6) That the assessments should be discharged.

Fry v. Salisbury House Estate, Ltd. (1) was referred to.

Counsel on behalf of the respondents agreed that the payments in question should be treated as payments of income and not capital.

5. It was contended by H.M. Inspector of Taxes (inter alia) :

(1) That the payments in question were profits or gains chargeable to income tax under the Income Tax Acts.

(2) That the payments in question were not a distribution of profits to the owner of the soil or property from which the colliery owner was entitled to deduct income tax under r. 5 of No. III of Sched. A.

(3) That the payments in question were not part of the annual value of the land assessed under No. 1 of Sched. A.

(4) That the payments in question were assessable either under r. 7 of No. II of Sched. A, or under Case III or Case VI of Sched. D.

6. Having considered the evidence and arguments adduced before us we held that the said rents were not liable to assessment under r. 7 of No. II of Sched. A or Case III or Case VI of Sched. D, and that the third contention submitted on

behalf of the respondents was correct and accordingly allowed the appeal and thereupon discharged the assessments.

7. The appellant immediately on the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

The Court of Appeal held, reversing the decision of FINLAY, J., that qua land, qua surface, the proper tax had been paid on the land under Sched. A; the owner of the land had an inherent right to the support of the surface, but that right only accrued when the injury to the surface occurred: (*Bonomi v. Backhouse* (2)). Such a right was not a profit arising from lands, tenements, hereditaments not being in the actual occupation or possession within the meaning of r. 7 of No. II of Sched. A, as in fact it was a sum given to the owner of the land to deter him from exercising his protective rights; it did not arise out of any using of the land, but by reason of the misuser of the mines which let down the surface. The agreement was apart from any user of the land, and apart from any profit arising from the land. Therefore the money received under the agreement was not something which fell within the widest interpretation of Sched. A or its rules.

The Inspector of Taxes appealed.

The Attorney-General (Sir Thomas Inskip, K.C.) and *Reginald P. Hills* for the Crown.

A. M. Latter, K.C., and *John Charlesworth* for the respondents.

The House took time for consideration.

July 19. **LORD WARRINGTON** read the following opinion.—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.J.J.) dated July 7, 1933, allowing an appeal by the respondents from an order of the King's Bench Division (FINLAY, J.), dated Jan. 31, 1933, whereby an appeal by the appellant on a Case Stated by the commissioners for the general purposes of the Income Tax Acts for the Chester Ward in the county of Durham was allowed and the decision of the commissioners was reversed.

The respondents are the owners of the surface of certain land at North Follingsby in the county of Durham. The minerals under the land are owned and worked by John Bowes and Partners, Ltd., hereinafter called the colliery company. The surface of the land has at all material times been let by the respondents to a farming tenant at a rack-rent of £296. On the basis of that rent as being under r. 1 of Sched. A the annual value of the lands the tenant as occupier has been assessed to tax under that schedule.

The claim on the part of the Crown, which has been rejected by the General Commissioners and by the Court of Appeal, is in respect of certain annual payments payable under an agreement dated Dec. 21, 1922, between the respondents, thereafter called the lessors of the one part and the colliery company therein-after called the lessees of the other part. The agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work any of the mines under the lands or adjacent thereto in such a manner as to let down the surface of the lands, and that the lessees were liable to pay damages to the lessors for injury already caused to the lands by the letting down of the surface, and it had been agreed that the lessors should grant to the lessees:

"Liberty in working the said mines and seams of coal to let down such surface upon the terms hereinafter appearing."

It was then witnessed that in pursuance of the said agreement and in consideration of the rent thereafter reserved and of the covenants by the lessees therein-after contained the lessors thereby demised unto the lessees:

"(5) Full liberty in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands of the lessors at North Follingsby aforesaid (which lands are hereinafter referred to as 'the

lands hereinbefore described') to withdraw from the said lands hereinbefore described or any part thereof any support for such lands whether vertical or lateral but subject as to such parts of the lands hereinbefore described or any other lands as may be affected thereby or subject thereto to the provisions of the Railway Clauses Consolidation Act, 1845, and it is expressly declared that nothing in these presents shall be deemed to authorise the lessees to cause any damage or injury to any lands adjacent to any of the said lands hereinbefore described or any buildings railways works or erections on such adjacent lands whether belonging to the lessors or to any other person.

"(6) To hold the liberties granted unto the lessees from the 1st day of May, 1938, until the 30th day of October, 1948, provided the lease dated the 19th day of December, 1906, from the lessors to the lessees of surface liberties in connection with the lands hereinbefore described shall so long continue and subject and without prejudice to any rights of support to which any third party may now be entitled as the owner of any adjoining land.

"(7) Yielding and paying therefor the yearly certain rent of £150, or so in proportion for any less period than a year.

"(8) And also yielding and paying yearly the rent of 1½d. for every ton of coal worked by the lessees from underneath the said lands hereinbefore described."

There then follow clauses as to short workings and as to the details of the payment of the several rents and other matters not relevant to the construction of the clauses quoted above. The agreement then contains clauses providing for the payment (cl. 14) to the lessors or their tenants of

"full compensation for all damage which has already been caused or arisen or may hereafter be caused or arise by or in consequence of any letting down of the surface of such lands to any drains, pipes, crops, stock cattle or other things for the time being thereon by reason or in consequence of any past or future underground operations of the lessees under the lands hereinbefore described or elsewhere whether the subsidences of such lands causing such damages arose previous to or after the commencement of any tenancy whether present or future of any of the said tenants."

The rest of this clause need not be quoted for the present purpose.

Clause 15, however, is important; it is as follows:

"On the expiration, or sooner, determination of the said term or within any time within three years thereafter, or, if so required by the lessors, at any time previous thereto to pay full compensation to the lessors for any injury which has already been caused or may hereafter be caused to any lands of the lessors by any past or future workings of the lessees whether under the lands hereinbefore demised or any adjoining lands."

The word "demised" must I think be a misprint or a clerical error for "described." No lands were hereinbefore demised.

By a further "lease," dated Feb. 20, 1931, between the same parties the term granted by the preceding instrument was extended to Oct. 30, 1970.

I defer any remarks on the construction and effect of the instrument of Dec. 21, 1932, until I have called attention to the material provisions of the Income Tax Act, 1918.

The charge of income tax is effected by s. 1 of the Act:

"Where any Act enacts that income tax shall be taxed for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D, and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those schedules."

The only schedule which deals with the charge in respect of "property" as

distinct from "profits or gains" is Sched. A, and that schedule begins with the statement that

"tax under Sched. A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every 20s. of the annual value thereof."

The point is that in order that the tax may be charged you must find something falling within the description of "lands, tenements, hereditaments, and heritages" capable of being the property of some person. There follows a series of rules under Nos. I, II and III directed to the estimation of the annual value of particular descriptions of lands, tenements and hereditaments, and in the case of II for determining the person chargeable. Rule 1 applies to all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of the schedule). The annual value is to be understood to be the rack-rent at which they are actually let if there be one, or, if not let at a fixed rack-rent, then the rack-rent at which they are worth to be let by the year.

The main arguments in this House on both sides were devoted to the question whether the case falls within r. 7 of No. II under Sched. A, and I accordingly propose to state as shortly as I can the terms and the effects of No. II. I do not forget that by the Finance Act, 1926, s. 28, it is provided that income tax in respect of the property in the lands, tenements, hereditaments or heritages to which the rules of No. II of Sched. A and in those to which the rules of No. III of Sched. A apply shall cease to be chargeable under Sched. A and shall become chargeable under Sched. D, but it is common ground that this transfer does not affect the questions in issue in this appeal, and I propose, therefore, to deal with the matter as if this change had not been made.

No. II is thus described :

"Rules for estimating the annual value of certain lands, tenements, hereditaments or heritages which are not to be charged according to the preceding general rule, and for determining the person chargeable."

There follows a series of rules enumerating the hereditaments to which this general rule is to apply. The first three rules relate: (1) To such hereditaments as tithes in kind; (2) payments in right of the Church or by endowment, or in lieu of tithes and all teinds arising in Scotland; and (3) tithes arising from lands, if compounded for, and all rents and other money payments in lieu of tithes arising from lands (except rent-charges confirmed under the Tithe Act, 1836). By r. 4 these are all to be assessed and charged on the person entitled to the tithes or payments, or his lessee or tenant, agent or factor. Rule 5 relates to manorial dues and casual profits. These are to be charged on the lord of the manor, or the person renting the same. Rule 6 deals with fines received in consideration of any demise of lands or tenements and the tax is to be assessed and charged on the receiver of the fines, with a proviso protecting fines applied as productive capital.

Putting aside r. 6, which stands by itself, it is a common feature of all the subjects of taxation mentioned in these rules that they are all properly called hereditaments or heritages, but as such they are separate from the land itself from which they arise and that land is not necessarily in the actual possession or occupation of the person to be charged.

I now come to r. 7 itself. It is in the following terms :

"In the case of all other profits not before enumerated (other than profits liable to deduction in pursuance of r. 1 and r. 4 of No. VIII of this schedule) arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, the annual value shall be understood to be the average amount for one year of the profits of the number of years which, on the statement of the person to be charged, appears

to the commissioners to be fair and equitable. Tax shall be assessed and charged on the receivers of such profits or on the persons entitled thereto."

"Profits liable to deduction in pursuance of r. 1 and r. 4 of No. VIII" are rents payable to a landlord from which the tenant occupier may deduct the tax paid by him and annuities payable by an owner of land from which he may deduct the tax relating thereto. This exception throws no light on the construction of the rule.

The Crown contends that the "rents" payable under the "lease" of December, 1922, are profits comprised in r. 7 of No. II of Sched. A. In my opinion, before the Crown can succeed, it must establish that such alleged profits arise from some hereditament, not being the lands themselves the subject of taxation under Sched. A, for these last-mentioned lands are in the actual possession and occupation either of the owner or of his tenant. In a sense they arise from the right of support, for it is the possession of this right which enabled the respondents to obtain the payments in question. But it is now thoroughly well settled, and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If, therefore, the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself and would not come within No. II, r. 7, but within rule No. I, and would be covered by the assessment on the annual value under that rule.

Then the Attorney-General insists that they should be treated as arising from the separate hereditament consisting of an easement alleged to be vested in the colliery company by virtue of the lease of 1922, the alleged easement being a right to let down the surface in the working of their mines without interference on the part of the surface owners. The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the lease no such right was in fact conferred on the colliery company, and in the second place such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself.

The first answer, however, requires further consideration. I need not repeat the terms of the lease which are sufficiently set forth above. The lease gives to the colliery company, for a limited and uncertain period, liberty in working any subjacent coal which they were entitled to work, to withdraw from the lands of the respondents any support for such lands. This, I think, merely means that the respondents during the term will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of cl. 14 and cl. 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise.

On the whole, then, I am of opinion that the claim on the part of the Crown that the payments in question constitute profits arising from lands chargeable under Sched. A as being profits comprised in r. 7 of No. II of Sched. A fails. In strictness this in terms only applies to the payments prior to 1927-28, but the same result follows as to the subsequent payments because it is common ground that the legal position is not altered by the transfer of the rule to Sched. D under the Act of 1926. So far, if at all, as the payments represent a profit of the respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under r. No. I, and this assessment covers the present claim. It follows, on the authority of the case of *Fry v. Salisbury House Estate, Ltd.* (1), that the Crown's alternative claim under Sched. D also fails.

In my opinion, the appeal should be dismissed with costs. I am asked to

say that my noble and learned friends, LORD BLANESBURGH and LORD A THANKERTON, concur in this opinion.

LORD ATKIN.—I also agree.

LORD WRIGHT.—I also agree.

Appeal dismissed.

Solicitors: *Solicitor for Inland Revenue; Gregory, Rowcliffe, & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

O'REILLY v. PRUDENTIAL ASSURANCE CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Slessor, L.J.J.), April 24, 25, 1934]

[*Reported* [1934] 1 Ch. 519; 103 L.J.Ch. 323; 151 L.T. 215; 50 T.L.R. 359; 78 Sol. Jo. 349]

Insurance—Life assurance—Payment of sum assured—Agreement to pay to executors or administrators of assured—Proviso that receipt for such sum signed by executor or administrator or a relation by blood or marriage of assured be conclusive evidence of payment to person lawfully entitled—Payment to and receipt signed by relation—Validity as against administrator of assured.

Under a policy of life assurance it was agreed that the sum assured should be paid to the executors or administrators of the assured person provided always that the production of a receipt for the sum payable thereunder signed by any person being either an executor or administrator or the husband or wife or a relation by blood or connection by marriage of the assured should be a discharge to the company and should be conclusive evidence of payment to the person lawfully entitled. The assured died on May 6, 1932, having by her will left all her property to her daughter. After the death of the assured her niece produced to the assurance company the policy and a letter signed by the deceased expressing her wish that after payment of her debts her remaining money, including the money for which she was assured, should go to her niece. The company, on May 20, 1932, in ignorance of the will and in good faith, paid to the niece the moneys due on the policy and took a receipt from her. On Sept. 22, 1933, letters of administration with the will annexed were granted to the daughter of the deceased, who thereupon, as such administratrix, claimed from the company the moneys payable on the policy, contending that the proviso (i) could not be effective to transfer to another the exclusive right of the administratrix, as such, to receive the moneys due to the assured's estate or to affect the nature of the evidence admissible in law to defeat the administratrix's claim; (ii) was void as being repugnant to the express clause of the policy making the sum assured payable to the executors or administrators; (iii) was void as being contrary to public policy in that (a) it gave the company power to select the person whom they should pay, (b) payment to persons other than personal representatives might defeat the claims of creditors, legatees, the Inland Revenue, or the Crown; (iv) was void for uncertainty as to the payee;

Held: the proviso was valid and effective, and the administratrix's claim therefore failed, because (i) the only right the administratrix could claim was

the limited right which the policy conferred, and the proviso, therefore, did not transfer or defeat any right of the administratrix.

Decision of CLAUSON, J. (infra), affirmed.

(ii) the proviso merely laid down a way in which the obligation to pay imposed by the clause might be satisfied, and so was not repugnant to the clause: *Da Costa v. Prudential Assurance Co.* (1) (1919), 120 L.T. 353, and *McCarthy v. Prudential Insurance Co. of America* (2) (1930), 169 N.E.R. 645, followed;

(iii) there was nothing in the circumstances of the case to render the operation of the proviso contrary to public policy;

(iv) the identity of the payee could be, and had been, made certain.

Per ROMER and MAUGHAM, L.JJ.: **Quære** whether the assurance company could have taken advantage of the proviso if they had known of the existence of the administratrix at the time when they made the payment to somebody else.

Per MAUGHAM, L.J.: **Quære** whether the assurance company could have relied on the proviso if they had known that the estate of the deceased was large enough to attract estate duty.

Notes. As to payment of a claim to the personal representative of the assured, see 16 HALSBURY'S LAWS (2nd Edn.) 465, para. 692. For the Life Assurance Act, 1774, s. 1, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 7.

Cases referred to:

- (1) *Da Costa v. Prudential Assurance Co.* (1918), 88 L.J.K.B. 884; 120 L.T. 353, C.A.; 29 Digest 381, 3055.
- (2) *McCarthy v. Prudential Insurance Co. of America* (1930), 169 N.E.R. 645.
- (3) *Devon v. Powlett*, 11 Viner's Abridgement 132.

Special Case stated by Industrial Insurance Commissioner. The Prudential Assurance Co., in its capacity of an industrial assurance company within the meaning of the Industrial Assurance Act, 1923, issued to Mrs. Florence Emily Cregeen three policies on her life dated, respectively, Nov. 8, 1897, Oct. 14, 1907, and Nov. 9, 1908, the total sums assured and payable on her death being £45 14s. 7d. By each policy it was agreed that the sum assured should be paid to the executors or administrators of the assured. There was, however, in each policy the following proviso:

"Provided always that the production by the company of a receipt for the sum payable hereunder signed by any person being either an executor or administrator or the husband or wife or relation by blood or connection by marriage of the assured shall be a discharge to the company for the same and shall be final and conclusive evidence to all intents and purposes that such sum has been duly paid and received by the person or persons rightfully entitled to the same and that all claims and demands whatsoever against the company in respect of this policy have been fully satisfied."

The assured died on May 6, 1932, having by her will left all her property to an illegitimate child, her only daughter, Mrs. O'Reilly. After the death of the deceased, Miss Doris Edith Rose, her niece, produced to the company the policies and a letter signed by the deceased expressing her wishes that, after payment of her debts, her remaining money, including the money for which she was assured, should go to Miss Rose, her niece. The company, thereupon, on May 20, 1932, in ignorance of the will and in good faith, paid to Miss Rose the moneys due on the policies, and took a receipt from her. On Sept. 22, letters of administration with will annexed were granted to Mrs. O'Reilly, the daughter of the deceased, who thereupon, as administratrix, claimed from the company the moneys payable on the policies less the sum of £19 14s. 6d., which Miss Rose had expended on the funeral expenses. The company, however, refused to pay anything to the administratrix, and relied on the receipt they had obtained from Miss Rose. The administratrix's claim was dealt with by the Industrial Assurance Commissioner,

who, by an award stated in the form of a special Case, held that the Prudential Assurance Co. were protected against the claim by the above-mentioned proviso.

The administratrix appealed.

A. T. Denning for the administratrix, Mrs. O'Reilly.—The administratrix is the only representative of the deceased that the law will regard, and no word or words introduced into the policy can transfer to another the administratrix's exclusive rights, derived from such representation, to receive the moneys and to give a good discharge: (WILLIAMS ON EXECUTORS (8th Edn.), p. 793; *Devon v. Powlett* (3)). The proviso is void as being repugnant to law and public policy in that the power given by it to the company to select the person to whom they should make payment is contrary to the law as to the administration of estates, and in that payment to any of the persons referred to other than the personal representatives might enable the claims of creditors, legatees, the Inland Revenue, or the Crown to be defeated. The proviso is repugnant to the express clause making the sum assured payable to the executors or administrators of the assured, and should be rejected. The proviso is void for uncertainty in that it leaves the payee unascertained and undetermined. He also referred to *Da Costa v. The Prudential Assurance Co.* (1).

Spens, K.C., and G. M. Blanco White for the assurance company.—This is a pure matter of contract, and *prima facie* the executors and administrators can have no greater or other right than that given to them by the assured's contract. The proviso does not purport to give any beneficial interest in the moneys to anyone except the personal representatives. It merely provides for machinery whereby a receipt may be given for the moneys. Therefore the proviso is neither illegal, nor repugnant, nor opposed to public policy.

CLAUSON, J.—This matter comes before me in the form of an award stated in the form of a Special Case, by Sir George Stuart Robertson, Industrial Assurance Commissioner. The case is designed to raise a question of interest and one of far-reaching importance.

The Prudential Assurance Co. issued a policy to one, Florence Emily Cregeen, upon her own life, the total sum thereby assured being a sum of £45 odd. There were three policies, but I deal with them, for simplicity's sake, as though there were only one. It provided in the usual way for payment of the sum assured to the administrators or executors of the assured. It was a sum, of course, payable at death. It contained the following proviso:

"Provided always that the production by the Company of a receipt for the sum payable hereunder signed by any person being either an executor or administrator or the husband or wife or a relation by blood or connection by marriage of the assured shall be a discharge to the company for the same and shall be final and conclusive evidence to all intents and purposes that such sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same and that all claims and demands whatsoever against the company in respect of this policy have been fully satisfied."

Florence Emily Cregeen died on May 6, 1932. On May 20, 1932, that is fourteen days after the death, the company paid the sum assured by the policy to one, Doris Edith Rose. Doris Edith Rose is a niece of Florence Emily Cregeen, and admittedly came within the class of persons mentioned in the proviso from whom, if the proviso is valid, the company may take a receipt which will have the operation needed. At the time of such payment, neither the company nor Doris Edith Rose were aware of the fact, which ultimately came to light, that Florence Edith Cregeen had made a will, by which she had bequeathed all her property to the administratrix, then Brenda Mary Cregeen. The payment was made by the company in good faith. The company were not aware of the existence of Brenda Mary Cregeen or of any other relations of the deceased, except Doris Edith Rose. The company made no inquiries as to whether the statements which Doris Edith Rose made on the claim form were true, save the inquiries which they made from her. Doris Edith Rose, in fact, produced a bill for the funeral, and payment was

made partly in cash and partly by cheque in favour of the undertakers who had been employed to carry out the funeral. The administratrix is prepared, in any view of the matter, to give credit for the £19 14s. 6d. expended on the funeral expenses, but claims the balance of the sum of £45 14s. 7d. She claims it upon the ground that the proviso which I have stated, for one reason and another, is not effective for the purpose for which it is obviously made.

I pause to say this. These small industrial policies (it would be affectation to pretend that this is not common knowledge) are issued by companies of this class for the purpose of providing, upon the death of persons in a humble position of life, an immediate sum for meeting, first of all, funeral expenses, and, secondly, other sums which naturally have to be met at the moment of death, and, whether the proviso is effective or not, the object of putting it in, plainly, is to enable payments to be made immediately without the delay, and it may be in some cases the expense, which would have to be incurred in taking proper, formal steps for bringing into being persons who could give the ordinary receipt.

It would be convenient, I think, that I should read the contentions on the part of the administratrix as stated by the Industrial Assurance Commissioner. The contentions have been put before me in a most lucid and interesting argument by MR. DENNING on her behalf. The first contention is this :

"That she as administratrix is the only representative of the deceased that the law will regard and no word or words introduced into the policy can transfer to another the administratrix's exclusive rights derived from such representation to receive the moneys and give a discharge."

Then secondly :

"That the proviso relied on by the company is repugnant to the express clause making the sum assured payable to the executors or administrators of the assured and is to be rejected."

Thirdly :

"That the proviso is void as being repugnant to law and public policy in that the power given by it to the company to select the person to whom they should make payment is contrary to the law as to the administration and devolution of estates; and in that payment to any of the persons referred to other than the executors or administrators would or might enable the claims of creditors, legatees, the Inland Revenue, or the Crown to be defeated, and in that a power to pay a person other than the executors or administrators is contrary to the tenor of ss. 1 and 2 of the Life Assurance Act, 1774, and would or might enable those sections to be evaded."

The fourth is :

"That the proviso is void for uncertainty in that it leaves the payee unascertained and undetermined."

Fifth :

"That the nature of the evidence admissible to defeat the claim of the administratrix or to ascertain who is legally entitled is determined by law and cannot be affected by the policy or by any agreement of the deceased."

And sixthly :

"That the company by their own act paid money to a person not entitled either at law or in equity and cannot rely on that act as an answer to the claim, and (or) paid the money without sufficient inquiries or proof of title and cannot therefore rely on such payment as an answer to the claim."

I deal first with the question of repugnancy. I am unable, for myself, to see that there is anything repugnant in this proviso. A clause, no doubt, which follows a covenant, which is in such terms as to destroy the covenant, will be repugnant, but, as I read this clause, it provides for this: the policy having

provided that on the death the sum in question shall be paid to the executors or administrators, the obligation imposed by the proviso must be read with the sentence which immediately precedes it, cut down to this extent, that a certain act, which the proviso seeks to define, is to be treated as satisfied in the events which the proviso indicates. I see nothing repugnant in the provision in a contract, by which A. undertakes to pay on a certain date money to B., of a proviso that A. may, at his option, satisfy that obligation in some other manner, say by handing over a sum of stock or shares in a company. There is nothing repugnant that I can see in that; there is nothing in the provision which in any way affects the right of the executors to enforce the contract, or gives a right to any person other than the executors to enforce the contract. The proviso merely provides that, if the company does a certain act, that is to be accepted as satisfaction of their obligation. The act is the production of a receipt for the sum payable, signed by certain persons there defined. The clause, besides providing that the production of that receipt is to satisfy the obligation, adds that that receipt is to be a discharge and final and conclusive evidence that the sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same. However, the most important words, to my mind, are the words which provide that that production shall be conclusive evidence that all claims and demands against the company have been fully satisfied. That appears to me to be the equivalent of saying that it is part of the contract that the production of a receipt complying with the terms of this proviso is to be accepted as a satisfaction of the covenant. If that be the true construction of the proviso, it seems quite clear that, as between two contracting parties, the proviso would be perfectly good. Does any difficulty arise from the fact that, owing to the inherent nature of the contract, the proviso must necessarily operate, not as between the company and the actual person whose life has been insured, but between the company and his executors? I cannot see that it makes any difference. The executors have no higher contractual right than the deceased, and I see no reason for holding, accordingly, either that this proviso is repugnant or that there is any difficulty in giving full effect to the contract, because effect is being given to it, not as against the original contractor, but as against his executors and administrators, who, in due course of law, are the persons who are entitled to enforce the contract, but to enforce it only according to its tenor and not with any higher right to enforce it than the policy holder himself had.

Having made these remarks, let me turn once more to the contentions which the administratrix has stated in the case. The first one is the most important in the case. That contention is this:

"That she, as administratrix, is the only representative of the deceased that the law will regard" [as to that there can be no doubt] "and no word or words introduced into the policy can transfer to another the administratrix's exclusive rights derived from such representation."

In my view, no words in the policy seek to transfer to another the administratrix's exclusive rights derived from such representation. She, and she only, can sue. It is not suggested—if it were suggested it would be plainly incorrect—that this clause gives anybody other than the executor a right to sue. The contention goes on by adding words, so that the sentence runs:

"the administratrix's exclusive rights derived from such representation to receive the moneys and give to a discharge."

But the administratrix's right to receive the moneys and to give a discharge is sub modo only; it is such right as appears from the tenor of the contract, and no words introduced into the clause in any way transfer to another her rights as so defined.

The second contention is that the proviso is repugnant to the express clause. With that I have already dealt in my remarks, and I say no more about it.

The third contention is that the proviso is void as being repugnant to law and

public policy. I can see no foundation for that contention. I do not see anything contrary to law in it. There is no attempt to interfere with the law which governs devolution of personal property upon the executor and upon no one else, nor do I find, and indeed I think it was scarcely contended, that anything could be said to be directly contrary to the Life Assurance Act, 1774. The utmost that was said was, that a clause of this kind might be used as a device to get round some of the provisions of that Act. If any case arises in which it can be suggested that such a course has been taken, it will be time enough to consider how far the attempt to evade any law has been successful; but no such point can be raised upon the facts here.

Then the contention that the proviso is void for uncertainty, in that it leaves the payee unascertained and undetermined, seems to me to be quite without foundation. There is no uncertainty about the matter at all. That is certain which can be made certain, and there is every provision for making certain the operation of the proviso.

The next contention is :

"That the nature of the evidence admissible to defeat the claim of the administratrix or to ascertain who is legally entitled is determined by law and cannot be affected by the policy or any agreement of the deceased."

That is merely a variant of the fallacy which I have already indicated, the fallacy that the proviso in some way or other affects rights which are vested in the executrix. The proviso does nothing of the kind; the proviso limits the rights, and it is the limited rights alone which become vested in the executrix.

The last contention is :

"That the company by their own act paid money to a person not entitled either at law or in equity."

That I need not spend time on, having regard to the view of the operation of the proviso which I have already stated.

In consequence, in my view, the administratrix is wrong in her contentions, and accordingly, having regard to the terms of the award, the company being, in my view, right in their contentions, the claim of the administratrix will, under the award, be dismissed.

The administratrix appealed.

D. N. Pritt, K.C., and A. T. Denning for the administratrix.

Wilfred Greene, K.C., W. P. Spens, K.C., and Blanco White for the assurance company were not called on.

LORD HANWORTH, M.R.—This is a very plain case, in my opinion, and I would have been content to have said that I agreed with the judgment delivered by CLAUSON, J., had it not been for the fact that we have had an interesting argument presented to us by Mr. Pritt and also by Mr. Denning, presenting the opposite view to that taken by CLAUSON, J. In deference to those arguments I will add to what CLAUSON, J., has said, at the same time making it quite clear that I agree with his reasoning and his conclusion.

The point that we have to decide is a narrow one. It is a point which has arisen, and in respect of which there is a dispute raised between Mrs. Brenda Mary Victoria O'Reilly, the administratrix, and the Prudential Assurance Co., Ltd. The administratrix claims that she ought to be paid sums which amount to the total of the sums which were assured, for which three policies of insurance were taken out by Florence Emily Cregeen, who was her mother. The mother and the daughter lived at some distance from one another. Florence Emily Cregeen had by three policies of insurance insured a total sum payable on her death of £45 14s. 7d. As a matter of fact, under the circumstances which I will mention in a moment, a part of that sum, namely £19 14s. 6d., had been expended on the funeral expenses of Mrs. Florence Emily Cregeen, and the administratrix says that she is prepared to allow that sum as a deduction from the £45 14s. 7d., but she

claims that she, and she only, is entitled to receive the margin or balance between A
those two sums.

The policies of insurance are all in the same form, and they declare that, upon
a proposal having been made to the insurance company and on the basis of that
proposal, under the policy the company agree that if the assured maintains the
payments of the premiums then upon the death and upon proof being given to the
reasonable satisfaction of the directors of the Prudential Assurance Co. of the B
death of the assured, the company will pay the said sum mentioned in the said
schedule to the executors or administrators of the assured. It appears that in
fact the assured had made a will, dated Sept. 13, 1923, and she had by that will
bequeathed all her property to the administratrix, then described as Brenda Mary
Cregeen, for she was at that time unmarried. That will was not known to the
insurance company, and the administratrix took out letters of administration to C
her mother's estate on Sept. 22, 1933. She, therefore, has become, by the grant
of those letters of administration, the legal hand to receive sums due to the estate
of her mother, and her duty, according to her bond, is to administer faithfully the
assets which come to her hand in the matter of payment of debts and the like.
However, her claim is made against the insurance company on the basis of the
promise which I have read contained in the policy of assurance. D

What happened was this: After the death of the assured, which took place on
May 6, 1932, her niece, Doris Edith Rose, came before the Prudential Assurance
Co. and signed a claim form, of which we have a copy. Therein she stated that
she was the niece and the only relation by blood of the assured, who had just died,
and she said that the assured did not leave a will. As a matter of fact, she was E
not the only relation and the assured did leave a will, but no charge of bad faith
is made against anybody. It was not known that there was this will, Doris Edith
Rose produced to the company the three policies, upon those policies and proof of
the death, the moneys secured by the policies were handed over to Doris Edith
Rose. Part of it was in the form of a cheque payable direct to the undertaker
who had carried out the funeral of Mrs. Cregeen. The assurance company received
a receipt for the full sum. It is said by the administratrix that that receipt does F
not avail against her, the administratrix of the assured. It is said by the
assurance company that they are entitled to rely upon that receipt as conclusive
evidence that the policy has been satisfied by reason of the terms of a proviso
which is in this form:

"Provided always that the production by the company of a receipt for the
sum payable hereunder signed by any person being either an executor or G
administrator or the husband or wife or a relation by blood or connection by
marriage of the assured shall be a discharge to the company for the same and
shall be final and conclusive evidence to all intents and purposes that such
sum has been duly paid to and received by the person or persons lawfully and
rightfully entitled to the same and that all claims and demands whatsoever H
against the company in respect of this policy have been fully satisfied."

The company claim to rely upon that receipt so given as conclusive evidence that
they had satisfied and discharged all their liability under the policy.

The dispute that has arisen in the manner I have already indicated is one on
which the administratrix contends:

"that she as administratrix is the only representative of the deceased that the I
law will regard, and no word or words introduced into the policy can transfer
to another the applicant's exclusive rights derived from such representation
to receive the moneys and give a discharge."

The insurance company did not have any knowledge of the will or of the existence
of the administratrix: they had no knowledge at all which prevented them acting,
or which would give them notice not to act, on the terms of the proviso.

The first point that has to be made, and which is made by counsel for the
administratrix, is this, that the administratrix takes a vested interest in the moneys

secured by the policies of assurance, and that that interest cannot be divested or taken away from the administratrix by any proviso; that the administratrix is the only representative that the law will regard. They have, to my mind, failed to establish that proposition. This is a contract between the deceased and the assurance company, a contract which both parties were competent to make, and it is a contract which provides that payment after death shall be made to the executors or administrators of the assured, with a qualification contained in the proviso. The proviso qualifies the provision for payment; it is a proviso whereby the company is entitled to recognise, and to pay over the sum to, the various persons who are named in what has been called, in one of the American cases which have been referred to, the circle of persons entitled to receive the money. There is no question that the person to whom payment in this case was made, Doris Edith Rose, was within that circle; and if there had not been a title to this sum which had become vested in the administratrix, a title which could not be defeated, the insurance company were entitled, under the very terms of the policy, to put in answer, by way of plea to any claim, this proof of payment, which, by the very terms of the contract, is made final and conclusive evidence that all claims under the policy have been fully satisfied.

It is, however, said that, if the terms of the contract go as far as that, there is a repugnancy between the express clause and the proviso. To my mind, that is to misread the terms of the proviso and of the express clause. The two must be read together. The proviso is one intended, as many provisos are, to qualify, to cut down, the absolute terms of the express clause; in other words, that you must not take the words in their absolute signification without bearing in mind the qualification introduced by the proviso. In *Da Costa v. Prudential Assurance Co.* (1), to which our attention has been called, BANKES, L.J., says of these very words, "It is not repugnant," and EVE, J., says, "The proviso is merely qualifying the provision"; I cannot find, upon the construction of the clause, ground for saying that there has been such a repugnancy as renders that proviso ineffective. We are not dealing here with questions of grants between parties; that sort of consideration as to whether there has been a derogation from a grant does not arise. We have to construe the contract between the parties. I therefore come to the conclusion that upon the true construction of this clause and the proviso there is no repugnancy.

I am unable to assent to the argument that it is void as being repugnant to law and to public policy. It must be remembered that in these cases, as pointed out by CLAUSON, J., it is of great importance to those who are insured under these policies that there should be a payment as early as possible. In many cases there is no estate to be administered; there is no executor or administrator, and the clause is one which, from the point of view of public policy, seems rightly to find its place in a contract of this nature and to be useful in the interests of the assured.

With regard to the contention that the proviso is void for uncertainty, CLAUSON, J., has given the answer to that by referring to the well-known Latin maxim: "id certum est quod certum reddi potest."

I come to the last point, namely, that this contract admits evidence to defeat the claim of the administratrix. That contention is relevant only if and when it has been decided that there is an absolute right which devolves upon the executor under the contract. Another test has been applied by counsel for the administratrix, namely, that if you treat this proviso as an authority to receive the money, then such authority would be revoked by death. Of course, he is right in that proposition. It is, however, quite unnecessary, and indeed very difficult, to construe this clause or this proviso as an authority to receive the money as an agent on behalf of the deceased. That is not the nature or the quality of the clause. The clause is one which, in the interests of both parties, provides for the money being paid in cases where the amount receivable is such as not to make it necessary (as is the fact in many cases) to have an administration of the estate; and,

as I have already said, it enures for the benefit as much of the deceased as of the Assurance Company. A

For these reasons it appears to me that the appeal must fail.

In *Da Costa v. Prudential Assurance Co.* (1), although it was unnecessary in that case for the decision, the court recognised—obiter, it may be, but it did recognise—that this clause was not one in which there was any repugnancy, but merely one in which the express clause and the proviso must be construed together. B
In *McCarthy v. Prudential Co.* (2) the effect of the decision was this: that upon a clause of the same nature as this, called the “Facility of Payment” clause, the fact that there had been a payment under it to McCarthy’s sister of 275 dollars was held to be a good and valid payment and discharge to the company. All that had to be determined was whether or not, beyond that, the receipt was effective to discharge the whole liability, which upon the face of it was in respect of 392 dollars; the court held that, although the payment was good in respect of the 275 dollars, the balance or margin between the 275 dollars and the 392 dollars must still be paid, for there was no authority or right under this clause to pay other than the full sum which was due upon the policy. That decision is one which deserves great respect, and it certainly does validate the clause which we have been discussing. C

For these reasons I have come to the conclusion that the appeal fails and must be dismissed with costs. D

ROMER, L.J.—I agree, and I only want to add this. As at present advised—and I say “as at present advised,” because the point has not been argued on behalf of the Prudential Assurance Company—I do not think the Assurance Company could take advantage of this proviso if they made the payment to somebody other than the executor or administrator at a time when they knew of the existence of such an executor or administrator. In the present case they made a bona fide payment at a time when they did not know that there was any executor or administrator; and, that being so, there is nothing in principle or authority which would enable this court to deprive the Prudential Assurance Company of the protection which the proviso obviously was intended to give them. E F

MAUGHAM, L.J.—I am of the same opinion. I agree with the judgment of CLAUSON, J., and with what has fallen from my learned brethren. I will only add that, besides not deciding that the Assurance Company could rely on the clause, if at the moment of payment under the clause in question there was, to their knowledge, an executor or administrator, we are, further, not deciding that they could rely upon it if they knew that the property of the deceased exceeded in value £100, so that the estate attracted estate duty. Nor are we deciding that when Miss Doris Edith Rose received the sum of £45 14s. 7d., she was entitled not only to pay the funeral expenses of Florence Emily Cregeen but was also entitled to receive and retain for her own benefit the balance of that sum. That does not arise before us. G H

With those qualifications I agree entirely with what my learned brethren have said, with the result that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Fladgate & Co.; Herbert H. Moseley.*

[Reported by J. H. G. BULLER, Esq., and GEOFFREY P. LANGWORTHY, Esq.,
Barristers-at-Law.] I

R. v. GRAHAM-CAMPBELL AND OTHERS. Ex Parte HERBERT

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Swift, JJ.), December 12, 13, 14, 1934]

[Reported [1935] 1 K.B. 594; 104 L.J.K.B. 244; 152 L.T. 556; 51 T.L.R. 198; 79 Sol. Jo. 12; 33 L.G.R. 186; 30 Cox, C.C. 209]

Parliament—House of Commons—Privilege—Sale of intoxicating liquor without licence—Licensing (Consolidation) Act, 1910 (10 Edw. 7, and 1 Geo. 5, c. 24), s. 65 (1).

Application was made to a metropolitan police magistrate for summonses against fifteen members of the Kitchen Committee and the manager of the refreshment department of the House of Commons charging them with having unlawfully sold by retail in the House of Commons intoxicating liquor which they were not licensed to sell by retail, contrary to s. 65 (1) of the Licensing (Consolidation) Act, 1910. The magistrate refused to accept jurisdiction on the ground that his jurisdiction was excluded by the privilege of Parliament.

Held: the magistrate had rightly declined jurisdiction as in the matters complained of the House of Commons was acting collectively in a matter falling within the ambit of its internal affairs, and it was impracticable to apply to the House either the general provisions of the Licensing (Consolidation) Act, 1910, or the particular provisions of s. 65 (1).

Burdett v. Abbot (1) (1811), 14 East, 1, *Stockdale v. Hansard* (2) (1839), 9 Ad. & El. 1, and *Bradlaugh v. Gossett* (3) (1884), 12 Q.B.D. 271, applied.

Expressions of doubt by LORD RUSSELL OF KILLOWEN, C.J., in *Williamson v. Norris* (4), [1899] 1 Q.B. 7, dissented from.

Notes. Section 65 (1) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 120 (1) of the Licensing Act, 1953, which is in substantially the same terms.

As to licences for the retail sale of intoxicating liquor, see 19 HALSBURY'S LAWS (2nd Edn.) 15 et seq., and for cases see 30 DIGEST (Repl.) 84 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Cases referred to:

- (1) *Burdett v. Abbot* (1811), 14 East, 1.
- (2) *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; 3 State Tr. N.S. 723, 849; 2 Per. & Dav. 1; 8 L.J.Q.B. 294; 3 Jur. 905; 112 E.R. 1112; 36 Digest (Repl.) 393, 396.
- (3) *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271; 53 L.J.Q.B. 209; 50 L.T. 620; 32 W.R. 552; 36 Digest (Repl.) 894, 415.
- (4) *Williamson v. Norris*, [1899] 1 Q.B. 7; 68 L.J.Q.B. 31; 79 L.T. 415; 62 J.P. 790; 47 W.R. 94; 15 T.L.R. 18; 43 Sol. Jo. 29; 19 Cox, C.C. 203, D.C.; 30 Digest (Repl.) 89, 672.
- (5) *Bensley v. Bignold* (1822), 5 B. & Ald. 335; 106 E.R. 1214; 12 Digest (Repl.) 305, 2341.
- (6) *Sir John Elliot's Case* (1629), 3 State Tr. 293; 3 Digest 326, 134.
- (7) *Leith Harbour and Docks Commissioners v. Inspectors of the Poor* (1866), L.R. 1 Sc. & Div. 17, H.L.; 38 Digest 480, 390.

Rules nisi for orders in the nature of mandamus.

Application was made by Mr. A. P. Herbert to a metropolitan police magistrate for summonses against fifteen members of the Kitchen Committee of the House of Commons, and against the manager of the refreshment department of the House, charging them with having unlawfully sold by retail in the House of Commons intoxicating liquor which they were not authorised to sell by retail, contrary to s. 65 (1) of the Licensing (Consolidation) Act, 1910. The magistrate refused to

accept jurisdiction on the ground that his jurisdiction was excluded by the privilege of Parliament. Rules nisi were granted at the instance of Mr. Herbert calling on the magistrate, the members of Kitchen Committee, and the manager of the refreshment department of the House of Commons to show cause why the magistrate should not proceed to hear and determine the application for the summonses. The grounds for the rules were that the magistrate had erroneously held that his jurisdiction was excluded by the privilege of Parliament and that he had erroneously declined jurisdiction.

By the Licensing (Consolidation) Act, 1910, s. 65 (1):

"Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices' licence authorising him to hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorises him to hold an excise licence for the sale of that liquor."

The Attorney-General (Sir Thomas Inskip, K.C.) (Wilfrid Lewis with him) showing cause.—The magistrate was right in holding that he had no jurisdiction. He rightly inferred that the House of Commons has placed an interpretation on the Licensing Acts which renders lawful the sale and supply of intoxicating liquor without a licence within the precincts of the House. The argument in support of the rule rests, no doubt, on certain observations of LORD RUSSELL OF KILLOWEN, C.J., in *Williamson v. Norris* (4) ([1899] 1 Q.B. at p. 12), suggesting that the internal procedure of the House of Commons might be subject to the Licensing Acts, and that legislation should be introduced to regulate the sale of liquor there without a licence. That case was decided in 1898, and no such legislation has in fact been introduced, though the matter was discussed on more than one occasion. The privileges of the House have always been regarded as extending to the interpretation and regulation of the law applicable to the affairs of the House within the jurisdiction of the House. Those privileges have never been defined, but have always been left to the decision of the House itself, and when the House exercises what it deems to be its privilege, no court of law can interfere. The High Court of Parliament is itself a court of judicature. [He referred to *Burdett v. Abbot* (1) and COKE'S INSTITUTES, Part IV, ch. 1: "Of Judicature."] *Bradlaugh v. Gossett* (3) is an authority for the proposition that in its administration of that part of the statute law which refers to internal procedure only the House is not subject to the control of any court of law. [AVORY, J., referred to the judgment of LORD DENMAN in *Stockdale v. Hansard* (2) (9 Ad. & El. at p. 115), that

"all the privileges that can be required for the energetic discharge of the duties inherent in the high trust [of the House] are conceded without a murmur or a doubt."]

H. G. Strauss (W. T. Monckton, K.C., and B. J. Mackenna with him) in support of the rule.—There is no evidence that, in acting as they did, the Kitchen Committee and the manager of the refreshment department were proceeding under the authority of the House of Commons. But, even if they were, the privilege of the House does not extend to excuse the commission of a statutory offence. The case in which the privileges of the House were put highest is *Bradlaugh v. Gossett* (3), but that was prior to *Williamson v. Norris* (4). In that case LORD RUSSELL OF KILLOWEN, though he was speaking obiter, strongly expressed the view that the Licensing Act, 1872, did apply to the House. The privileges of Parliament do not extend to an ordinary crime committed within the jurisdiction of the House, though they may extend to crimes such as sedition or conspiracy to make seditious speeches. [He referred to LAWS OF ENGLAND (2nd Edn.), Vol. 9, p. 25; ANSON'S CONSTITUTIONAL LAW (5th Edn.), Vol. 1, p. 186.] The magistrate appears to have drawn a distinction between mala prohibita and mala in se, but such a distinction no longer exists (*Bensley v. Bignold* (5)). In *Sir John Elliot's Case* (6) it was never contended that an assault on the Speaker was outside the

jurisdiction of the King's Bench Division. Privilege which involves the commission of a crime has never been claimed in the courts.

LORD HEWART, C.J.—In these cases I am satisfied that the rules ought to be discharged. Each of the rules is a rule nisi for an order in the nature of a mandamus calling on Sir Rollo Graham-Campbell to hear and determine according to law certain summonses against members of a body called the Kitchen Committee of the House of Commons and the manager of the refreshment department of the House respectively. In my opinion, the learned magistrate came to a correct conclusion upon the quite sufficient materials before him.

There are two grounds upon which each of these rules nisi was granted. The first is that the chief magistrate erroneously held that his jurisdiction was excluded by the privileges of Parliament, and the second is that he erroneously declined jurisdiction.

I do not propose to review the long line of cases which have been cited to us. It seems to me that the authorities relied upon by the Attorney-General are much in point—in particular, *Burdett v. Abbot* (1), *Stockdale v. Hansard* (2), and *Bradlaugh v. Gossett* (3). It was manifest to the magistrate, as well from the documents which were before him as from the argument offered to him, that he was called upon to deal with the House of Commons acting by means of its Kitchen Committee and the manager of the refreshment department. To pass over many other matters which appear sufficient, I think the decision of Lord DENMAN, C.J., in *Stockdale v. Hansard* (2) (9 Ad. & El. at p. 115) is sufficient for the present purpose:

“The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt.”

Here, as it seems to me, the learned magistrate was entitled to say upon materials which were before him that in the matters complained of the House of Commons was acting collectively in a matter falling within the ambit of the internal affairs of the House, and, that being so, any tribunal might well feel upon the authorities an invincible reluctance to interfere. To take the opposite course would be, after the various stages of some such matter had been passed, to make the House of Lords arbiter of the privileges of the House of Commons. More than that, with the greatest respect to the observations of my illustrious predecessor, Lord RUSSELL OF KILLOWEN, C.J., in *Williamson v. Norris* (4) ([1899] 1 Q.B. at p. 12), it appears to me that the bulk of the provisions of the Licensing Acts are quite inapplicable to the House of Commons. It was conceded candidly enough by counsel that, if there was no jurisdiction to adjudicate in a case brought against the Kitchen Committee, it followed that there was no jurisdiction to adjudicate in a case against the manager of the refreshment department. For these reasons I am clearly of the opinion that the rules ought to be discharged.

AYORY, J.—I am of the same opinion. I have nothing to add to the reasons given by my Lord for holding on the authorities that the privileges given to the House of Commons are in themselves sufficient for our decision that these rules ought to be discharged. But I wish to add a word or two upon a point mentioned by my Lord, namely, the question which was argued in *Williamson v. Norris* (4) but not decided. In other words, I wish to express my view that, even assuming that it were possible that either the House of Commons or some official of it could be licensed to sell intoxicating liquors under the Licensing (Consolidation) Act of 1910, it is impossible to apply the one provision of the Act which is relied on here—namely, that contained in s. 65 (1)—without having regard to all the other provisions in the Act, the great majority of which are wholly inapplicable to the House of Commons. I wish in this connection to call attention to the argument

presented by the Attorney-General in *Williamson v. Norris* (4) ([1899] 1 Q.B. at p. 9), where he said:

"In the first place, the Licensing Acts do not apply in any way to the House of Commons. By 1 & 2 Vict., c. 7 [Houses of Parliament (Purchase of Site) Act, 1837], s. 5, and 30 & 31 Vict., c. 40 [Houses of Parliament Act, 1867], s. 2, the House of Commons is vested in the Queen. The Houses of Parliament do not fall within the Rating Acts: *Leith Harbour and Docks Commissioners v. Inspector of the Poor* (7), per LORD CRANWORTH (L.R. 1 Sc. & Div. at p. 20). It does not follow that, because the House of Commons is not expressly mentioned in the list of exemptions contained in s. 72, the Act applies. Section 72 is not exhaustive. The whole of the Act must be looked at to see whether it can apply, and not merely the special words of exemption."

And he proceeded:

"The House of Commons has power to regulate its own internal procedure (*Bradlaugh v. Gossett* (3)), and to hold that it was subject to the Licensing Acts would be to take away this right."

I wish to adopt that argument as part of my judgment in this case. While it is true that LORD RUSSELL OF KILLOWEN, C.J. ([1899] 1 Q.B. at p. 12), said:

"It was argued for the respondent that no offence had been committed, on the ground that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law as to licensing. . . . It is not necessary for us to decide this question; but I think it right to say that I am far—very far—from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply."

In my view, those words do not amount even to dicta upon this question. At the most, they amount to an expression of doubt, and, speaking with the most profound respect even for an expression of doubt on the part of LORD RUSSELL OF KILLOWEN, I have come to the conclusion that the argument which was thus pressed on the court by the Attorney-General ought to have prevailed, and that, it being quite impracticable to apply the general provisions of the Licensing Act to the House of Commons, it is equally impracticable and impossible to apply the provisions of s. 65 (1), which forbids the sale of intoxicating liquors by any person who has not been licensed.

Once it is made clear that the Licensing (Consolidation) Act, 1910, cannot be applied to the House of Commons, it follows that no court of law has jurisdiction to entertain such an application as was made in this case to the magistrate. The question of jurisdiction certainly did not arise in *Williamson v. Norris* (4), because in that case the magistrate had assumed jurisdiction and had stated a Case. The question in the present case does involve the question whether the magistrate had jurisdiction, and, in my opinion, seeing that the Act of Parliament was not applicable to the subject-matter before him, he had no jurisdiction, and on that ground I agree that the rules must be discharged.

SWIFT, J.—I agree.

Rules discharged.

Solicitors: Treasury Solicitor; Bull & Bull.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

JOSEPH AND ANOTHER v. PHILLIPS

[PRIVY COUNCIL (Lord Blanesburgh, Lord Warrington, Lord Atkin, Lord Macmillan and Lord Alness), March 6, 21, 1934]

[Reported [1934] A.C. 348; 103 L.J.P.C. 79; 151 L.T. 51; 50 T.L.R. 385; 78 Sol. Jo. 317]

Will—Gift of "my personal effects in my room, including . . . desk . . . complete with . . . contents"—Contents including documents of title to money.

A testator bequeathed to a legatee "my personal effects in my room, including pictures, roll-top desk and chiffonier complete with their contents." In the desk there was a drawer in which were three pass books referring to the testator's deposit accounts for a total sum of \$30,575.62 and nine promissory notes, all payable to order and not endorsed. The will also provided for a number of pecuniary legacies, of which one of \$5,000 was to the same legatee.

Held: the bequest, on its true construction, did not extend to the choses in action represented by the pass books and the promissory notes because (i) it was a bequest of "personal effects," i.e., physical chattels, (ii) the testator, by the mere direction to include the desk with its contents, could not have intended to enlarge the bequest to include property not within the description "personal effects," the inclusion of which would convert the bequest into a pecuniary legacy of over \$30,000.

Re Robson, Robson v. Hamilton (1), [1891] 2 Ch. 559, distinguished.

Quære whether even a valid bequest of the pass books and promissory notes would have conferred on the legatee the right to the choses in action represented by them.

Notes. As to the construction in wills of descriptions of property by locality, and of the words "personal effects," see 34 HALSBURY'S LAWS (2nd Edn.) 241, para. 294, and for cases on the subject see 44 DIGEST 670-671, 5106-5119, 677-679, 5176-5204; and *ibid.* 248, para. 299, text and note (u), respectively.

Case referred to:

(1) *Re Robson, Robson v. Hamilton*, [1891] 2 Ch. 559; 60 L.J.Ch. 851; 65 L.T. 173; 7 T.L.R. 512; 44 Digest 679, 5198.

Appeal from a judgment of the Court of Appeal for Ontario, dated Oct. 3, 1932, reversing the judgment of ORDE, J., dated Sept. 18, 1931.

The appellants were the executor and executrix of the last will and testament of Abe Lyons, deceased, who died in Toronto on July 26, 1930. The action was brought by the legatee against the executors for a declaration that under the terms of the will the legatee was entitled to three savings bank receipt books, and the moneys represented thereby, promissory notes, mortgages, and cash removed by the executors from a roll-top desk and chiffonier belonging to the testator, and for an order that the necessary documents be executed to complete the transfer.

The facts, together with the relevant clauses of the will, are set out in the judgment of the Judicial Committee.

The trial judge, ORDE, J., dismissed the action. He held that the roll-top desk was the usual repository for the savings bank receipt books and promissory notes, and that the removal thereof from the desk shortly before his death did not remove them from the ambits of the gift, but that under the words "my personal effects in my room," the only things that passed to the respondent, were things of a personal character such as furniture, clothing, or jewellery, which could have a local situs, and not assets of an intangible nature like choses in action.

The Court of Appeal (MULOCK, C.J.O., MASTEN and GRANT, JJ.) reversed that decision.

MULOCK, C.J.O., in his reasons for judgment in which MASTEN, J., concurred, held that the savings bank receipt books and promissory notes must be deemed to have been in the testator's desk at the time of his death; that the word "including" meant something in addition to what was included in the preceding words "personal effects in my room" so as to give to the legatee all the contents of the roll-top desk, including the bank books and notes. He further held that savings bank receipt books and the promissory notes were capable of being the subject of a good *donatio mortis causa*, and by like reasoning a good testamentary gift, and that the legatee became entitled to the moneys and notes in question.

The executors appealed.

Tilly, K.C., for the executors.

Rowell, K.C., and G. C. Lindsay for the legatee.

Their Lordships took time for consideration.

March 21. The judgment of their Lordships was delivered by

LORD WARRINGTON.—This is an appeal from a judgment of the Court of Appeal of Ontario, dated Oct. 3, 1932, allowing an appeal from the judgment of ORDE, J.A., dated Sept. 18, 1931.

The appeal raises a short question on the construction of the will of the testator, Abe Lyons.

The will was dated June 16, 1928. The testator died on July 26, 1930, after an illness which began early in June. On June 8, 1930, he was moved to hospital, where he remained until his death. During that time he was mentally incapable of looking after his affairs.

He was a member of the firm of Lyons and Marks, and spent most of his time travelling for the firm, only returning to town for week-ends. He lived alone in one room in Euclid Avenue, Toronto.

The appellant executor, Kenneth Joseph, was in the confidence of the testator, looking after his private financial affairs. He and the testator each had a key of a safety deposit box in their joint names at the Dominion Bank, in which securities of the testator were kept. The executor opened this once a month for the purpose of detaching coupons and other purposes connected with the securities. He also, at the testator's request, procured a duplicate key of the drawer hereinafter mentioned in the desk in his room.

Under these circumstances, the testator made his will. It was prepared by his solicitor on his instructions.

The will is in paragraphs. Paragraph 1 contains the usual direction for payment of debts and so forth. Paragraph 2 contains a bequest of a specific legacy of a gold watch. Paragraphs 3 and 4 are in the following terms:

"3. I bequeath my jewels, including my diamond bar pin and extra stone in safety deposit vault at Toronto General Trust Corporation to my niece, Leah Singer, wife of Israel Singer.

"4. I bequeath my personal effects in my room, including pictures, roll-top desk and chiffonier complete with their contents to my niece, Esther Phillips, wife of Nathan Phillips."

Paragraph 5 contains special directions for the disposal of his interest in his firm's business and paras. 6 to 16 contain a number of pecuniary legacies and a residuary gift in favour of the appellants, who are also appointed executor and executrix.

Among the pecuniary legacies were one of \$5,000 to the respondent legatee, and to each of her children living at his death \$500.

The question arises with regard to the bequest of the personal effects contained in para. 4, and in particular, as to the contents of the roll-top desk.

In the desk below the roll-top there was a drawer. This is the drawer of which as hereinbefore mentioned, the executor had a duplicate key. When the testator was taken ill in June, 1930, there were in this drawer three pass books referring

to his deposit accounts, two in the Bank of Montreal and one in the Dominion Bank for a total sum of \$30,575.62, and nine promissory notes, all payable to order and not endorsed and all of apparently little or no value.

Shortly after the removal of the testator to hospital the executor in (as their Lordships believe) perfect good faith and, as he thought, in the testator's interest and on his behalf, removed the pass books and the promissory notes from the drawer and deposited them in the safety deposit box above referred to. Their Lordships attribute no blame to the executor for his action, but for the purposes of their decision assume that it did not affect any right of the legatee, and proceed to deal with the case as if the books and notes had formed part of the contents of the desk at the death of the testator. The desk also contained other things as to which no question has been raised.

The question is whether the bequest on its true construction is only of things which can properly be treated as personal effects, that is to say, physical chattels, having some personal connection with the testator such as articles of personal or domestic use or ornament, clothing, furniture and so forth which would not include money or securities for money or whether in the actual contents it extends to the choses in action represented by the pass books and the promissory notes.

Their Lordships are of opinion that the former is the true construction. The bequest is one of personal effects, and it cannot properly be said that, by the mere direction to include the desk with its contents, the testator intended so to enlarge the scope of the bequest as to include property not within the term "personal effects," and the inclusion of which would convert the bequest into a pecuniary legacy of over \$30,000. Probably the testator regarded the pictures, the chiffonier and the desk as of a special description making it desirable *ex abundanti cautela* to mention them as being in his view covered by the terms of the bequest, and considerable support is afforded to this view by the bequest in para. 3. That is a bequest of jewels, including two particular jewels in a safety deposit vault and not in his own room. The use of the word "including" in this paragraph clearly did not extend the bequest to anything not a jewel. The frame of the will, the separation of the specific gifts of chattels from the pecuniary legacies, points in the same direction.

If the above view on the construction is correct, the pass books and promissory notes not being within the description of personal chattels, it becomes unnecessary to consider whether they were of such a nature that the bequest of them would have conferred on the legatee the right to the choses in action represented by them respectively. Their Lordships, however, must not be supposed to accept the views of the Court of Appeal on this point. With all respect they appear to have been misled by decisions on the law affecting *donationes mortis causa*. These gifts depend for their validity on the physical delivery to the donee of something the possession of which may confer a title to claim the real subject of the gift. In the case of a legacy, the subject of it, if a chose in action, may be itself bequeathed, and the bequest entails on the executor the duty of placing the legatee in possession.

Re Robson, Robson v. Hamilton (1) was purely a case of construction, and depended on its own peculiar circumstances.

Their Lordships are of opinion that the appeal should be allowed, that the order appealed from should be reversed and that of the Supreme Court restored, and that there should be no order as to the costs either in the courts below or of this appeal. They will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors : *Blake & Redden; J. Nadler & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re A JUDGMENT DEBTOR (No. 171 of 1934).
Ex parte JUDGMENT CREDITOR

[COURT OF APPEAL (Lord Hanworth, M.R., Romer and Maugham, L.JJ), March 23, 1934]

[Reported [1934] Ch. 431; 103 L.J.Ch. 253; 78 Sol. Jo. 297;
[1934] B. & C.R. 43; 151 L.T. 107; 50 T.L.R. 333]

Bankruptcy—"Cross-demand"—Claim by debtor to interest in property held by creditor jointly with others as trustees—*Bankruptcy Act, 1914* (4 & 5 Geo. 5, c. 59), s. 1 (1) (g).

On Jan. 10, 1934, the creditor obtained a final judgment in the King's Bench Division against the debtor for £1,240 9s. 1d., and on Jan. 29, 1934, served the debtor with a bankruptcy notice in respect of that sum. On April 27, 1933, the debtor had issued a writ in the Chancery Division against the creditor and two others who were trustees of other property in dispute, claiming that the interest in such property and in the proceeds of the sale thereof had been assigned to the creditor as trustee for the debtor, who had advanced the purchase consideration for such assignment, and that the debtor was entitled, subject to a mortgage to the London Midland and Scottish Rail. Co., to a first charge on the property for £1,401 8s. 4d., and subject thereto, and to repayment to the creditor of £2,850, that he was entitled out of the proceeds of sale to repayment of £1,350 expended by him on the property, and subject thereto that the property was held in trust for the creditor and debtor in equal shares. The Chancery action was still pending. On a claim by the debtor that the bankruptcy notice should be set aside on the ground that his claim in the Chancery proceedings constituted a cross-demand within the meaning of s. 1 (1) (g) of the *Bankruptcy Act, 1914*,

Held: the claim in the Chancery action was not a "cross-demand" and so was not a ground for setting aside the bankruptcy notice because (i) (per LORD HANWORTH, M.R.) the claim was too uncertain; (ii) (per ROMER and MAUGHAM, L.JJ.) the claim was for an interest in property properly retained by third parties, and not for property in the hands of the creditor.

Notes. Rule 140 (2) of the *Bankruptcy Rules, 1915*, is now r. 137 of the *Bankruptcy Rules, 1952* (S.I. 1952 No. 2113).

Referred to: *Re a Debtor* (No. 66 of 1955), *Ex parte the Debtor v. Trustee of the Property of Waite*, [1956] 2 All E.R. 94. Applied: *Re a Debtor* (No. 80 of 1957), *Ex parte Debtor v. Wiseburgh*, [1957] 2 All E.R. 551.

As to setting aside a bankruptcy notice by reason of a cross-demand, see 2 HALSBURY'S LAWS (3rd Edn.) 282, 283, paras. 525, 526; and for cases on the subject see 4 DIGEST 104, 105, 937-940. For the *Bankruptcy Act, 1914*, s. 1 (1) (g), see 2 HALSBURY'S STATUTES (2nd Edn.) 804. For the *Bankruptcy Rules, 1952*, r. 137, see 3 HALSBURY'S STATUTORY INSTRUMENTS 187.

Case referred to:

- (1) *Re G.E.B. (A Debtor)*, [1903] 2 K.B. 340; 72 L.J.K.B. 712; 89 L.T. 245; 10 Mans. 243; 51 W.R. 675; 47 Sol. Jo. 618, C.A.; 4 Digest 104, 938.

Appeal from an order of REGISTRAR WARMINGTON that a bankruptcy notice issued against the debtor be set aside.

The question arising on this appeal was whether the debtor had a cross-demand against the creditor, who had issued a bankruptcy notice against the debtor, which exceeded the amount of the sum claimed by the creditor, and whether that was such a cross-demand as to come within the meaning of sub-s. (1) (g) of s. 1 of the *Bankruptcy Act, 1914*. The subsection is set out in the judgment of the Master of the Rolls.

On Jan. 29, 1934, the debtor was served with a bankruptcy notice in respect of £1,249 9s. 1d., claimed by the creditor as being the amount due on a final judgment obtained by him in an action in the King's Bench Division on Jan. 10, 1934. The debtor claimed that he had a counter-claim or cross-demand for £2,751 8s. 4d., being a sum equal to or exceeding the claim of the creditor. The grounds of the counter-claim or cross-demand were: (1) There was actually pending between the debtor and the creditor and others an action in the Chancery Division in which the debtor claimed that there was due to him out of the proceeds of sale of certain properties at the Walworth Road two sums of money—£1,350 and £1,401 8s. 4d. respectively, and certain other sums of money, all of which were being withheld from him by creditors and certain trustees of the property appointed by the creditors and under his control.

On Feb. 20, 1934, the registrar gave the following considered judgment:

In this case the debtor asks that a bankruptcy notice issued against him be set aside on the ground that he has a cross-demand against the creditor which exceeds the amount of the sum claimed by the creditor, and which he could not set up in the action. It appears that the parties have been engaged in several transactions together, and the respective claims are in respect of two wholly independent transactions.

In April, 1933, the debtor started proceedings in the Chancery Division against the creditor and two other persons who were trustees. In this action he claims that he is entitled to a charge for £2,750 on certain properties for money advanced in respect of a transaction in which the debtor and the creditor were interested, and for a declaration that on sale of the properties the debtor and creditor are entitled to a half-share each in any profits resulting from the transaction, and to have an account taken. The creditor denies that the debtor has any such rights. Notice of trial of this action has been given, and it is expected that the action will soon be heard, it now standing twenty-five out of the judge's list.

The creditor, on Sept. 15, 1933, commenced an action in the King's Bench Division against the debtor; based on a covenant in a mortgage claiming a sum of £2,057 2s. 11d. This mortgage had no connection with the properties or the transaction the subject of the action in the Chancery Division. The debtor admitted the liability but disputed the amount, and after a hearing before the Official Referee the creditor obtained judgment on Jan. 16, 1934, for £1,240 9s. 1d., and on Jan. 23, 1934, issued the bankruptcy notice for that amount. The creditor says that the debtor's claim in the Chancery action is not a claim against the creditor, and if it is it could have been set up in the King's Bench action, and that there is no proof that it is a good claim or that the amount which the debtor would succeed in claiming exceeds £1,240 9s. 1d.

There is an allegation on behalf of the debtor that this bankruptcy notice has been issued for the purpose of hampering the debtor in his action. This allegation has not been proved, but it is obvious without proof that the existence of an act of bankruptcy would hamper the debtor not only in regard to the action but in all his business activities. The claim in the Chancery action is, to my mind, for the purpose I have to consider, a cross-demand against the creditor. It is true that in form it asks for no direct payment from him, but in substance the allegation is that the creditor retains under his control property of the debtor in the form of denying a charge for a sum of money and a half-share of profits, and by so doing is keeping the debtor's money. The creditor does, in the action, maintain that this money does not belong to the debtor or is not charged on the property.

I further consider that this cross-demand could not have been set up in the action. The action already existed before the creditor issued his writ. The writ dealt with a wholly unrelated cause of action and the creditor is not entitled to demand of the debtor that he should stop his action and attempt to get it reinstated as a counter-claim or a simple money demand. It is clear that the action is of such a nature that it would not have been referred to an Official Referee to deal

with in this manner and it could not have been set up as a cross-demand while the action was in existence. A

There remains the further point whether the cross-demand exceeds the amount claimed in the bankruptcy notice. I should like to have adjourned the hearing of this application until after the hearing of the action, but I consider I have no power to do this. I have very little evidence to go upon, but I see at present no reason why the debtor should not be believed, that he has advanced the sums which he alleges of £2,750, and that the value of the properties is such that he will obtain this sum on any sale of the property. B

I have therefore decided that I should order the bankruptcy notice to be set aside with costs to be paid by the creditor, the creditor being at liberty, if the action should be decided in his favour, to serve another bankruptcy notice. C

The creditor appealed.

G. O. Slade for the creditor.

H. B. L. Braund for the debtor.

The arguments as to whether the claim in the pending Chancery action was at this time a cross-demand which the debtor had against the creditor appear from the judgments. D

LORD HANWORTH, M.R.—This appeal raises an interesting point in bankruptcy law. The facts are these. The debtor had some complicated proceedings which led him in April of last year to bring an action against three persons with whom he had been associated in dealing with certain property. The statement of claim starts by stating that there was an agreement made for the sale of certain properties between the London, Midland and Scottish Rail. Co. and a company called Upton Park Estates, Ltd. By that agreement there was to be conveyed to the company some property called "the Walworth Road premises," and they were duly conveyed. The terms of payment were that a certain sum, a portion of the sum to be paid, should remain on mortgage, and that mortgage should be paid off by certain instalments which were to be paid over a period of years in instalments of £1,401 8s. 4d. on June 24 in each year. In respect of the property so obtained there was what might be called, I suppose, a development scheme, under which certain money was to be laid out upon that property, and I suppose the profit obtained as a consequence of that was to be spent upon the property. Then in para. 5 it is alleged that the debtor by an oral agreement agreed to provide, and did provide, a sum of £1,350 which was to be laid out upon the property. Then there is a further claim that on one occasion one of these instalments due to the railway company was not forthcoming by the Upton Park Estates, Ltd., and so by an oral agreement the money was provided at the verbal request of the defendant, who is now the creditor, by the present debtor. The result of these proceedings was this, that the plaintiff, that is the debtor, should be subrogated to the railway company's security for the said instalment; in other words, whereas the railway company was entitled to be paid as mortgagees this sum of £1,401, the debtor claims that by the verbal request of persons interested, he has been subrogated to the rights which belonged to the railway company for the enforcement of the payment of that £1,401. Then the prayer includes a claim for a number of declarations under which, if all goes well, it is hoped that when the matter has been carried to a proper conclusion there will be a sum which the debtor is entitled to be paid and that, by means of subrogation to the security of the railway company, it will ultimately emerge on the sale of the property that there is to be paid to him this £1,401 8s. 4d. E F G H I

That action was commenced in April, 1933. The defences were delivered after some delay, a delay which I dare say is easily explained, but two of them were not delivered until May 7, and the last one by the last defendant, until Dec. 7 of last year. The action has now been set down for trial, and we understand it is shortly to be heard in the course of next term before the learned judge who is taking long witness actions. In the meantime an action was brought by the

present appellant, the creditor, in September, 1933, against the present debtor. The matter involved a question of amount only and the result was that after a hearing before MR. PITMAN, K.C., an official referee, judgment was obtained by the creditor against the debtor for a sum of £1,240 9s. 1d. on Jan. 16 of this year. The position, therefore, was this, that the present creditor was entitled to be paid the sum of £1,240 9s. 1d. by a judgment obtained on Jan. 16 of this year. In the meantime, in the Chancery proceedings which were sauntering along, the debtor, here the plaintiff, had certain rights in respect of land to which he had contributed certain sums, and which he hopes to be paid if and when that Chancery action is brought to a conclusion, and, if I understand it aright, if the property is sold the money can be raised to pay him. In that Chancery action there is no claim against the present creditor in respect of any personal liability charged against him.

A bankruptcy notice was issued by the creditor on Jan. 23 of this year requiring payment in the ordinary course within seven days from the debtor, and that bankruptcy notice contained, as the rules demand that it shall contain, the statement: You must either pay or compound the sum demanded or you must satisfy the court that you have a counter-claim, set-off or cross-demand against him, the creditor, which equals or exceeds the sum claimed by him, and which you could not set up in the action or other proceedings in which the judgment order was obtained. Dealing with that last point first, I think it may fairly be said that it would have been difficult, and probably inconvenient, if any actual claim had been transferred from the Chancery proceedings into the King's Bench proceedings as an answer to the claim made against the debtor in the King's Bench action. The King's Bench action was not commenced until September of last year, when the Chancery proceedings were well on their way, the statement of claim therein having been delivered in the previous July. At the same time the debtor either has to show that he has paid or secured or compounded the said sum, or he must satisfy the court that he has a counter-claim, set-off or cross-demand against the creditor.

The learned registrar, before whom the matter came, took time to consider his judgment; in a judgment which has been helpful to the court he came to the conclusion that he would set aside the bankruptcy notice on the ground that the debtor has got some claim which may sound in money against the creditor, with the result that the creditor's proceedings on the bankruptcy notice are not so conclusive against the debtor as to justify that bankruptcy notice being maintained. From that decision of the registrar an appeal is now brought to this court.

It is necessary for the purpose of this judgment to consider the proceeding which is allowed by a bankruptcy notice. Section 1 (1) (g) of the Bankruptcy Act, 1914, provides that:

"if a creditor has obtained a final judgment or final order against him [that is the debtor] for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act and he does not, within seven days after service of the notice . . . either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt . . . and which he could not set up in the action in which the judgment was obtained,"

then that non-compliance is an act of bankruptcy on which a petition can be founded. Turning to s. 2 it will be observed that there are certain conditions which are laid down in that section and in the proviso which are closely to be attended to in relation to the bankruptcy notice, which is issued under sub-s. (1) (g). Turning to the Bankruptcy Rules, 1915, r. 140, sub-r. (2), provides that certain details are to be contained in the bankruptcy notice, and it says:

"There shall be endorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off or cross-demand which equals or

exceeds the amount of the judgment debt and which he could not have set up in the action,"

then he must within the time specified in the notice file an affidavit to that effect with the registrar, and then, if he does, that the filing of such an affidavit is to operate as an application to set aside the bankruptcy notice, and thereupon the registrar has to fix a day for hearing the application. What the registrar has to hear and determine upon such affidavit is: Was there a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt?

The learned registrar has satisfied himself that the conditions have been sufficiently complied with by the debtor, and that the bankruptcy notice ought to be set aside. We have come to a different conclusion. The question really turns upon whether or not the proceedings, which are now taken, and which are reaching an end, in the Chancery Division, providé:

"A counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt."

At the conclusion of the Chancery proceedings it may be that the debtor will have established that he is entitled to receive the money, £1,350 and £1,401. That sum may ultimately be paid to him. Is that such a counter-claim, set-off or cross-demand, with the concomitant condition that it equals or exceeds the amount of the judgment debt, that it overtops, or cancels out, the right, which the creditor at the present time has, to have the debt, in respect of which he has a judgment, paid by means of the execution provided under a bankruptcy notice?

I can deal quite shortly with these three points. It is unnecessary at the present moment to define precisely what is meant by those words. What claims are included in the words "counter-claim, set-off or cross-demand?" With regard to the word "set-off," that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set-off. With regard to a counter-claim, that is a creature of the Judicature Act, 1873. By s. 24 (3) it was provided that the courts should have the power to hear a counter-claim, a matter which could not until that time have been included in the same action. Under that subsection the defendant is enabled to set up, by way of counter-claim, a claim which he might have had against the plaintiff and that should be heard in the action started by the plaintiff against him, and rules are provided for that purpose. Subsection (3) of s. 24 of the Judicature Act is now s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Act which consolidates all the Judicature Acts. The debtor's claim in the Chancery action does not appear to be a counter-claim. It is certainly not a claim which can be at the moment so definitely pointed to or quantified as to say it is one which necessarily equals or exceeds the amount of the judgment debt. It is a claim which may inure to the benefit of the debtor, and he may be able ultimately to receive a sum, but, so far as the position can be taken at the present time, it is difficult to say that it equals or exceeds the amount of the judgment debt.

I turn, therefore, to what to my mind is the wider word, "cross-demand." If a cross-demand is only to be interpreted as meaning something which could have been introduced into the action by way of counter-claim, it adds nothing to the word "counter-claim." "Cross-demand" seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside the counter-claim, but which is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt. I do not desire to say what a "cross-demand" may include, but it is not difficult to say that it does not include a claim of this uncertain nature presented in the Chancery proceedings. That claim does not appear to be one which it would be proper to describe as a cross-

demand; it is a right which may inure ultimately to the benefit of the judgment debtor. Therefore, it appears that there is no sufficient ground for setting aside this bankruptcy notice; the bankruptcy notice stands good and must be complied with.

It would not, however, be right to leave the creditor in the belief that he had surmounted all his difficulties, because when the bankruptcy notice has not been complied with and the act of bankruptcy is complete, then the creditor has a right to present a petition for bankruptcy. Then comes the duty of the court to consider the effect of s. 5 (3) of the Bankruptcy Act, 1914, under which a discretion is given to refuse to make an order upon a petition and to dismiss it. I do not wish it to be supposed that by this decision to-day we have in any way determined or indicated what the decision ought to be if the powers of sub-s. (3) of s. 5 are hereinafter invoked; upon that I give no opinion and no indication at all.

The result is that this appeal must be allowed with costs.

ROMER, L.J.—I agree, and I have only a very few words to add. The words with which we are confronted in this case are the words in s. 1 (1) (g) of the Bankruptcy Act, 1914, which are in these terms, that the debtor has to

“satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid.”

Strictly, of course, a claim or a demand cannot exceed or be equal to or less than the amount of the judgment debt; it is the thing which is claimed or demanded that has to be compared with the amount of the judgment debt. Some things that are claimed or demanded cannot be compared with the amount of the judgment debt. It would be impossible to say that a declaration or an injunction could equal or exceed the amount of a judgment debt, and there are obviously other things which cannot be compared with the amount of a judgment debt. These words seem to me to refer to a case where the judgment debtor is claiming to receive from the judgment creditor something which it can properly be said equals or exceeds the amount of the judgment debt. I cannot accede to the suggestion made by counsel for the debtor that the words are satisfied if the judgment debtor is claiming something in the hands of and properly retained by a third party. This case obviously falls within that category. The judgment debtor is there saying that something which is at present in the hands of, and properly retained by, third parties will be payable to him in priority to the judgment creditor when the proceeds come to be distributed. Such a claim, in my opinion, is not within the words of the subsection.

MAUGHAM, L.J.—I am of the same opinion. The question involved is really a question of the true construction of s. 1 of the Bankruptcy Act, 1914, sub-s. (1) of which begins with the words: “A debtor commits an act of bankruptcy in each of the following cases,” and then follow a number of cases which, in the view of the legislature, involve the fact that the debtor ought to be made liable. In sub-cl. (g) we find the part material to the present case, which, reading it shortly, says: If a creditor has obtained a final judgment against a debtor for any amount and, execution thereon not having been stayed, has served on him a bankruptcy notice and he does not within seven days comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained. *Primâ facie*, if there is any ambiguity about any part of that subsection, it may perhaps be resolved by a consideration of the other subsections, that is to say, by a consideration of the context in which it is to be found. If a creditor has a final judgment against a debtor and the debtor can satisfy the court that he has an answer to the claim of the creditor, it is quite clear that that ought not to be treated as an act of bankruptcy.

The first question I would like to deal with is the question as to the context in

which the word "has" is used. He *must* satisfy the court that he *has* a "counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt." There this court has no difficulty because the Court of Appeal in *Re G.E.B. (A Debtor)* (1), with considerable regret, in the peculiar circumstances of that case, came to the conclusion that the section meant a counter-claim, set-off or cross-demand which is effective at the time of the hearing of the application to set aside the bankruptcy notice. It was decided by VAUGHAN WILLIAMS, L.J., who was a great authority on this branch of the law, and was agreed with by ROMER and STIRLING, L.JJ.

In my opinion the words

"counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt"

are words which refer to a counter-claim, set-off or cross-demand against the creditor; the Act does not use those precise words, but that is intended. With regard to the words "which equals or exceeds the amount of the judgment debt," I agree with ROMER, L.J., that that must mean, or refer to, a claim against the creditor, either for money, or, at any rate, for money or property of value which equals or exceeds the amount of the judgment debt. For instance, it is possible, although the question does not arise here, that if the creditor possessed a bag of diamonds belonging to the debtor of the value exceeding the amount of the judgment debt, this bankruptcy notice would be set aside. That, as I say, may very well be the case. If we are considering the words "cross-demand" in the present case, it has to be a cross-demand against the creditor effective at the time of the hearing of the application to set aside the bankruptcy notice, either for an amount equal to or exceeding the amount of the judgment debt or, at any rate, for property of the value which at that moment exceeds the amount of the judgment debt.

If that be the correct construction of the subsection, it only requires a consideration of the statement of claim in the Chancery action, the nature of which has been stated by the Master of the Rolls, to arrive at the conclusion that the debtor cannot bring himself within that description. As is already pointed out, there is property in the hands of the third parties in the Chancery action to which they are partially entitled as trustees, and it has not been shown that, at the present date, at any rate, there is either money or property in the hands of the creditor which amounts to or is in value equal to the amount of the judgment debt.

On those grounds it seems to me that the present order by the learned registrar is wrong and that the appeal must be allowed with costs.

I would only wish to add, following what has been said by the Master of the Rolls, that it does not therefore follow that there will be an adjudication, because, contrary to the position with regard to a receiving order, the court has a judicial discretion under the Act as to whether it will or will not adjudicate a man bankrupt on a creditor's petition. It may be that, as the Master of the Rolls has pointed out, if the facts are established, they will justify the view that this is not a case in which there should be such an order.

Appeal allowed.

Solicitors: *Stafford Clark & Co.; Herbert Smith.*

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

STEWART (INSPECTOR OF TAXES) v. LYONS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), November 27, 1934]

[Reported 152 L.T. 291; 79 Sol. Jo. 31; 19 Tax Cas. 79]

Income Tax—Valuation of property—Valuation by person of skill—Duty of valuer—Conclusiveness of valuation—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 138 (1).

On an appeal against an assessment under Sched. A of the Income Tax Act, 1918, the taxpayer, under s. 138 (1) of that Act, required the commissioners to direct him to cause a valuation to be made by a person of skill, whereupon the commissioners named A.H. as the person of skill to make the valuation. A.H. made his valuation, and, on being questioned as to its basis, said that he had not known, when making the valuation, the rent payable by the occupants of the premises, and although he had read the provisions of the Act of 1918 relating to assessments for the purposes of Sched. A, he considered that s. 138 (1) set these aside and provided for a completely independent valuation.

Held: the assessment by A.H. was not conclusive, and a valuation which did not comply with the rules applicable to Sched. A was not a valuation for the purposes of s. 138. A valuation under that section provided the material from which the commissioners were to determine the valuation for the purposes of Sched. A, but did not relieve the commissioners of their responsibility to make the valuation.

Appeal allowed.

Notes. The Income Tax Act, 1918, s. 138, was replaced by the Income Tax Act, 1952, s. 53.

Referred to: *Lyons v. Collins*, [1936] 2 All E.R. 292.

For the Income Tax Act, 1952, s. 53, see 31 HALSBURY'S STATUTES (2nd Edn.) 59.

Case referred to:

(1) *Stocks v. Sulley* (1899), 4 Tax Cas. 98; 28 Digest 7, *m*.

Appeal by the Crown from an order dated July 13, 1934, of FINLAY, J., made on a Case Stated under 8 & 9 Geo. 5, c. 40, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leeds Borough in the County of York, for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts acting in and for the division of Leeds Borough in the county of York, held at 4, South Parade, Leeds, on Thursday, Aug. 13, 1931, S. H. Lyons (hereinafter called the taxpayer), as owner of the premises known as 39 and 40, Commercial Street, Leeds, appealed against the following assessments under Sched. A of the Income Tax Act, 1918, on the said premises:

Year of Assessment.	Occupier.	Owner.	Description.	Return of Rent.	Assessment.	
					Gross.	Net.
1927-28	Swears and Wells, Ltd.	S. H. Lyons.	Shop and rooms.	No return £750	£2,750	£2,500
1928-29	Etam, Ltd.	do.	Shop and basement.			
1929-30	do.	do.	do.	do.	£2,750	£2,500
1930-31	do.	do.	do.	do.	£2,750	£2,500
1931-32	do.	do.	do.	{ £200 £750 }	£2,400	£2,000

2. The following facts were proved or admitted at the said meeting:

(a) The said premises were demised by the taxpayer to Messrs. Swears and

Wells, Ltd., furriers and costumiers (hereinafter called the lessees) by lease dated Feb. 1, 1928, from Feb. 1, 1928, for a term of thirty years at a rent reserved of £2,000 for each year, the lessees covenanting to maintain the premises in good and tenantable repair, both inside and outside, and having power to determine the said term at the expiration of the first ten years or the first twenty years thereof.

(b) The lessees with the written consent of the taxpayer, sub-demised from Feb. 1, 1928, a part of the ground floor and the whole of the basement of the said premises to Messrs. Etam, Ltd., at a rent of £750 yearly, the sub-lessees covenanting to maintain the portion of the said premises so sub-demised in good and tenantable repair and to insure them against risk of loss or damage by fire.

(c) Previous to Feb. 1, 1928, the said premises were demised on a yearly tenancy by the taxpayer to Messrs. Alexandre, Ltd. (who carried on under the name of Alexandre et Cie the trade of selling gowns and mantles and furs), from Dec. 1, 1923, at a rent of £1,250 yearly.

(d) Between Feb. 1, 1928, and March 26, 1928, with the permission of the taxpayer, the ground floor was divided by a slab partition, shutting off any internal communication between the portion occupied by Messrs. Etam, Ltd., and the remainder of the said premises.

(e) The annual value under Sched. A of the Income Tax Act, 1918, of the said premises was determined on appeal before the said general commissioners of Income Tax on Nov. 3, 1927, for each of the financial years 1923-24, 1924-25, and 1925-26 in the sum of £1,333 gross, £1,107 10s. net, and this assessment was continued in the same amount for the financial years 1926-27 and 1927-28. It was not in dispute that the alterations referred to in sub-para. (d) above made such a change in the property that it was a different property from that which existed previously to such change, and, consequently, that it was necessary to ascertain the annual value of the property as altered without consideration of the annual value previously arrived at of the property before the alteration, and it was also not in dispute that the premises constituted a building assessable and chargeable as one entire house or tenement pursuant to the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (c).

(f) No books, lists of customers, or introductions to customers were supplied by Messrs. Alexandre, Ltd., nor was any portion of the managerial staff taken over by the lessees who, however, retained the name of Alexandre et Cie, which appeared on the building at the date of the demise to the lessees, and so appeared at the date of the division by permission of the taxpayer.

(g) The taxpayer is the principal shareholder and governing director of Messrs. Alexandre, Ltd.

(h) The superficial area of the said premises is as follows: (i) In occupation of the lessees: ground floor, 69 square yards; first floor, 113 square yards; second floor, 104 square yards; third floor, 68 square yards—total, 354 square yards. (ii) Sub-leased by the lessees and in the occupation of Messrs. Etam, Ltd.: basement, 98 square yards; ground floor, 34 square yards—total, 132 square yards.

(j) The premises occupied by the lessees were at all material times rated at £885 gross, £734 rateable, and the premises occupied by Etam, Ltd., were at all material times rated at £334 gross, £275 rateable, making a total gross annual value of £1,219, and a total net rateable value of £1,009.

3. A dispute having thus arisen at the aforesaid meeting as to the annual value of the said premises, the taxpayer under s. 138 of the Income Tax Act, 1918, required the commissioners to direct him to cause a valuation to be made by a person of skill; whereupon the commissioners named Mr. Arthur Hollis, partner in Messrs. Hollis and Webb, auctioneers, valuers and surveyors, Leeds, as a person of skill to make such valuation.

4. At an adjourned meeting held on Oct. 15, 1931, the commissioners met to receive Mr. Hollis's valuation, which was as follows:

"In accordance with s. 138 of the Income Tax Act, 1918, and as a result of the request sent to me signed by Mr. S. H. Lyons and dated Aug. 14, 1931, I beg to

report that I have made a very careful and detailed inspection of the premises above mentioned, have completed the necessary measurements, investigated local comparisons, and given careful consideration to conditions ruling during the period over which my opinion is required.

"I place the annual value of the premises Nos. 39 and 40, Commercial Street, Leeds, occupied by Messrs. Swears and Wells (1926), Ltd., and by Messrs. Etam, Ltd., at the following figures :

"April 5, 1927, to April 5, 1928	...	£1,200
April 5, 1928, to April 5, 1929	...	£1,400
April 5, 1929, to April 5, 1930	...	£1,400
April 5, 1930, to April 5, 1931	...	£1,400
April 5, 1931, to April 5, 1932	...	£1,330."

5. On examination before the said commissioners Mr. Hollis deposed on oath that the aforesaid valuation was true and accurate to the best of his knowledge and belief, that it had been made on the basis of superficial area ranging from £10 10s. to 10s. per square yard as follows :

Description					Etam, Ltd.	Swears and Wells, Ltd.
					Per square yard	Per square yard
Basement..	..	..	..	..	£0 15 0	—
Ground floor	..	..	..	..	£10 10 0	£9 0 0
First	..	..	..	..	—	2 5 0
Second	..	..	..	..	—	1 0 0
Third	..	..	..	..	—	0 10 0

Mr. Hollis also deposed (and we accepted his evidence) that he had not when making his valuation known the exact annual rent payable by each occupier, but that if he had known what these rents were, this would not have altered his opinion as to the annual value. In making this he had heard, and understood, that the rent payable was in the region of £2,000 per annum. He stated that, although he had read through the income tax provisions relating to the ascertainment of annual value under Sched. A of the Income Tax Acts, he considered that s. 138 of the Income Tax Act, 1918, set these aside and provided for a completely independent valuation.

6. The taxpayer contended (inter alia) :

(a) That the lessees carried on the same type of business as Messrs. Alexandre, Ltd. (the former occupiers), and that by taking over the premises they obtained the benefit of the connection and goodwill of Messrs. Alexandre, Ltd., including, by the taxpayer's permission, the use of the name, Alexandre et Cie.

(b) That the rent reserved by the lease was not a rack-rent.

(c) That as the said rent was not a rack-rent it was necessary to ascertain the rack-rent in accordance with sub-para. (2) of No. 1 of the General Rules of Sched. A, and accordingly a valuation was requested under s. 138 of the Income Tax Act, 1918, for the rack-rent to be ascertained by an independent valuation by a person of skill.

(d) That on the evidence the said rent was in excess of the rack-rent.

(e) That under s. 138 of the Income Tax Act, 1918, the annual value of the premises should be determined in accordance with Mr. Hollis's valuation.

(f) That the assessments under appeal should be reduced accordingly.

7. The Crown contended (inter alia) :

(a) That the assessing Rules of Sched. A of the Income Tax Act, 1918, were not overridden by s. 138 of that Act.

(b) That the valuation of the said Mr. Hollis, the person of skill named by the commissioners, had proceeded on a wrong basis, inasmuch as he had disregarded the provisions of the Income Tax Acts relating to the ascertainment of annual

value, and that consequently such valuation was not binding upon us.

(c) That on the available evidence the annual value should be in the sum of £2,400.

8. The commissioners, having heard the evidence and the contentions of the parties, and having examined on oath the said person of skill named by them, were of opinion that by the terms of s. 138 of the Income Tax Act, 1918, the annual value must be determined in accordance with that valuation and reduced the assessments accordingly.

9. Thereupon the inspector of taxes declared his dissatisfaction with the determination of the appeal as being erroneous in point of law, and duly required a Case to be stated for the opinion of the High Court of Justice.

10. The question for the decision of the court was whether the commissioners were bound to accept the valuation put forward by the person of skill in view of the fact that in arriving at his valuation he had disregarded the rules applicable to Sched. A of the Income Tax Act, 1918, relating to the ascertainment of annual value, and that he had valued without regard to his knowledge of the rents paid.

FINLAY, J., dismissed the appeal of the Crown, holding that the commissioners were bound to accept the valuation made by Mr. Hollis.

The Attorney-General (Sir Thomas Inskip, K.C.) and R. P. Hills for the Crown. A. M. Latter, K.C., and Cyril King for the taxpayer.

LORD HANWORTH, M.R.—The Commissioners for the General Purposes of the Income Tax Acts who were acting in and for the division of Leeds had before them Mr. Lyons, who was the owner of certain premises known as numbers 39 and 40, Commercial Street, Leeds, and who was the appellant against certain assessments made on him under Sched. A of the Income Tax Act, 1918. The facts, or some of the facts, relating to those premises are set out in the Case Stated, and we are told that in the course of the hearing a dispute arose as to the annual value of the premises, in consequence of which the respondent, under s. 138 of the Income Tax Act, 1918, asked that a valuation should be made by a person of skill, and so the commissioners appointed Mr. Arthur Hollis, who is a distinguished valuer and surveyor at Leeds, as being a person of skill to make a valuation. He made a valuation, and he made a valuation on a method by no means unknown; he took the superficial area of the premises which had to be valued, and giving that a certain value, he placed the annual value of those premises at sums ranging between £1,200 and £1,400 for the various years in question. Mr. Hollis was examined before the commissioners and he said "that he had not when making his valuation known the exact annual rent payable by each occupier" of these premises, "but that if he had known what these rents were, this would not have altered his opinion as to the annual value," and he had understood that the rent payable was in the region of £2,000, and

"He stated that, although he had read through the income tax provisions relating to the ascertainment of annual value under Sched. A of the Income Tax Acts he considered that s. 138 of the Income Tax Act, 1918, set these aside and provided for a completely independent valuation."

The commissioners, having heard the evidence and the contentions, were of opinion that by the terms of s. 138 of the Income Tax Act, 1918, the annual value must be determined in accordance with the valuation that is made by the person of skill under it and they reduced the assessments accordingly. The question which is propounded by the commissioners is this—whether the commissioners

"were bound to accept the valuation put forward by the person of skill in view of the fact that in arriving at his valuation he had disregarded the rules applicable to Sched. A of the Income Tax Act, 1918, relating to the ascertainment of annual value, and that he had valued without regard to his knowledge of the rents paid."

The commissioners, therefore, held that they were bound under the terms of s. 138 to accept his valuation, and that the annual value must be determined in accordance with that valuation. FINLAY, J., has agreed with the commissioners and he has put it in this way. Calling attention to the fact that the valuation was verified on oath he says this :

"Now why is that not conclusive? It is said that the independent person having appeared before the commissioners answered, and I should think answered in a stupid way, certain questions which were put to him. I cannot regard his answers to those questions as in any way preventing this from being a valuation, and if it is a valuation verified on oath then whatever the person of skill may have said, whether what he said was ill-advised or well-advised, it seems to me that on the words of the section that is conclusive as to the matter of annual value."

We have, therefore, to review those decisions and come to our conclusion as to what is the effect of s. 138. Does it mean that when a person of skill has given a valuation verified on oath that valuation per se takes the place of the determination of value by the commissioners and, to use the commissioners' own words, that "the annual value must be determined in accordance with that valuation"? In my view that is a misreading of s. 138. I cannot agree with the view of FINLAY, J., or with the construction put on that section by him, and incidentally I may say that I do not agree with the observation of LORD McLAREN in *Stocks v. Sulley* (1) ((1899), 4 Tax Cas. at p. 105) who said that one may have an independent valuation made by a person appointed by the commissioners, "and that is to be conclusive of the whole subject."

It must be remembered that on an appeal against an assessment it is the duty of the commissioners to hear and determine it, and in the course of that determination powers are given under s. 138 for the appointment of a person of skill. Let me, then, see what is the use to be made of the valuation verified no doubt by the person of skill—what is to be its effect? It appears to me that in terms the annual value is one which is to be determined not by that valuation, but in accordance with that valuation. It means that the valuation which is made by the person of skill will contain data which will enable the commissioners on their responsibility to determine what the annual value is to be. The words that I have referred to appear to me to carry that meaning and to intend it, and when one comes to s. 138 (3) I think that it is made plain: that subsection provides :

"The costs and charges of any such valuation shall abide the final determination of the commissioners, and if the value so found exceeds the value alleged by the appellant the commissioners may order him . . ."

and so on; in other words, it is recognised by that subsection that there is to be a final determination of the commissioners, a final determination which is not, or need not be, the same as the result reached by the person of skill.

I want to consider how this dispute may possibly arise. Schedule A deals with the tax to be applied to lands, tenements, and hereditaments, which are to be taxed according to the annual value thereof, and under the general rule of No. I rules are laid down for estimating the annual value. Where there is a rack-rent, that gives a basis for valuation. If they are not let at a rack-rent then one takes the rent at which they are worth to be let by the year. In the ascertainment of what is the rack-rent, or if there is no rack-rent, what they are worth to be let by the year there is room for several opinions. When one comes to look at No. IV, to which counsel for the taxpayer called our attention, one will see that there is a number of rules laid down for estimating the annual value. It is quite true that the assessors are required to do certain things and to take into account certain factors, but, having so done, the assessment that they make is not to be binding if it appears to the commissioners, and so on, in the hypotheses which are laid down in r. 9 under No. IV, and in that and in other rules there is a number of matters referred to which contain the possibility of a divergence of opinion on

figures. It appears to me that it is for the settlement of those matters for which the person of skill is required to come on the scene, and he is to determine and prepare for the commissioners the materials which are placed beyond controversy which may be relevant to the determination of the commissioners, but that determination of the commissioners is to be of the annual value of any lands, tenements, or hereditaments, and their decision as to annual value is undoubtedly to be in accordance with the terms and rules which are laid down in the Act. It does not appear to me that s. 138 (1) takes away that responsibility from the commissioners and places it on the person of skill. The person of skill lays to rest controversies about various factors which may have existed, but when he has verified his valuation so made then once more the commissioners must receive and take the responsibility of determining what the annual value is in accordance with the figures which are presented in the valuation and in accordance with the rules laid down for the determination of the annual value, and which are binding on the commissioners. In the present case it is quite plain that the commissioners treated the report of the person of skill as beyond question and that s. 138 had supplanted the duty which belonged to the commissioners and placed it finally on the person of skill. For the reasons which I have given I do not think that is the effect of s. 138 nor do I agree, therefore, with FINLAY, J., who says that the report of the person of skill is conclusive as to the matter of the annual value. For these reasons it appears to me that the appeal must be allowed and the matter must be remitted to the commissioners for their consideration in the light of what has been said by this court.

SLESSER, L.J.—In this case in which a person of skill, as he is described in the Income Tax Act, 1918, s. 138 (1), had been appointed by the commissioners at the request of the person disputing the annual value, we are told by the commissioners in the Case Stated that the person of skill, in arriving at his valuation

“had disregarded the rules applicable to Sched. A of the Income Tax Act, 1918, relating to the ascertainment of annual value, and that he had valued without regard to his knowledge of the rents paid.”

The actual statement which the gentleman made to the commissioners was,

“that although he had read through the income tax provisions relating to the ascertainment of annual value under Sched. A of the Income Tax Acts, he considered that s. 138 of the Income Tax Acts, 1918, set these aside and provided for a completely independent valuation.”

In my view we are not concerned here to consider the case of what would have happened if that statement had not been made. The question which is propounded to us, whether the commissioners were bound to accept the valuation, states that he had so disregarded the rules, and it is on that basis that the learned judge considered this case and I consider it. The learned judge has come to the conclusion that in so far as there was here what purported to be a valuation which was verified on oath, that matter was conclusive and binding on the commissioners, and he goes further, and says:

“I cannot regard his answers to the questions” [that is as to what he had done and what he had regarded and what he had not regarded] “as in any way preventing this from being a valuation. . . . It seems to me that on the words of the section that is conclusive as to the matter of annual value.”

In my view, the commissioners here are not bound by this purported valuation for this reason, that when s. 138 is considered I am of opinion that the person of skill never made a valuation within the meaning of that section at all. It will be noticed that the purpose of the appointment of a person of skill and the valuation arise from the fact that a dispute arises as to the annual value of the lands, and the Income Tax Act provides in Sched. A that

"Tax under Sched. A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof,"

and then lays down rules to which we have been referred, beginning with No. I, the general rule, rules dealing with special matters, and No. IV dealing with estimation of annual value, all of which seem to me to lay down the principles on which annual value is to be ascertained. In so far as a valuation is to be made under s. 138 for the purpose of giving the annual value to the commissioners in order that they may determine it in accordance with that valuation, to quote the last words of sub-s. (1), it is clear, I think, that a valuation which does not follow the rules and conditions under which annual value has to be ascertained is in reality no valuation at all. A valuation has to be ascertained in a certain and prescribed way, and when we are told that the valuer ignored the rules and provisions and took the view that he could give a completely independent valuation, it seems to me that that completely independent valuation is not a valuation within the meaning of sub-s. (1).

It follows, to my mind, that the general commissioners never received from the person of skill a valuation at all, and, therefore, they had no material on which they could determine in accordance with that valuation. For those reasons I think that this appeal must be allowed, and the present position, as I understand it, is this, that at the moment the requirements of s. 138 have not been satisfied at all.

ROMER, L.J.—I also agree that this appeal must be allowed. The particular case with which we are dealing is one in which the hereditaments are charged under the first general rule No. I to Sched. A. The principle involved in the case is by no means confined to such hereditaments. It equally applies to hereditaments not chargeable under the first general rule, but under general rules Nos. II and III.

Before considering the meaning of s. 138, I want to point out this—a point really that lies at the root of the argument on behalf of the taxpayer: The rules relating to Sched. A are dealing with two things which are essentially distinct, one is as to the ascertainment of the annual value, the other is as to the assessment to be made after the annual value has been ascertained. General rule No. I is a rule which, as its name implies, is applicable to all hereditaments, other than those which are expressly dealt with in later parts of the rule. General rule No. II is one which deals with certain particular hereditaments, namely, the case of tithes and so forth. General rule No. III is dealing with other special hereditaments such as quarries of stone, slate, limestone, and so forth, and it will be found, if one looks at those rules, that they deal with both matters, not only the estimation of the annual value but also with assessment. General rule No. IV entitled "Rules for estimating annual value," deals with certain particular cases in relation to the estimation of the annual value of them. Rule 1, for instance, of No. IV, provides:

"Where a landlord is subject to an agreement to pay or satisfy out of the rent reserved on any lands or tenements, any public local rates, taxes, or assessments, which by law are charged upon the occupier, or any composition for tithes . . . the annual value shall be estimated exclusive of any such public local charges."

—that is dealing with ascertainment of the annual value. Rule 4 does not deal with the ascertainment of the annual value, but with the power of the assessor to make his assessment. The rule provides:

"Where the annual value is to be ascertained according to the general rule of No. I of this schedule, and that value cannot be otherwise ascertained . . . the assessor may make his assessment by reference to the annual value."

Rule 10, again, is dealing and dealing exclusively with assessment and not with the ascertainment of the annual value. Going back to the general rule No. I, the

cases to which that rule is applicable may be taken speaking generally to be those where annual value is the amount at which the premises are worth to be let by the year. In No. II that is no longer the basis of the annual value, and in No. III the basis is the profits either of the preceding year of the subject-matter in question or the profits of the preceding year, the profits of the three preceding years, and so forth.

I turn to s. 138, and it will be observed that it only deals with a case where on an appeal against an assessment the appellant is dissatisfied with the annual value that has been ascertained, and it provides that where that happens a valuation is to be made by a person of skill. Valuation there must, in my opinion, mean the ascertainment of the annual value in accordance with the rules laid down in the rules to the schedule. If the valuer observes those rules, and, applying the figures in accordance with the rules, arrives at a certain result, a certain figure, as being the annual value, speaking for myself I doubt whether the commissioners would be justified in going behind that valuation, but in the present case we are told by the person of skill himself that his view is that when he is asked to value under that section he may disregard entirely all the rules contained in the schedule. The result of that would be that if he is ascertaining the annual value of a quarry he can if he thinks fit look at what rent, if any, is being paid for it, and disregard entirely the profits that have been made during the preceding three years, or the preceding year—I forget which it is in the case of quarries. In my opinion, where a valuer does that he is not making a valuation such as is contemplated by the section, and, for the purposes of that section, his valuation is, in my opinion, a complete nullity. That being so, there has been no ascertainment of the annual value in this case, and, in my opinion, the case must go back to the commissioners for the purpose of having the annual value properly ascertained.

Latter.—In order that there should be no misunderstanding as to the position below, I understand your Lordships' decision to be this, that there has not been a valuation for the purposes of the section, and therefore the position of my client is that he has asked for a valuation to be made that has not yet been made, and it will have to be made, and the commissioners will direct Mr. Arthur Hollis, or whoever they think fit, to make a valuation. That is the position, that that valuation has to be made in accordance with your Lordships' view, and it has not yet been made.

LORD HANWORTH, M.R.—He has given certain data, and those data are determined beyond controversy. Whether the data are those which will enable the commissioners to determine the annual value is quite a different question.

ROMER, L.J.—I must say, speaking for myself, that if that be the view taken by Mr. Hollis of his duties under the section, if there is to be a valuation by a person of skill, it should be a valuation by somebody other than himself.

Latter.—No doubt Mr. Hollis will obey the views of this court.

Hills.—I suggest that the case should go back with your Lordships' judgment.

LORD HANWORTH, M.R.—We all agree that there has been no determination under s. 138 of the annual value. The data are given. In view of what he has said and the misdirection which the commissioners have adopted, it seems to me to leave the matter quite open.

Latter.—I was only anxious to preserve the rights of my client, whatever they are, under s. 138. If the section has not been used he is still entitled to use it.

ROMER, L.J.—You have to ask for a valuation by a person of skill.

SLESSER, L.J.—It is for them to name the valuer, as I understand the section. I do not know whether they will decide to name the same person of skill again. That is for them.

LORD HANWORTH, M.R.—We all agree that the valuation or so-called valuation is not a valuation under the section. I think it must go back to the

commissioners unfettered; they have to go through their duty. They have misdirected themselves. I think I said they have to deal with the matter once more in accordance with the explanation that we have given of the section.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Gisborne & Co., for Aubrey Kremer, Leeds.*

[*Reported by J. H. G. BULLER, Esq., and G. P. LANGWORTHY, Esq., Barristers-at-Law.*]

Re BROOKER. PUBLIC TRUSTEE v. YOUNG

[CHANCERY DIVISION (EVE, J.), April 24, 1934]

[Reported [1934] Ch. 610; 151 L.T. 345; 103 L.J.Ch. 247; 78 Sol. Jo. 447]

Trustee—Partition—Land held by trustees for sale in trust for persons of full age in whom proceeds absolutely vested in undivided shares—Power of trustees to partition—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 28 (3) (a).

The power conferred by s. 28 (3) of the Law of Property Act, 1925, on trustees for sale of land, "where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares . . . with the consent of the persons, if any, of full age . . . interested in possession in the net rents and profits of the land until sale" to "partition the land" is exercisable even where the "persons of full age" in whom the net proceeds of sale have become absolutely vested and the persons interested in possession in the net rents and profits are entitled to such proceeds, rents and profits only as trustees or personal representatives of the persons beneficially entitled thereto.

Re Thomas, Thomas v. Thompson (1), [1930] 1 Ch. 194, distinguished.

Re Gorringe and Braybon's Contract (2), [1934] Ch. 614, n., followed.

Notes. As to partition by trustees in whom the legal estate in the entirety is vested, see 14 HALSBURY'S LAWS (3rd Edn.) 502, para. 954; for the Law of Property Act, 1925, s. 28 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 479.

Cases referred to:

(1) *Re Thomas, Thomas v. Thompson*, [1930] 1 Ch. 194; 99 L.J.Ch. 140; 142 L.T. 310; Digest Supp.

(2) *Re Gorringe and Braybon's Contract*, [1934] Ch. 614, n; 151 L.T. 347, n; Digest Supp.

By his will made in 1921, the testator, Thomas Elvy Brooker, gave to his wife Jane Brooker (inter alia) all his rents, including the rents and the property owned by him jointly with his brother Joseph, and directed that after their decease it was to be equally divided between his brothers and sisters therein mentioned, the shares of any then deceased to go equally between their children. By a codicil made in 1923, he declared that at his death his brother Joseph should share equally with his brothers Ben and Will.

He died in December, 1923, and letters of administration with the said will and codicil annexed were granted to the widow in January, 1924.

At his death the testator was entitled with his brother Joseph to a number of freehold properties, consisting of houses and lands in East Grinstead, as tenants in common in equal shares. Joseph Brooker made his will in 1929, and appointed the defendants C. E. Simmons, H. J. Brooker, and F. A. Brooker executors and trustees thereof, and devised all his real and personal estate to them upon trust for sale, but not to sell any part of the real estate so devised to them until the death of the survivor of his six children. The net income was to be divided equally among the children, the capital ultimately to be distributed equally between their issue on attaining twenty-one years or marriage in equal shares per stirpes, and he authorised his trustees to concur with other persons entitled in making a partition of any property held in undivided shares.

Joseph died in March, 1929, and his will was duly proved in May, 1929. The said property thus became vested in the Public Trustee upon the statutory trusts on Jan. 1, 1926, under Sched. I, Part IV, para. (4) of the Law of Property Act, 1925. Thomas's widow died in January, 1933, leaving part of the estate of her husband unadministered, and in April, 1933, administration with the will and codicil annexed was granted of this estate to the Public Trustee.

By an appointment dated March 1, 1934, and made between the Public Trustee of the first part, Joseph Brooker's trustees of the second part, and the plaintiffs Harry Young and Frederick Brooker of the third part, the plaintiffs were appointed to be trustees on the statutory trusts in lieu of the Public Trustee.

The beneficiaries under Thomas's will and codicil had desired the Public Trustee to sell the property and to distribute the proceeds. But Joseph's trustees and their beneficiaries, having regard to the direction in his will that his real estate should not be sold until the death of all his children, and to the facts that part thereof was the headquarters of a company in which he was the principal shareholder and several houses were occupied by his children, did not desire a sale.

It was then arranged between the Public Trustee and Joseph's trustees that the property should be partitioned, and a scheme for this purpose was agreed on. This summons was then taken out by the plaintiffs as statutory trustees asking whether upon the true construction of s. 28 (3) of the Law of Property Act, 1925, and in the events which had happened, the plaintiffs as trustees upon the statutory trusts of the land held in undivided shares had power under the subsection, with the consent of the defendants as legal personal representatives of the two estates respectively, to partition the lands, and if they had no such power that they might be authorised by the court under s. 57 of the Trustee Act, 1925, to partition the lands in accordance with the proposed scheme.

Winterbotham for the plaintiffs.—It has been doubted whether there is power under s. 28 (3) of the Law of Property Act, 1925, for trustees to partition, so as to give executors any share therein. There is no reference to legal personal representatives in the section. It is therefore, *semble*, confined to persons beneficially entitled: *Re Thomas, Thomas v. Thompson* (1).

Trevor Roberts and *R. C. Horne* for the defendants.—The partition can, *semble*, be carried out under the section. In *Re Thomas* (1) the property was divided and the shares settled by the will. That case is distinguishable. Trustees and personal representatives are included in "persons of full age," otherwise the proviso which follows would be futile: see also Settled Land Act, 1925, s. 7 (5). In *Re Gorringe and Braybon's Contract* (2) BENNETT, J., held on similar facts that personal representatives and trustees came within that expression.

By Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20):

Section 28 (3): "Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust), the trustees for sale may, with the consent of the persons, if any, of full age, not

being annuitants interested in possession in the net rents and profits of the land until sale: (a) Partition the land remaining unsold or any part thereof; and (b) provide (by way of mortgage or otherwise) for the payment of any equality money; and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale, or where any part of the land becomes settled land, by a vesting deed, or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given."

EVE, J.—The question raised in this summons is whether the words in s. 28 (3), "vested in persons of full age in undivided shares," are to be read as including trustees and legal personal representatives or in some more restricted sense.

There is nothing in the section to limit the class to persons beneficially interested, and the terms of the proviso on which counsel for the defendants has relied support the wider interpretation which includes trustees and legal personal representatives. In *Re Thomas* (1), a decision of FARWELL, J., was cited in support of the argument for the narrower interpretation, but all that the learned judge decided there was that the words do not extend to a case where the proceeds are only vested in life tenants.

Re Gorringe and Braybon's Contract (2), wherein the vendor under a contract of Aug. 12, 1932, applied by summons for, and obtained an order declaring that a partition effected by a deed of Nov. 26, 1927, was validly and effectively made under s. 28 (3) of the Law of Property Act, 1925, and that a good title to the property had been shown, is more to the point. The purchaser had persisted in an objection that the deed was void and relied on the decision in *Re Thomas* (1) in support of his objection. At the date of the partition deed the proceeds of sale were vested, as to one moiety in the vendor beneficially, as to one-sixth in another beneficiary and as to the remaining two-sixths in trustees upon trust for two life tenants with remainder in each case to their children with divers remainders over in default of children. BENNETT, J., held that the case was not governed by the decision in *Re Thomas* (1) and made the declaration above indicated.

I agree with his judgment and declare that upon the true construction of s. 28 (3), and in the events which have happened, the plaintiffs as trustees have power under the section, with the consent of the defendants as the legal personal representatives of Thomas Elvy Brooker and Joseph Brooker respectively, to partition the lands described in the schedule to the summons. The costs of all parties to be taxed as between solicitor and client, with liberty to apply as to raising such costs.

Solicitors: *Waterhouse & Co.*, for *Frederick Turner & Jones*, East Grinstead.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

BOYCE (INSPECTOR OF TAXES) *v.* WHITWICK COLLIERY CO., LTD.
 COALVILLE URBAN DISTRICT COUNCIL *v.* BOYCE

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ), June 19, 20, 1934]

[Reported 151 L.T. 464; 78 Sol. Jo. 568; 18 Tax Cas. 655]

Income Tax—Income—Recoupment of capital outlay—Colliery company—Equipment for supplying water to local council—Annual payment by local council including proportion of cost of equipment—Right of council to deduct as revenue payment—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Rules applicable to Case I and Case II, r. 3 (f).

Incidental to their business of coal mining, a colliery company had to dispose of surplus water. An urban district council desired to be supplied with that water and the company and the council entered into an agreement for such supply. The agreement, among other things, provided that the company should provide pumping, filtering and storage equipment according to designs, specifications and tenders to be previously approved by the council's engineer. This equipment was unnecessary for the purposes of the company's business of coal mining. The said agreement further provided that payment should be made by the council under four heads: (a) £285 in each year, (b) a sum equal to one-thirtieth of the cost of the works, (c) interest at 5 per cent. per annum on the portion of the cost of the works for the time being unpaid, and (d) one penny per thousand gallons of water supplied. The agreement was to last for thirty years, and at the end of that period the equipment was to remain the sole property of the company. If the company ceased to work the colliery within that period, the council were to be permitted to enter on the premises for the purpose of obtaining the water, making such payment to the company as was equitable. Under head (b), the council paid in each year £316 to the company. The company claimed that the payment was capital in their hands and not liable to income tax; the council contended that the payment was of a revenue nature, and, therefore, deductible by them from their receipts for the purposes of income tax.

Held: (i) the annual payment of £316 was not liable to income tax in the hands of the company because it was an instalment of the repayment of capital outlay made at the instance of the council and did not represent part of the payment for the supply of water.

(ii) the council were precluded from deducting the payment in computing their profits for the purposes of income tax by r. 3 (f) of the Rules applicable to Cases I and II of Sched. D, because the payment was a sum employed as capital in the trade of the council as water undertakers within that provision.

Decisions of FINLAY, J. (1934), 151 L.T. 464, reversed.

Notes. The Income Tax Act, 1918, Sched. D, Rules applicable to Case I and Case II, r. 3, was replaced by the Income Tax Act, 1952, s. 137.

Referred to: *Racecourse Betting Control Board v. Wild*, [1938] 4 All E.R. 487; *Doncaster Amalgamated Collieries, Ltd. v. Bean*, [1946] 1 All E.R. 642.

As to items ranking as capital expenditure, see 20 HALSBURY'S LAWS (3rd Edn.) 162-164, para. 281; and for cases on the subject see 28 DIGEST 47-49, 237-252. For the Income Tax Act, 1952, s. 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.

Cases referred to:

- (1) *Secretary of State in Council for India v. Scoble*, [1903] A.C. 299; 72 L.J.K.B. 617; 89 L.T. 1; 51 W.R. 675; 19 T.L.R. 550; 4 Tax Cas. 618, H.L.; 28 Digest 65, 337.

- (2) *Perrin v. Dickson*, [1930] 1 K.B. 107; 98 L.J.K.B. 683; 142 L.T. 29; 45 T.L.R. 621; 14 Tax Cas. 608, C.A.; Digest Supp.
- (3) *Lady Emily Foley v. Fletcher and Rose* (1858), 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P.819; 5 Jur.N.S. 342; 7 W.R. 141; 157 E.R. 678; 28 Digest 65, 336.

Appeals by taxpayers, dependent on the same facts, from orders dated March 19, 1934 (reported 151 L.T. 464) of FINLAY, J. In *Boyce v. Whitwick Colliery Co., Ltd.*, FINLAY, J., held that an annual payment received by the company from the Coalville Urban District Council was income and liable to income tax accordingly; and in *Coalville Urban District Council v. Boyce*, FINLAY, J., held that the said annual payment was a revenue payment by the council and deductible in computing the council's net profit for the purposes of tax. The Case Stated in *Boyce v. Whitwick Colliery Co., Ltd.*, is (so far as necessary) set out below. It is not thought necessary to set out the Case in *Coalville Urban District Council v. Boyce*.

This Case was stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the division of West Goscote in the county of Leicester for the opinion of the High Court of Justice.

1. At a meeting of the said commissioners held at the County Buildings at Ashby-de-la-Zouch within the said division on Nov. 29, 1932, the Whitwick Colliery Co., Ltd. (hereinafter called "the respondents") appealed against four additional assessments made on them for the years ended April 5, 1929; April 5, 1930; April 5, 1931; and April 5, 1932, respectively under Sched. D of the Income Tax Act, 1918, in the respective sums of £316 for each of the said years.

The said sums of £316 were paid to the respondents by the urban district council or the urban district of Coalville in the county of Leicester (hereinafter called "the council") under an agreement in respect of the supply of water by the respondents to the council and the provision of the plant required in connection with such supply. The only question involved in the appeal was whether, in the circumstances, the said sums were repayments by the council of capital expended by the respondents or rentals or revenue received by the respondents.

2. The following facts were proved or admitted to the commissioners:

(i) Towards the end of the year 1912 the council was seeking a supplemental supply of water for domestic, trade, and general purposes for the urban district, and approached the respondents, who are the owners of collieries in the same district. In connection with the working of the respondents' collieries it was necessary for them to pump from certain of their pits a quantity of water, some of which water was surplus to their requirements. After long negotiations, the respondents agreed to supply the council with such surplus water upon the terms hereinafter referred to. To enable the respondents to give and the council to receive such water supply it was necessary that certain plant and buildings and other works should be erected in connection with the pumping, purification, measurement, and distribution of the water.

(ii) Questions then arose between the respondents and the council as to the provision of the capital required in order to provide such plant and buildings, and it was ultimately agreed between the respondents and the council that the council should take a lease of a water supply for thirty years, with an option of renewal, and that the respondents should provide the sum which would represent the capital expenditure which would be incurred for buildings, plant, and other works, such capital to be repaid by the council to the respondents by thirty equal annual instalments with interest at 5 per cent. per annum on the amounts outstanding from time to time. Further it was agreed that such buildings, plant, and works should remain the property of the respondents at the expiration of the lease.

It was also agreed that the council should make to the respondents a fixed annual payment of £250 by way of rental for the said works and for the purchase of water up to 200,000 gallons a day; other payments were to be made by the council to the respondents of £35 per year in respect of repairs and renewals to plant and

buildings and of 1d. per 1,000 gallons for water delivered into the council's mains. A

(iii) These terms were agreed to at a meeting between the respondents' representative and a sub-committee of the said council held on Sept. 23, 1915, and such terms were reduced to writing.

(iv) On July 1, 1918, a formal agreement was entered into between the respondents and the council.

(v) It subsequently became necessary to install a new pump for pumping the water to the surface at the said works, and a supplemental agreement, dated June 21, 1923, was entered into between the respondents and the council. This agreement was in evidence before the commissioners and, in effect, provided for the installation of a new pump if and when required and for the payment by the council to the respondents by annual instalments, with interest, of half the cost of such installation (with a limit of £3,000) and for the necessary amendments in the agreement of July 1, 1918. This new pump, in like manner with the other works, remains the sole property of the respondents. B

(vi) The total cost of the works provided by the respondents by arrangement with the council was £12,281 17s. 4d., of which sum £9,476 11s. 9d. was by cl. 7b of the agreement of July 1, 1918, as amended by the agreement of June 21, 1923, repayable by the council to the respondents in sixty equal half-yearly instalments with interest on the amount for the time being unpaid at the rate of 5 per cent. per annum. The sum of £9,476 11s. 9d. is made up as follows: C

Under agreement of July 1, 1918	...	...	...	£6,671	6	2
Under agreement of June 21, 1923	...	£5,610	11	2		
Less one-half	...	...	...	£2,805	5	7
				£2,805	5	7
				£9,476	11	9

(vii) The respondents have rendered to the said council every half-year a statement of account debiting the council with £157 18s. 10d. for E

"one half-yearly payment of one-sixtieth of the capital cost (£9,476 11s. 9d.) of the pumping machinery and plant under the agreements dated July 1, 1918, and June 21, 1923." F

Added to this statement there has also been a debit in respect of interest at 5 per cent. "on the capital cost unpaid." That interest has varied with each half-yearly statement as such capital cost was reduced by payments made by the council. The council in making its half-yearly payments has specified that such payments included "instalment of principal £157 18s. 10d." G

3. The respondents contended that the one-sixtieth part of the cost of the works paid at six-monthly intervals by the council (namely, the above-mentioned £157 18s. 10d.) represented a capital repayment by the council of the sums expended by the respondents in erecting the works. It was contended by the inspector of taxes (i) that the half-yearly payments of £157 18s. 10d. above referred to were income or business receipts received by the respondents in the course of their business and fell to be included in the computation of their profits for assessment to income tax; (ii) that the said additional assessments were correct and should be confirmed. F

4. The commissioners decided that the said half-yearly payments of £157 18s. 10d. made by the council to the respondents were repayments of capital expended by the respondents at the request of the council and were not payments by way of rent in respect of the water supplied by the respondents to the said council and accordingly allowed the appeal of the respondents.

5. The inspector of taxes, on behalf of the Commissioners of Inland Revenue, immediately on the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law and, in due course, required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

6. The question for the consideration of the court was whether, on the facts above stated and on the proper construction of the documents before us, we came to a correct decision or not.

A. M. Latter, K.C., and J. H. Bowe for the Coalville Urban District Council.

The Attorney-General (Sir Thomas Inskip, K.C.) and Reginald P. Hills for the Crown (in both appeals).

Raymond Needham, K.C., and J. S. Scrimgeour for the Whitwick Colliery Co., Ltd.

BOYCE (INSPECTOR OF TAXES) v. WHITWICK COLLIERY CO., LTD.

LORD HANWORTH, M.R.—This is an appeal by the colliery company from a decision of FINLAY, J., on a Case Stated by the commissioners, who decided in favour of the company. The company have appealed against four additional assessments made on them for the years 1929, 1930, 1931 and 1932 in respect of a sum of £316 for each year. That £316 in each year was composed of two half-yearly payments which were made to the company of £157 18s. 10d. and paid by the council for the urban district of Coalville. The learned commissioners, when the matter was before them, decided that these half-yearly payments made by the council were repayments of capital expended by the company at the request of the council and were not payments by way of rent in respect of water supplied by the company to the council. The commissioners allowed the appeal of the company, but from that decision of the commissioners the appeal was taken to FINLAY, J., and he reversed the decision of the commissioners, whereupon the company have appealed to this court.

The point arises under an agreement which was made on July 1, 1918, between the company and the Coalville Urban District Council. The council were anxious to obtain water from various sources, and they made this agreement with the company for the supply of water by the company to the council. The company having, for the purpose of working their coal mine, to pump a good deal of water out of the mine, the council were anxious to secure the benefit of that water instead of letting it run to waste, and to use it for re-sale to their individual customers within their area.

It must be borne in mind that in all these cases we have to look at the substance of the matter. Perhaps the best authority for that is the statement made in the speech of LORD HALSBURY in *Secretary of State for India v. Scoble* (1), where he says ([1903] A.C. at p. 302):

“Looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words) . . .”

The primary business of the company was the getting of coal from their colliery. Incidental to the getting of coal they had to keep their coal mine free of water. They had, therefore, some waste water available. The council, on the other hand, were anxious to secure this water, and the terms of the agreement provided that there should be an outlay made by the company to the reasonable satisfaction of the surveyor and waterworks engineer to the council, and the outlay was for the purpose of cleaning out the company's existing water shaft, raising the amount to cover the shaft head so as to exclude surface water, then

“Provide and erect upon the company's lands at the said colliery according to designs specifications and tenders to be previously approved by the engineer [to the council] the houses premises engines tank filter equipment pipe meter fittings and works mentioned in the first schedule hereto.”

That schedule sets out that there was to be

“(1) Engine and pump house and premises with engine and pump as now existing or with new pump at company's option. (2) A new filter house with new filter and machinery and equipment. (3) An equalising tank to hold

25,000 gallons with new engine and pump which together with the existing engine and pump is to be sufficient in all respects for the purpose of pumping 200,000 gallons of water at least per day. A 9 in. connecting pipe from such pumps to the council's 12 in. main opposite the said colliery." A

It will be observed that the equipment that was stipulated was unnecessary for the getting of coal from the coal mine and was for the purpose of enabling the council to be supplied with water. In fact, we are told in the Case that the outlay that was made under this head was £9,476 11s. 9d. The outlay, as I have pointed out, had to be made under the direction and to the satisfaction of the surveyor and waterworks engineer of the council, and the outlay was, therefore, not in the hands of the company, but it was in the hands of the surveyor. On the certificate being given that the works mentioned had been completed and that the equipment was ready for the delivery of water, then there were to be payments made under cl. 7 of the agreement. B C

By cl. 11, this agreement is to last for a period of thirty years and at the conclusion of thirty years this equipment, on which the outlay is made, is to remain the sole property of the company; but during that time, certain contingencies were contemplated in that clause. It was possible, for instance, that the company should cease to work their mine. If so they were to have no interest in the outlay that had been made. They had to permit the council to continue pumping their water and the council could then come and continue to use the mine for the purpose of getting water out of it, with the provision that in such circumstances payment was to be made by the council to the company as may be just and equitable, in other words, to recoup the company for some of the outlay that had been made and which in that given contingency would be of no use to the company, who had, in the event contemplated, ceased to operate. Also it is possible that the council could give twelve calendar months' notice, and could continue the agreement for a period further and beyond the thirty years. D E

What was the situation thus created? The company were to make an outlay unnecessary for their coal-getting business, an outlay which in a certain contingency of their not continuing to get coal might not inure at all for their benefit, but they were to find this capital; and there is no indication in the agreement that the company have turned their attention from being a coal mining company to being a water-getting company. The indication is rather the other way, because it is the council who, if the company ceases to get coal, may thereupon come on the company's premises and continue the pumping of the water. F

It is provided by cl. 7 that there shall be payments made on four separate heads: (a) £285 in each year, which seems to be a price or general consideration not determined by any specific detail; (b) a sum equal to one-thirtieth part of the cost of the works, whatever the outlay might prove to be—in fact £9,476; and then (c) interest at the rate of 5 per cent. per annum on any portion of such cost for the time being unpaid. That, of course, would be a decreasing figure year by year; there would be an amortisation of one-thirtieth of the cost, leading to the necessity for a smaller payment of interest on the capital outlay which had been made and which decreased year by year. Then (d) one penny per thousand gallons of water actually pumped by the company. We have to look at the agreement and see whether or not these sums which were paid, the £316 which was paid per year or the £157 which was paid half-yearly, were repayments of capital or were income received by the company. It is found in the Case that the company have rendered to the council every year a statement of accounts debiting the council with £157 18s. 10d. for one half-yearly payment of the capital cost, £9,476 11s. 9d. The amount is so small because by a later agreement the yearly payment was to be one-sixtieth and not one-thirtieth of the outlay made. G

It is always a difficult question whether such annual payments are sums which are paid on account of repayment of capital or whether they can be said to be annual payments within what used to be s. 40 of the Act of 1853, or whether they

fall within r. 19 of the All Schedule Rules under the Act of 1918. It is pointed out in the *Scoble Case* (1) that the income tax does not fall to be charged on repayments of capital, and in that case the direction was given that so far as any payment of the annual sum which was paid was in respect of capital then it did not fall to be charged with income tax. The question which arose in that case was whether these annual sums were capital or income, and the House of Lords finally determined that the word "annuity" loosely used in that case covered payments which were of both characters—both capital and income; and inasmuch as the income tax never was intended to tax capital, an aliquot part of that so-called annuity which was paid and which could be appropriated to the repayment or amortisation of capital must be left outside and free from the incidence of income tax.

Efforts have often been made to lay down some sort of principle as a guide in these cases, but I confess that I think that one has to look at the facts of each case. In *Perrin v. Dickson* (2) I found myself in agreement with ROWLATT, J., and I said ([1930] 1 K.B. at p. 117):

"I agree with ROWLATT, J., that there is no simple touchstone to be applied—such as that there was or was not a pre-existing debt."

The suggestion that there must be a pre-existing debt was pressed on us. I do not intend to go through the cases again; I did so in my judgment in *Perrin v. Dickson* (2).

I intend to look at the agreement as a whole, and I find in the agreement a capital outlay made not really for the purpose of the company but for the purpose of this supply of water and on assets, the user of which in certain events might pass to the council, and in respect to which there was no undertaking or covenant or certainty that the company would continue to use them for the full term of thirty years. In my view the commissioners came to a right conclusion and FINLAY, J., expressed himself to have reached a different decision by no means free from doubt. I will, however, turn to one case which is always referred to in these cases, *Lady Emily Foley v. Fletcher and Rose* (3). That case arose on a demurrer to the fourth plea, which justified the deduction of a sum of money out of the instalments which had to be paid to Lady Emily Foley in respect of one moiety of mines which was sold by the plaintiff for a total capital value of £45,000. On that fourth plea POLLOCK, C.B., said ((1858), 3 H. & N. at p. 777):

"The question upon the fourth plea turns upon whether this is an annuity or annual payment liable to income tax under either the first or second Act referred to."

Then he says (*ibid.* at p. 779):

"These instalments are payments of money due as capital: the Act has made no provision for such a case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits. If payments such as those in the present case are subject to income tax, wherever any debt of any sort is to be repaid by annual payments, or by instalments at three or six months, it would be subject to income tax."

Therefore he deals carefully with the terms of the section but he comes to this conclusion (*ibid.* at p. 780):

"Section 40 does not apply to any case where that which is paid is not distinctly profit. If the plaintiff had sold her estate for an annuity, so calling it, the annuity would have been liable to income tax. But she has sold it for a sum which is payable by instalments, which is therefore not chargeable."

In the present case the company were not, when this agreement was made, trading in selling water. Their main business, as I have pointed out, was the getting of coal, and if they were to sell water it involved them in an immediate capital outlay which they had to make, the reimbursement of which could only

take place after a period of years. But there is as a possible event the contemplation that the company may not go on for the full period of years. There is in the agreement a definite distinction in the sums which are to be paid in respect of items (a), (b), (c) and (d). The agreement does not provide for an inclusive payment for water over a time certain in any event. It provides for the repayment of one-sixtieth part of the capital and provides that interest should be recoverable only upon such portions of capital as remain unpaid—a decreasing sum as years go on.

In these circumstances it appears to me that on the best consideration that I can give to the matter what is paid under item (b) and under item (c) is a payment of an instalment towards the complete payment of the capital outlay which was made at the instance and under the direction of the council, and which inured in certain given events to the benefit of the council even at a time when the company had ceased to operate.

For these reasons I have come to the conclusion that the judgment of FINLAY, J., ought to be set aside and the decision of the commissioners restored. The result will be that the appeal will be allowed with costs.

SLESSER, L.J.—I agree that this appeal must be allowed. In my view the commissioners came to a right conclusion, on consideration of the relevant documents, that this payment was in effect a repayment of capital. The argument for the Crown is substantially this: That under that agreement of July 1, 1918, although certain moneys are to be paid by the council to the colliery company, nominally in respect of different matters, some for water and some for cost of works and interest, and the like, in reality all these payments are payments for the supply of water and nothing else, and that the various methods in which the sums are to be ascertained are no more than methods of quantifying the amount due. If that view is right, then the Crown are right in saying that these moneys which are here sought to be the subject of taxation are income and business receipts received by the company. But, in my view, that is not a proper conclusion when one has regard to the agreement entered into between the company and the council.

There is no question of principle in this case at all. It is a question which must be decided with reference to the substance of the agreement entered into between this company and the council. As I understand the matter, this agreement, though stated in the preamble to be a contract for supply of water, deals with two distinct and different matters, first, the supply of water simpliciter, for which the company are given the right to make charges, those charges, as has been pointed out, being varied on the expiration of thirty years. Then, altogether apart from the agreement as to the supply of water, there is an agreement with regard to the recoupment to the company of the expense to which they have been put in erecting certain waterworks and associated works in order to satisfy the conditions of the contract and the requirements of the council. It is true that by cl. 1 it is provided that the works shall, when completed, remain the sole property of the company; and hence it is argued, among other things, that really the council are buying nothing, and that there is no capital expenditure on their part. But it appears to me that this is in the nature of a joint adventure between two contracting parties. It is true that ultimately the works become the sole property of the company, but during the period dealt with by the contract the council are given many rights over these works and over the business which is there to be carried on and, as my Lord has pointed out, in the event of the company failing to supply the water under the contract the council are themselves given the power to enter on the works and do the pumping. Apart from that, the company are under obligations not only to supply water but also under direct obligations to the council with regard to the works themselves. Thus, by cl. 4:

“The company shall at all times during the continuance of this agreement

maintain and keep the aforesaid shaft and the said works . . . in good and proper repair and condition to the reasonable satisfaction of the engineer."

Again, by cl. 5, dealing with the filtering apparatus, which is part of the works, they are to be managed, maintained, controlled, and repaired, and supplied with the necessary material by the council, and the company shall at all reasonable times during the continuance of this agreement permit reasonable access to see that the filtering works are in proper condition, and are at liberty in certain circumstances to effect extensions and installations at their own cost and expense.

Therefore as it seems to me, during these thirty years, though it is true that the company have entirely to find the money originally, yet throughout that time the council are directly concerned in the making and efficiency of those works, and in respect of the fact that it is only through the existence of these works that they are in a position to obtain this water, they are called on to pay money to the company in direct recoupment of the expenditure upon the works. That is made clear, I think, not only by reference to the general subject-matter of the contract and the way in which it is to be carried out, but by direct agreement. In cl. 7 (b) it is provided that the council shall pay to the company a sum equal to one-thirtieth part of the cost of the said works in each of the thirty years. That is, that within thirty years they will have completely paid back the company for their expense. If it be said, as it has been said, that this is a mere method of quantification, a sum equal to one-thirtieth is not directly a sum attributable to the cost as such, but, as ROMER, L.J., has pointed out during the argument, sub-cl. (c) makes it clear that sub-cl. (b) and sub-cl. (c) of cl. 7 are dealing with the cost as such, because sub-cl. (c) speaks of interest at the rate of 5 per cent. per annum on any portion of such cost for the time being unpaid. The company have paid for the works, and the cost unpaid must be the cost unpaid quoad the council, which indicates that cl. 7 is dealing with the repayment year by year of the cost of those works.

The learned judge has come to the contrary conclusion principally by reason of certain language in cl. 11, which deals with the period for which the agreement lasts. He points out that in one of the terms of that agreement it is said that at the end of the thirty years, if the agreement is renewed, as it may be renewed as there provided, it shall be renewed

"with the following variation (that is to say) that the periodical payments to be made to the company under sub-cl. (a) and sub-cl. (b) of cl. 7 hereof shall be the sum of £356,"

and on that he thinks that this clause favours the view that this is dealing only with water and, for this reason, that it is grouping together sub-cl. (a), which is the item for water (I am paraphrasing what he says), and sub-cl. (b), which is dealing, as it is alleged, with the cost of the works; they are grouped together after the thirty years in £356 to include both. The learned judge says:

"Now that seems to me to be inconsistent with the view that this sum paid under sub-cl. (b) [the payment in respect of part of the cost] was just a payment of capital. It seems to me to show that it was payment in respect of the water and was to continue after the total sum had been repaid."

With respect to the learned judge, I take a different view of that clause. I do not myself quite take the view which was suggested to us by counsel for the company, that sub-cl. (b) has got in by mistake. I think the intention of the draftsman was this. He is speaking of a variation of the original agreement. The original agreement provided for payment (a) of £285 in respect of water, and (d) also with respect to water one penny per thousand gallons, and (b) and (c) dealing with the cost of the work and the interest thereon; and I think that the draftsman is intending to recite again the provision which obtained during the thirty years, for he says:

"The following variation (that is to say) that the periodical payments to be made to the company under sub-cl. (a) and sub-cl. (b) of cl. 7 hereof [I think

he means which have before been required so to be paid] shall be the sum of £356." A

Then it goes on: "and no further sum shall thereafter accrue under sub-cl. (c) of cl. 7." So read, it is merely by way of recital of sub-cl. (a), sub-cl. (b), and sub-cl. (c), and the substitution of £356 for what is still operative, namely, sub-cl. (a), which is dealing with water, and the clause to my mind presents no difficulty; sub-cl. (c) admittedly has come to an end, because the costs have all been repaid and there is no interest to be borne thereon; and similarly sub-cl. (b) has come to an end. In so far as the judgment is founded on so reading that clause I think it cannot be maintained; indeed, I think if anything the clause is rather an indication of the other view. B

An earlier part of cl. 11 refers to

"(a) loss involved by the company's expenditure upon the said works, and (b) the determination of this agreement," C

which again indicates to my mind that part of this agreement is dealing throughout with the thirty years with regard to the works and part of it is dealing with the supply of water.

For these reasons I agree with my Lord that in so far as we are here dealing only with that part of the money which is attributable to the works and not to the water as such, and in so far as in my view the Crown's construction cannot prevail, it follows that these payments are in the nature of capital expenditure, and therefore are not liable to tax, as the commissioners have, I think rightly, decided. D

ROMER, L.J.—I agree. The question which has to be solved appears to me to be one solely as to the proper construction to be placed on the agreement of July 1, 1918. At the time when that agreement was entered into, it is sufficiently plain that the company, though no doubt well equipped both as regards machinery and buildings for the purpose of carrying on a colliery business, was not properly equipped in either respect for the purpose of supplying water to the council. The council were desirous that water should be supplied to them by the company, and they, therefore, must have recognised that if a contract was to be entered into by the company for supplying water to them the company must put themselves into a position, by the provision of adequate machinery and buildings, to do so. If in those circumstances the company had agreed with the council that they would themselves erect the necessary buildings and machinery for the purpose, and the council had agreed that in consideration of their so doing the council would repay to the company by thirty yearly instalments the cost to which the company had been thereby put, I cannot conceive that anyone could contend successfully that the sums so paid by the council to the company were liable to income tax, even though at the end of the thirty years the buildings and plant, which presumably by that time would not be worth very much, should remain the property of the company. A taxpayer can make a capital expenditure on the land of a third party; it is none the less a capital expenditure even if it is on the land of a third party and not on his own land. E F G H

The question that we have to determine, as it seems to me, is this: Is the agreement of July 1, 1918, a composite agreement consisting partly of such an agreement as I have just referred to and partly of an agreement by the company to supply the water when the capital expenditure had been made, or is it solely an agreement by the company to supply the council with water? I

Turning to the agreement it will be found that by cl. 1 the company undertakes to execute works. Clause 2 imposes on the company the obligation, when these works have been completed, of supplying the council with water. In approaching cl. 7, therefore, which provides for the payments to be made by the council, one might reasonably expect that part of that clause would provide for the repayment to the company of some part, if not the whole, of the cost of executing the works or at any rate provide for a payment to the company as consideration for the execution by them of the works. It is to be observed that the clause itself does

not say for what the payments are to be made; it does not say these payments are to be made for the supply of the water; it does not, of course, in terms say that the payments are to be made as consideration for the execution of the works by the company. What it does provide is that during the continuance of the agreement, which is to be thirty years from the date of the engineer's certificate given as to the completion of the works, the council shall pay to the company (a) a sum of £285, and (b) a sum equal to one-thirtieth part of the cost of the said works. Pausing there, it might well be contended that those payments are made solely for the supply of water, because sub-cl. (b) does not say that the council are to pay one-thirtieth part of the cost of the works, but a sum equal to one-thirtieth part of the cost of the works. So that it might well be contended that that is merely a method of estimating the payment to be made for the water under sub-cl. (b) but in no sense a provision for the payment of any part of the cost itself. Then follows sub-cl. (c), which to my mind is conclusive on the matter. It says there is to be paid in addition interest at the rate of 5 per cent. per annum on any portion of such cost for the time being unpaid. Unpaid by whom? Obviously unpaid by the council; in other words, sub-cl. (c) to my mind shows that sub-cl. (b) is providing for a repayment of capital and not for a payment for water supplied calculated by reference to the capital expended.

I doubt whether there is very much in the rest of the agreement that throws any real light on that question. Clause 11, however, provides that in the event of the agreement being terminated by either party the council are to pay to the company the loss involved by the company's expenditure on the said works, which might, of course, involve a payment of practically the whole cost. If the agreement were determined towards the end of the thirty years it is not likely that the works at that time would be worth very much, and the loss involved to the company by its expenditure on works might really be the whole cost of the works. Therefore we find that in any case, whatever construction we put on cl. 7 (b), provision is made in a certain event for throwing, if not the whole cost, at any rate part of the expenditure on the works on to the council.

There is this further to be observed under cl. 11, that if the agreement be terminated by the council the company is to receive by way of compensation not only the loss involved by its expenditure on the works, but also the loss involved by the determination of the agreement. Supposing that the agreement had been determined by the council at an early period of its existence, let us say two years from its date, the council; if the Crown are right in the construction that they ask us to put on cl. 7, would have to pay first of all practically the whole expenditure on the works if the company could persuade the arbitrator that thenceforth the works would be practically useless to them, and in addition would have to pay to the company the whole loss occasioned to the company by not receiving the next twenty-eight instalments under sub-cl. (b) of cl. 7. It is somewhat strange, because there is no doubt that sub-cl. (b) was intended to provide a payment to the company, even if it is paid for water, which the company could properly in its own books allocate as a repayment to it of the expenditure incurred on the works. But in the events which I have mentioned, if the Crown's contention is right, the company would get that sum practically twice over.

SLESSER, L.J., has referred to another part of cl. 11, which undoubtedly at first sight seems to create a difficulty against the construction which I am inclined to put on this agreement. One would have expected that, in the event of the renewal of the agreement, the agreement would have provided that payments under sub-cl. (a) should be continued and that all payments under sub-cl. (b) and sub-cl. (c) would come to an end. On the other hand, what it does seem to provide is that payments under sub-cl. (a) and sub-cl. (b) shall continue and that payments under sub-cl. (c) shall come to an end. But it must also be observed that the payment is in effect the £285 provided by sub-cl. (a) with an addition of 25 per cent., just as, under sub-cl. (d), the payment for a thousand gallons of water is to be at the rate of 1d. with an addition of 25 per cent. Even, therefore,

if that part of cl. 11 is not to receive the construction that SLESSER, L.J., has put on it, it could not, in my opinion, and ought not to militate against giving effect to what appears to be the plain words of sub-cl. (c), and the influence that those words have on the meaning of sub-cl. (b)

I will only add this, that it is a great satisfaction to me to find that the construction which this court has put on the agreement is the construction which was put on it by the parties themselves. In June, 1923, there was some dispute as to the cost to which the company was going to be put, or might be put, by the erection of a new pump, and accordingly an agreement was entered into in June, 1923, which contains a recital which is the source of my satisfaction. It says this :

"Whereas by cl. 1 of the principal agreement [of July 1, 1918] it was agreed that the works therein referred to as 'the said works' should be commenced within a period of three months from the date therein mentioned And whereas such commencement has been delayed by agreement between the parties hereto And whereas disputes have arisen between the parties hereto respecting the liability of the council to pay for the costs of providing erecting and substituting a new pump."

There is no dispute as to the liability of the council to pay the cost of erecting the other machinery and plant; it is merely a dispute as to the liability of the council to pay the cost of erecting a new pump. Why is there any dispute at all? If the Crown are right as to the construction of this agreement there is no liability whatsoever on the council to pay for any part of the buildings, machinery and plant that has been erected in pursuance of the agreement. I agree that this appeal must succeed.

Appeal allowed.

Solicitors : *Savage, Cooper & Wright*, for *Wright, Woodrow, & Aysom*, Leicester;
Solicitor of Inland Revenue.

COALVILLE URBAN DISTRICT COUNCIL v. BOYCE (INSPECTOR OF TAXES)

LORD HANWORTH, M.R.—This is an appeal which is brought by the Crown. The urban district council appeared before the commissioners and claimed that the payment that they made of £316 a year in their accounts to the colliery company ought to be allowed as a deduction from the profits of their water undertaking. It appears that the council carry on a water undertaking, and part of the water that they obtain for that purpose and for the purpose of distribution among their customers is derived from sources of the colliery worked by the Whitwick Colliery Co. Before the commissioners the view was presented that the total payments which were made under this agreement of July 1, 1918, were made on account of the purchase of water which the council had to obtain for the purpose of their water undertaking. The matter came before the commissioners and the Crown then contended that in view of the decision of the commissioners that these payments of £316 a year were made by the council to the company for the purpose of repayment of capital, these were payments not of a revenue character and were not proper items to be debited against the receipts of the council in computing their profits for assessment to income tax.

The commissioners who heard the claim of the council before them, came to the conclusion that inasmuch as these payments were repayments of capital they were not payments of a revenue character, and, therefore, that the council were not entitled to set them off against the profits which they obtained in carrying on the water undertaking. From that decision of the commissioners the council appealed to FINLAY, J., and he once more in his judgment came to an opposite view to that held by the commissioners, although he says he did so not without doubt. The Crown now have appealed to this court, and it was necessary that they should do so in case the appeal which we have just decided was allowed in favour of the company.

We have already in our judgment in the other case fully considered the

terms of the agreement of July 1, 1918, and we have come to the conclusion that the payments made by the council were payments made on account of capital for the purpose of replacing and restoring the capital outlay made by the Whitwick Colliery Co. So the Crown say, that decision having been reached, it must be obvious that the council were not entitled to debit those payments against the profits received in computing their profits. I think, myself, however, that it would be unwise to say that the two decisions were necessarily correlative the one to the other. I think that we have once more to look at the agreement and consider it from the point of view of the urban district council in relation to their liability to pay tax, and I prefer to do so, bearing in mind the conclusion that we have reached, that under that agreement these were repayments of capital.

In computing the amount of the profits or gains which are returned to the income tax authorities, and on which the income tax is charged, by r. 3 of the rules applicable to Cases I and II of Sched. D of the Income Tax Act, 1918, it is laid down that no sum shall be deducted in respect of items (f) and (g). Item (g) is as follows:

"Any capital employed in improvements of premises occupied for the purposes of the trade, profession, employment, or vocation."

It is clear to my mind that that prohibition does not apply in the present case. These repayments on account of capital were made to the company in respect of an outlay by the company in alterations of the colliery premises for the purpose of producing and storing and ultimately passing on the water to the council. Those capital payments and those capital repayments were not in respect of improvement of the premises occupied by the council for the purpose of their trade as water undertakers. But we have still to consider the prohibition in r. 3 (f). That prohibition is as follows: No sum shall be deducted in respect of

"any capital withdrawn from or any sum employed, or intended to be employed as capital in such trade, profession, employment, or vocation."

These repayments were capital repayments and have been held to be capital repayments, but they were sums which were employed as such capital repayments in the trade of water undertakers carried on by the council, and it appears to me that they are really hit by the prohibition contained in r. 3 (f). That provision prevents it being possible for the council to make a deduction in respect of these payments in computing their profits for assessment to income tax. Although I can conceive some cases in which r. 3 (f) might not in parallel circumstances apply, yet I have definitely come to the conclusion, for the reasons already given in the previous case, that these were repayments on account of capital, and I do not see that in respect of them it is possible to say that they were not employed as capital in the trade of the water undertakers.

For these reasons, though I regret I find myself differing from FINLAY, J., it appears to me that the appeal of the Crown must be allowed with costs here and below, and the decision of the commissioners once more restored.

SLESSER, L.J.—I agree.

ROMER, L.J.—I agree. This case, of course, is to be determined on the footing that our recent decision is correct. Whether ultimately it is judged to be correct or not it is at any rate binding on us, and, having regard to that decision, it seems to me necessarily to follow that each payment of £157 10s. by the council, under cl. 7 (b) of the agreement of July 1, 1918, represented a sum brought into the trade of the council as capital, and none the less because it represented capital expenditure not on the land of the council, but on the land of a third party.

I agree that this appeal must succeed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Andrews, Purves, Sutton, & Creery, for A Fishers, Ashby-de-la-Zouch.*

[Reported by J. H. G. BULLER, Esq., and G. P. LANGWORTHY, Esq.,
Barristers-at-Law.]

PEARCE v. MARYON-WILSON

[CHANCERY DIVISION (Luxmoore, J.), November 6, 1934]

[Reported [1935] Ch. 188; 104 L.J.Ch. 169; 152 L.T. 443; 78 Sol. Jo. 860]

Landlord and Tenant—Lease—Covenant against change of user without consent—Identical covenants in all leases on estate—Building scheme—Power of landlord to consent to change of user by one tenant—Rights of other tenants.

Where a number of houses are held under identical leases from the same landlord, each lease containing a covenant against user "otherwise than as a private dwelling-house without the consent in writing of the said lessor having been first obtained," the lessor is entitled to give or withhold such consent without regard to anything but his own wishes. Even if the covenants form part of a building scheme a tenant under such a lease cannot prevent the landlord from consenting.

Per **Curiam**: if there is a building scheme in existence the landlord cannot authorise any departures from the scheme unless the covenant contains words, such as those above set out, providing for his consent to such departures.

Notes. As to waiver of restrictive covenants in identical leases, see 20 HALSBURY'S LAWS (2nd Edn.) 232, para. 253 text and note (q). As to building schemes, see 14 HALSBURY'S LAWS (3rd Edn.) 565-568, paras. 1053-1057.

Case referred to:

- (1) *Whitehouse v. Hugh*, [1906] 2 Ch. 288; 75 L.J.Ch. 677; 95 L.T. 175; 22 T.L.R. 679; 50 Sol. Jo. 615, C.A.; 26 Digest 298, 288.

Action by the plaintiff tenant, the lessee of a house on a Hampstead building estate of the predecessor in title of the defendant landlord, held under a lease for ninety-nine years which contained a covenant not to convert, use or occupy the house as a school, hospital, sanatorium, place of reception for lunatics or persons of unsound mind, a shop, &c., or otherwise than as a private dwelling-house "without the consent in writing of the said lessor having been first obtained." The tenant alleged that the estate was subject to a building scheme. This the landlord denied. The tenant alleged that the landlord, in breach of an implied condition, had permitted other purchasers and lessees to use their houses otherwise than as private dwellings, which had altered the character of the houses and caused him damage. He claimed an injunction to restrain the landlord from so doing.

Gavin Simonds, K.C., and Fortune for the tenant.—This property is on an estate which we say is subject to a building scheme. Some restriction must therefore be put on the words of the covenant. The equity of the case requires that consent to vary those words can only be given where it does not create a radical alteration in the scheme. There is no dispensing power, as between lessor and lessee, except by agreement. [He referred to *Whitehouse v. Hugh* (1)]

Vaisey, K.C., and Danckwerts, for the landlord, were not called on.

LUXMOORE, J.—The answer to the main question arising in this case depends on the true construction of a limitation in a particular covenant contained in a series of leases. For the purpose of determining this question, and for this purpose only, I shall assume as facts matters which are in dispute between the parties, in particular that there was a building scheme which affected the property of Sir Spencer P. M. Maryon-Wilson in Hampstead. Whether that building scheme is in respect of the whole of that property or only of a particular part of it does not matter. I shall also assume that the covenants which have been entered into with regard to the property comprised in that estate are binding on the various persons who are lessees of the estate; that the release of those covenants to a substantial extent would injuriously affect the plaintiff tenant and other persons holding leases of property on the estate; and that all the leases are in the same form, or substantially in the same form, as the lease of March 20, 1899, entered into between Sir Chas. Pocklington Maryon Maryon-Wilson of the one part and Mr. Simon Henry Pearce, the plaintiff in this action, of the other part. The lease is for the term of ninety-nine years from Dec. 25, 1895, at a ground rent of £16 a year, and it contains a number of covenants. The material covenant—cl. 14—is in these words:

“The said lessees will not convert use or occupy the said premises or any part thereof into or for any school hospital or sanatorium or for the reception of lunatics or persons of unsound mind or for any shop warehouse or other place for carrying on any trade business or manufacture whatsoever or keep fowls pigeons or poultry upon any part of the said premises or let furnished or unfurnished apartments or hang out or expose any linen which may have been washed or otherwise to dry in the front or back gardens or use the same otherwise than as a private dwelling-house” [then follow these material words which I think are a limitation on the whole covenant] “without the consent in writing of the said lessor having been first obtained.”

The question which I have to determine is this: Is the power which is reserved by the lessor to release those restrictions a power which he can exercise arbitrarily? I do not use that word in an offensive sense—but can he do it according to his own pleasure, and without regard to the rights of any other person interested in this estate?

Counsel on behalf of the tenant says that, having regard to the fact that there is a building scheme, there must be some restriction put on the generality of these words. He says that the equity of the case requires that the consent can only be given in respect of matters which do not create a radical alteration of the scheme, and that, as between a lessor and a lessee, there is no need for any dispensing power at all. It is quite true that in the case of a single lessor and a lessee there is no need for the words “without the consent in writing of the said lessor having been first obtained,” because of course the lessor can agree with his lessee to vary the terms in any way they both desire. I think, however, that the very fact that there is a building scheme in existence requires that these words should be present in each of the leases if the lessor is to have power to authorise any departure from the building scheme. The words make it quite clear that the lessor is to have the widest possible power. He is given an absolute power of consenting or withholding his consent, and there is no authority to which I have been referred, or which the industry of counsel has been able to discover, which suggests that these words should, in a lease of this kind, be construed in anything but their ordinary and *primâ facie* meaning.

That being so, I am satisfied, on the assumption which I have made, that the lessor is entitled to give or withhold his consent to the various modes of user of the property which are referred to in cl. 14 of the lease, without regard to anything but his own wishes. It seems to me that even if counsel established the existence of a building scheme, and injury to his clients by any departure from it, he would still in law have no cause of action against the present landlord. In those circum-

stances no useful purpose could be served by proceeding further with the case and the only thing that I can do is to dismiss the action, and dismiss it with costs.

Action dismissed with costs.

Solicitors: *Ellis, Bickersteth & Co.; May, May, & Deacon.*

[*Reported by A. W. CHASTER, ESQ., Barrister-at-Law.*]

ABIGAIL v. LAPIN

[PRIVY COUNCIL (Lord Blanesburgh, Lord Tomlin, Lord Wright, Lord Alness and Sir Lancelot Sanderson), May 7, 8, 10, 11, 14, June 19, 1934]

[*Reported* [1934] A.C. 491; 103 L.J.P.C. 105; 151 L.T. 429]

Australia—Mortgage—Priorities—Conflicting equities—Transfer absolute in form intended as security only—No caveat lodged by transferor—Mortgage not registered—Register not searched—Transferee of certificates of title authorised to raise money—Excess of authority on part of agent—Real Property Act, 1900 (N.S.W. No. 25).

Mortgage—Priority—Equitable interests—Transfer of land absolute in form intended as security only—Transferor's rights not registered—Mortgage by transferee—Apparent authority of transferee—Validity of transferee's mortgage as against transferor.

Registered proprietors of two parcels of land under the provisions of the Real Property Act, 1900, of New South Wales, on Dec. 5, 1923, transferred those properties to O.H., the wife of B.H., by transfers in the form prescribed by the Act. The transfers, though absolute in form, were given only as security for payment of costs owing to B.H. and of an amount owing to a bank. The mortgage to the bank was paid off, and the transfers were registered on Dec. 18, 1923, whereupon O.H. became the registered proprietor in fee simple of the lands. On March 14, 1924, O.H. mortgaged the lands to another bank and these mortgages were duly registered. On Sept. 2, 1925, the mortgages were discharged out of moneys lent by a mortgagee which were secured by a statutory mortgage of the same date granted by O.H. as "being the registered proprietor of an estate in fee simple" in the specified properties. On Sept. 4, 1925, the mortgagee lodged a caveat under the Act in respect of these two properties. On Feb. 24, 1926, the mortgagee lodged the mortgage for registration, but it was referred back, and before it was finally re-lodged the original registered proprietors lodged caveats. The mortgagee had no notice of the outstanding equity of the original registered proprietors, but had not searched the register.

Held: the original proprietors' equity ought to be postponed to that of the ultimate mortgagee because

(i) the original proprietors were bound by the natural consequences of their acts in arming O.H. with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to another person: *Butler v. Fairclough* (1), 23 C.L.R. 78, approved; *Rice v. Rice* (2) (1854), 2 Drew 78, approved in part and applied; *Dixon v. Muckleston* (3) (1872), 8 Ch. App. 155, applied; *Shropshire Union Railways and Canal Co. v. R.* (4) (1875), L.R. 7 H.L. 496, distinguished,

(ii) the original proprietors had given O.H. authority to dispose of the property, and, although that authority was subject to restrictions, those restric-

tions did not bind the ultimate mortgagee as they had not been brought to his knowledge: principle stated by FARWELL, J., in *Rimmer v. Webster* (5), [1902] 2 Ch. 163 at p. 173; and by LORD HERSCHELL, L.C., in *Brocklesby v. Temperance Permanent Building Society and others* (6), [1895] A.C. 173 at p. 180, applied.

Notes. As to the postponement of an equitable claimant, see 14 HALSBURY'S LAWS (3rd Edn.) 538, 539, para. 1010, and for cases on the subject see 35 DIGEST 457 et seq.

Cases referred to:

- (1) *Butler v. Fairclough*, [1917] V.L.R. 175; 23 C.L.R. 78; 35 Digest 457, t.
- (2) *Rice v. Rice* (1854), 2 Drew 73; 2 Eq. Rep. 341; 23 L.J.Ch. 289; 22 L.T.O.S. 208; 2 W.R. 139; 61 E.R. 646; 35 Digest 485, 2175.
- (3) *Dixon v. Muckleston* (1872), 8 Ch. App. 155; 42 L.J.Ch. 210; 27 L.T. 804; 21 W.R. 178, L.C.; 35 Digest 484, 2168.
- (4) *Shropshire Union Railways and Canal Co. v. R.* (1875), L.R. 7 H.L. 496; 45 L.J.Q.B. 31; 32 L.T. 283; 23 W.R. 709, H.L.; 35 Digest 464, 2017.
- (5) *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L.J.Ch. 561; 86 L.T. 491; 50 W.R. 517; 18 T.L.R. 548; 35 Digest 482, 2150.
- (6) *Brocklesby v. Temperance Permanent Building Society*, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 43 W.R. 606; 11 T.L.R. 297; 11 R. 159, H.L.; 35 Digest 482, 2149.
- (7) *Carritt v. Real and Personal Advance Co., Ltd.*, (1889), 42 Ch.D. 263; 58 L.J.Ch. 688; 61 L.T. 163; 37 W.R. 677; 5 T.L.R. 559; 35 Digest 485, 2173.
- (8) *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231; 70 L.J.Ch. 477; 84 L.T. 397; 49 W.R. 451; 17 T.L.R. 413; 45 Sol. Jo. 394, C.A.; 35 Digest 441, 1830.
- (9) *Burgis v. Constantine*, [1908] 2 K.B. 484; 77 L.J.K.B. 1045; 99 L.T. 490; 24 T.L.R. 682; 11 Asp.M.L.C. 130; 13 Com. Cas. 299, C.A.; 21 Digest 364, 1419.
- (10) *Barry v. Heider*, 19 C.L.R. 197.
- (11) *Great West Permanent Loan Co. v. Friesen*, [1925] A.C. 208; 94 L.J.P.C. 49; 132 L.T. 408; 35 Digest 458, l.
- (12) *Currey v. Federal Building Society*, 42 C.L.R. 421.
- (13) *Honeybone v. National Bank of New Zealand, Ltd.* (1890), 9 N.Z.L.R. 102; 20 Digest 239, c.
- (14) *Agra Bank, Ltd. v. Barry* (1874), L.R. 7 H.L. 135, H.L.; 35 Digest 457, 1977.
- (15) *Re King's Settlement, King v. King*, [1931] 2 Ch. 294; 145 L.T. 517; 100 L.J.Ch. 359; Digest Supp.
- (16) *Perry-Herrick v. Attwood* (1857), 2 G. & J. 21; 27 L.J.Ch. 121; 30 L.T.O.S. 267; 11 Jur.N.S. 101; 6 W.R. 204; 44 E.R. 895, L.C.; 35 Digest 481, 2145.
- (17) *Tsang Chuen v. Li Po Kwai alias Li Kan*, [1932] A.C. 715; 101 L.J.P.C. 193; 148 L.T. 44; Digest Supp.

Appeal by special leave from a judgment of the High Court of Australia (Appellate Jurisdiction), dated March 28, 1930, reversing a judgment of the Full Court of the Supreme Court of New South Wales, dated Sept. 23, 1929, which had affirmed the judgment of the judge in equity of the Supreme Court. The plaintiffs, Mark Lapin and his wife, brought an action in the Supreme Court of New South Wales in Equity against the ultimate mortgagee (since deceased), claiming to be registered as full proprietors of certain lands under the Real Property Act of New South Wales, 1900, free from a mortgage to the ultimate mortgagee, dated Sept. 2, 1925, delivery up of the certificates of title and other relief. The plaintiffs were the original registered proprietors of the lands until they allowed the ultimate mortgagee's mortgagor to be registered as proprietor. The facts, together with the relevant sections of the above Act, are fully set out in the judgment of the Judicial Committee.

The trial judge (LONG INNES, J.) dismissed the action and his judgment was affirmed by the Full Court of the Supreme Court of New South Wales (HARVEY, C.J., in Equity, STEPHEN, J., and HAMMOND, A.J., see (1929) S.R. (N.S.W.) 514). On appeal to the High Court of Australia the judgment of the Supreme Court was reversed (KNOX, C.J., ISAACS and DIXON, JJ.; GAVAN DUFFY and STARKE, JJ., dissenting).

The appeal is reported 44 C.L.R. 166.

Maughan, K.C., and *Wilfrid Barton* for the ultimate mortgagee.

Piddington, K.C., and *Chetwood* for the original proprietors, the plaintiffs.

Their Lordships took time for consideration.

June 19. The judgment of their Lordships was delivered by

LORD WRIGHT.—The appellants are the representatives of E. R. Abigail, a solicitor at Sydney, who was a defendant in the action but has since died; he will hereafter be referred to as the ultimate mortgagee. The respondents are the Lapins, Mark and Pearl, husband and wife, who were plaintiffs in the action and the original registered proprietors of the land. Other defendants in the action were one Heavener, a solicitor, and his wife, Mrs. Heavener, who was in the matter in question his nominee. On Dec. 5, 1923, the original proprietors executed two memoranda of transfer, duly witnessed by a solicitor in the statutory form required by the Real Property Act of New South Wales, 1900, of two properties, in respect of which they were then respectively registered as proprietors of an estate in fee simple, to Mrs. Heavener; in the one case the consideration money was expressed to be £1,800, and in the other case £1,200; the receipt of these sums respectively was acknowledged on the transfers. The titles of the original proprietors were at the time subject to a registered mortgage of £1,320 to the Union Bank, which was discharged on Dec. 7, 1923. On Dec. 18, 1923, Mrs. Heavener, or Heavener on her behalf, lodged these transfers and the certificate of title which she had received from the respondents, at the Land Registry, where the transfers were entered in the Land Registry books, and particulars were endorsed on the certificate of title which the Heaveners held, and which accordingly showed Mrs. Heavener as the proprietor in fee simple of the estates. On March 14, 1924, Mrs. Heavener mortgaged the properties in statutory form to the English, Scottish and Australian Bank; this mortgage was duly registered, as appears on endorsements on the certificates of title, which the mortgagee bank held. On Sept. 2, 1925, as appears from further endorsement on the certificates of title, these mortgages were discharged, as is sufficiently clear, out of moneys lent by the ultimate mortgagee to the Heaveners on or about Sept. 2, 1925; these moneys, which amounted in all to £5,500, were secured by a statutory mortgage dated Sept. 2, 1925, granted by Mrs. Heavener in terms as "being the registered proprietor of an estate in fee simple" in the specified properties, including the two properties in question; the mortgage was also signed by the ultimate mortgagee as being correct. The ultimate mortgagee thereafter held the certificates of title. On Sept. 4, 1925, the ultimate mortgagee, as mortgagee, lodged a caveat under the Act in respect of these two properties. On Feb. 24, 1926, the ultimate mortgagee lodged the mortgage for registration, but it was referred back by the registrar for the correction of some minor formal defects; before it was finally relodged the original proprietors lodged caveats and in due course brought the present action.

The original proprietors claimed as against the Heaveners that the register should be rectified by registering them as full proprietors of the lands and that the certificates of title should be delivered up to them; they alleged that they had handed over the certificates of title solely as collateral security for a loan in respect of another transaction, but that the loan had since been discharged; they further alleged as regards the transfers that they did not sign them at all or, if they did, were induced to do so by Heavener's fraud in the belief that they were by way of further security for the other transaction. Heavener by way of answer alleged

that the lands were transferred absolutely in order to discharge the Union Bank mortgage and in payment of costs due to him. The ultimate mortgagee was joined as defendant by the original proprietors, as having no better title than the Heaveners because he did not take bona fide as a purchaser for value and without notice. It was also alleged that the security was void because the ultimate mortgagee was acting as a moneylender in the transaction without being registered as such.

The trial before LONG INNES, J., took a somewhat unusual course: after evidence had been given and closed on these issues, the original proprietors were allowed to amend as against the Heaveners, though not in terms as against the ultimate mortgagee, by alleging that, if they knowingly signed the transfers, they did so on the terms that Heavener would hold the transfers as security for his professional costs and not otherwise, and that he registered the transfers in fraud of that understanding and without their knowing what he had done until October, 1925. This was a new case, contrary to the evidence given by both parties.

By his judgment delivered on March 22, 1929, LONG INNES, J., did not accept the evidence of the original proprietors, but found that they did sign the transfers, and signed them, moreover, knowing that they were signing transfers of the properties, that they were signing as transferors, and that the transferee was Mrs. Heavener; he did, however, further find that they understood the transfers were to be by way of security only for Heavener's costs and for repayment of the mortgage debt to the Union Bank. In so finding the judge took a midway course, disbelieving the sworn evidence of both parties. As to the ultimate mortgagee, who gave, so the judge said, his evidence with great frankness and whose evidence the judge accepted, he found that it was not established that he was a moneylender within the meaning of the Moneylenders and Infants Loan Act, 1905; the judge also found that the ultimate mortgagee, as regards the mortgage in question, discharged the onus of establishing that he was a bona fide purchaser for value without notice; he further found that the ultimate mortgagee made the advance in question on the faith of the transfers of Dec. 5, 1923, and of the certificate of title in Mrs. Heavener's name, and of the mortgage executed by Mrs. Heavener as registered proprietor. He accordingly held, in regard to the mortgage of Sept. 2, 1925, that the original proprietors were estopped by their representations from asserting as against the ultimate mortgagee that their equity was prior in point of time to that of the ultimate mortgagee.

A later mortgage given by the respondents to the ultimate mortgagee on the lands, which stood on a different footing, is not here material.

This judgment was on appeal affirmed by the Full Court of New South Wales. The court agreed with the findings of fact of the local judge; in effect, the court held that the case was covered by the decision of the High Court of Australia in *Butler v. Fairclough* (1); that the ultimate mortgagee's equity, though subsequent in time, was the better equity; that the original proprietor's conduct

"in executing a memorandum of transfer on the face of it clear and unfettered, and the failure to place on the register any embargo which would prevent the Heaveners from using those transfers at their face value, is such unreasonable and negligent conduct as to make their equity inferior"

to the ultimate mortgagee's. They also agreed with the judge's finding that the ultimate mortgagee was not carrying on business as a moneylender. They accordingly dismissed the appeal.

The original proprietors then appealed to the High Court of Australia, the judges of which by a majority (KNOX, C.J., ISAACS and DIXON, JJ.) allowed the appeal, GAVAN DUFFY and STARKE, JJ., dissenting.

It is difficult fairly to summarise these carefully reasoned judgments; but, taking the crucial issue to be whether the equitable interest of the original proprietors was to be postponed to that of the ultimate mortgagee, the conclusion on that point of the late learned Chief Justice, SIR ADRIAN KNOX, long a distinguished member of

the Judicial Committee, may be found in substance in the following passage from A his judgment:

"The registration of Mrs. Heavener as proprietor in fee simple was consistent with the existence of an equitable interest outstanding in some other person and not inconsistent with the whole beneficial title to the lands being in the original proprietors. Mrs. Heavener was in a fiduciary relation to the original proprietors, and was entitled under the arrangement between them and Heavener to become registered as proprietor and to hold the documents of title until the debt intended to be secured was paid off. The decisions in *Shropshire Union Railways and Canal Co. v. R.* (4), *Carritt v. Real and Personal Advance Co., Ltd.* (7), and *Taylor v. London and County Banking Co.* (8), and the observations of FARWELL, J., in *Rimmer v. Webster* (5) ([1902] 2 Ch. at p. 172), and *Burgis and others v. Constantine* (9) ([1908] 2 K.B. at p. 501) seem to me to indicate that the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act of omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity at the time when he acquired it that the prior equity was not in existence. On the evidence as it stands no such act or omission on the part of the original proprietors has, in my opinion, been proved. The transfers did not amount to such an act for there is no evidence that the ultimate mortgagee ever saw them. The certificates of title showing Mrs. Heavener as registered proprietor were consistent with the beneficial ownership of the lands being in the original proprietors or any other persons and did not indicate that she held the beneficial as well as the legal interest. The omission to lodge a caveat can have had no effect in inducing the ultimate mortgagee to advance the money for it is not proved that any search was made before the money was advanced."

ISAACS, J., dealing with the same issue, said:

"The full court's concurrence on that point is open, as I think, to the observation that too great significance is attached to the single fact of Heavener's registration, and too little both to the lack of evidence as to the ultimate mortgagee's conduct being in part influenced by the absence of a caveat, and to the silence of Harris."

DIXON, J., lays emphasis on the fact that:

"Although the original proprietors did not caveat, it does not appear that any search for caveats was made on the ultimate mortgagee's behalf, or that he acted in the belief that there was no caveat. The default of the original proprietors—if default it be—therefore, did not contribute directly to any assumption upon which the ultimate mortgagee may have dealt with the Heaveners."

On the other hand, the final conclusion of GAVAN DUFFY and STARKE, JJ., is summed up in the following words:

"In our opinion, the original proprietors are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of the ultimate mortgagee to the extent allowed by the Supreme Court."

In this conflict of eminent judicial opinion their Lordships find themselves in agreement with GAVAN DUFFY and STARKE, JJ., in regard both to their reasoning and their conclusion.

The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout Australasia and in other

parts as well. It is a system for the registration of title, not of deeds; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers, and privileges thereto belonging or appertaining, is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognised under the Real Property Acts. This was held in *Barry v. Heider* (10) and in *Great West Permanent Loan Co. v. Friesen* (11). For the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed. In the registry all statutory transfers are filed and duplicate certificates of title are kept and noted up from time to time with all registered dealings; the other duplicate certificate of title is held by the registered proprietor. The register is open to inspection and search.

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of affecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee. Such a practice has been recognised in various decisions of the courts, and in particular in *Currey v. Federal Building Society* (12). In the present case the same result was effected, as the judge found, as between the parties by an oral agreement; but all that appeared in the registry was the absolute grant of transfer as for full consideration paid and received; no document of qualification was executed and no caveat was lodged. In the result the public register showed to all the world, that is, to anyone who cared to inspect, that the fee simple was in the two estates vested in Mrs. Heavener; the equity of redemption (if it is so to be called for convenience) was in no way indicated to any searcher of the register.

The Full Court of New South Wales regarded the present case as governed in principle by *Butler v. Fairclough* (1), where there was a conflict of equities between a prior equitable encumbrancer who had lodged no caveat and a subsequent transferee who had, after a search of the register and without notice of the unregistered equitable charge, paid the purchase consideration. It was held that the former was to be postponed. GRIFFITH, C.J., thus summed up the position:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of

inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it. Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case the plaintiff might, if he had been sufficiently diligent, have registered his charge of June 30 on that day. The defendant, having before parting with the purchase money to Good found on searching the register that Good had a clear title, and relying on the absence of any notice of defect in Good's title, paid the agreed price."

Their Lordships think that that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualification. The only distinction between *Butler v. Fairclough* (1) and the present case appears to be that in the present case it was not proved that (though he had no notice of the prior charge) the ultimate mortgagee made any search before lending the money: he said that he instructed his conveyancing clerk Harris to examine the title and left it to him. Though there is no reason why Harris should have neglected his duty, Harris was not called, it seems because of the unfortunate course taken at the trial of raising fresh issues after the evidence was closed. That the question whether or not a search of the register had been made might be regarded as of decisive importance, does not emerge on the record or in any of the judgments until those in the High Court. The question is whether, in such a case as this, where the title on the register was clear, the failure to prove a search by the second encumbrancer can make any difference. There is no reason to think that Heavener would have ventured to claim that Mrs. Heavener was proprietor in fee simple unless she was so registered, and in that sense the grant of the transfer by the respondents to her did cause or contribute to the ultimate mortgagee's lending the money. A search by or on behalf of the ultimate mortgagee would merely have shown that the transfer purported to be for full consideration, thus excluding any idea of it being by way of security. The case is closely parallel to *Honeybone v. National Bank of New Zealand* (13), where the second encumbrancer's equity was preferred, on the ground that the act of the plaintiff in falsely representing the transaction with the first encumbrancer to have been a sale and not a mortgage, and in placing him in a position to obtain a title as registered proprietor and so obtain an advance from the bank, the second encumbrancer, disentitled him to put his equity in competition with the later equity. No question is raised in that case whether the second encumbrancer made any search or enquiries: the emphasis is placed on the conduct of the mortgagor. This is in accordance with the judgment of KINDERSLEY, V.-C., in *Rice v. Rice* (2), where the question was whether the equity of the plaintiff in respect of his lien as unpaid vendor should be preferred to that of a subsequent equitable mortgagee, who had lent his money to the purchaser against a deposit of the title deeds and of an assignment showing payment of the purchase money in full. The opinion of the Vice-Chancellor no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that *prima facie* priority in time will decide the matter unless, as laid down by LORD CAIRNS, L.C., in *Shropshire Union Railways and Canal Co. v. R.* (4), that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose. The Vice-Chancellor did not treat the possession of the title deeds as necessarily decisive: he said that the conduct of the parties having the equitable interests and all the circumstances must be taken into consideration in order to determine which has the better equity. He held that the second encumbrancer

was not bound to go and inquire of the vendors whether they had received all the purchase money: he then describes the conduct of the vendors in this language:

"They voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong for he has only done that which the vendors authorised and enabled him to do."

These words can aptly be applied to the present case if "for deposit of the deeds" here is substituted that the original proprietors had authorised and enabled Mrs. Heavener to register herself as owner in fee simple. Apart from priority in time, the test for ascertaining which encumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim; in the present case the original proprietors on the one hand enabled the Heaveners to represent themselves as legal owners in fee simple, while on the other hand it cannot be said that the ultimate mortgagee did or omitted to do anything which he should have done in lending the money on the security, though he might by registering the mortgage, have secured the legal title; it may be that he accepted Heavener's word that he or his wife were registered as having the legal title, but that was a true statement and no search or inquiry that could have been made would have displaced it.

The majority of the High Court refer to the English cases which have held that the equitable interest of a beneficiary is not in general to be postponed to that of a subsequent encumbrancer, who has taken for value under the trustee without notice that the trustee was not absolute owner but was committing a breach of trust. Such a rule is well established in England, and has been applied in the *Shropshire Union Railways Case* (4) and many other later cases which it is not necessary here to cite; LORD CAIRNS bases the rule primarily on the fact that "there is a large, well-known and recognised system of trusts in this country," and concludes, proceeding upon that well-established system, that he could not find that there was anything done by the cestui que trust which ought to forfeit and displace their equitable title. It may be that the application of this rule has been induced by the partiality of courts of equity for their protégé, the cestui que trust; but even the equity of a cestui que trust may be defeated, as LORD CAIRNS said,

"by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and take away the pre-existing equitable title."

But the rule is one which has been applied to trusts, and not to equitable estates or interests, such as those of unpaid vendors and equitable mortgagees, or to equities like an equity to set aside a conveyance for fraud; it cannot be said that in regard to such equities there is any recognised system of trusts which ought to put their parties on inquiry in dealing with the party clothed with the legal estate. It is not here necessary to consider whether the same rule is applicable where there is a system of registration of legal titles and for protection of equitable interests by caveats such as prevails under the Torrens system. LORD SELBORNE, in *Agra Bank, Ltd. v. Barry* (14) (L.R. 7 H.L. at p. 147), pointed out that what has been called a duty of a purchaser or mortgagee to investigate title is not a duty owing to the possible holder of a latent title or security, but is simply a prudent course in the purchaser or lender's own interest; he adds, with reference to the policy of the Irish Register Act, that it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. It is unnecessary here to add that when these questions need to be considered, it is always understood that the purchaser or mortgagee has not either express or constructive notice of the prior charge.

It may be, however, that the majority judgment in the High Court laid emphasis

on the absence of search of the register by the ultimate mortgagee because they were of opinion that there must be something in the nature of a direct representation by the original proprietors to the ultimate mortgagee. In fact, in this case the only documents under the hand of the original proprietors or either of them which a search would have revealed are the transfers, the terms of which embody a transfer out and out as for full consideration: and if these had been seen by or on behalf of the ultimate mortgagee they might in one sense be construed as a direct representation from them to him; but it seems that the transfers were put on the register by the Heaveners, not by the original proprietors: the transfers could thus only in an artificial sense be described as representations made by the original proprietors to the ultimate mortgagee. In truth, the essence of the matter was the conduct of the original proprietors in giving the transfers to Heavener: so far as there was any representation in any strict sense to the ultimate mortgagee, it was made by Heavener. In *Dixon v. Muckleston* (3) LORD SELBORNE in terms distinguishes the case of an express representation from the case of acts or of negligence: a man, he says,

"is not entitled to deny being bound by the natural consequence of his acts, if it be a case of positive acts."

He adds, in much the same language as that of *KINDERSLEY, V.-C.*, quoted above,

"By one or other of these means he may have armed another person with the power of going into the world with false colours; and if it be really and truly the case that by his act or his improper admissions such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power."

LORD SELBORNE also adds that the equitable charge will be good if there has been a positive statement honestly believed.

It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in *Re King's Settlement, King v. King* (15). But it is seldom that the conduct of the person whose equity is postponed takes, or can take, the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the ultimate mortgagee to succeed in this appeal.

In the High Court *GAVAN DUFFY* and *STARKE, JJ.*, also relied on a further or supplementary reasoning, based on the principle of an authority being acted upon to create the later equity, but acted upon either contrary to or in excess of the authority actually intended to be given. As they point out, the form of actual transfer was adopted

"so that Olivia Sophia Heavener might deal with the lands as if they were her own and without the restrictions created by an instrument of mortgage under the Act of New South Wales":

she was thus necessarily trusted by the original proprietors as to the time and method of realisation (that is, in order to pay the cash due to her husband) and not to exceed the limits of her security. On this view the case falls within the general principles laid down in *Brocklesby v. Temperance Permanent Building Society and others* (6). LORD HERSCHELL, L.C., thus sums up the rule ([1895] A.C. at p. 180):

"Where a person has thus been intrusted with the possession of title deeds with authority to raise money upon them, the owner of the deeds cannot take

advantage of any limitation in point of amount which he placed upon the authority to raise money as against a lender who had no notice of it."

The same principle, it was held, had been applied in equity in *Perry-Herrick v. Attwood* (16). This decision of the House of Lords was followed in *Rimmer v. Webster* (5), where certain stock had been transferred to a broker by the owner with instructions to sell it, but the broker abused his position as transferee of the stock in order to borrow money for his own purposes on its security: it was held by FARWELL, J., that the borrower's equity must prevail: SIR GEORGE FARWELL has stated the principle ([1902] 2 Ch. at p. 173):

"When the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee."

The foundation of the rule is that there has been an authority to deal with the property, as GAVAN DUFFY and STARKE, JJ., in the High Court have here found that there was; no doubt they have so found as an inference from all the facts, but their Lordships accept the finding. The case then becomes one of an agent exceeding the limits of his authority but acting within its apparent indicia. *Rimmer v. Webster* (5) has been approved by this board in *Tsang Chuen v. Li Po Kwai alias Li Kan* (17); *Burgis and others v. Constantine* (9) contains nothing contrary to this rule; as SIR GEORGE FARWELL there points out, the case before the court was to be distinguished from *Rimmer v. Webster* (5) because it was one of trustee and cestui que trust, to which he thought the principles of the *Shropshire Union Railways Case* (4) were applicable. Their Lordships agree with GAVAN DUFFY and STARKE, JJ., that on this ground also the ultimate mortgagee should succeed.

This conclusion renders it unnecessary to consider the contention, raised on behalf of the ultimate mortgagee, on s. 43 of the Land Transfer Act, 1900, namely, that the section is not limited to the case of a registered mortgagee or other transferee. But the question has now become immaterial in this appeal.

A contention was put forward on behalf of the original proprietors that on any view the original proprietors were in possession of at least one of the pieces of land at all material times, so that in this way the ultimate mortgagee was put on inquiry as to their title. No reference is made to any such point in any of the judgments. It is enough here to say that the evidence on the record is wholly inadequate to justify any finding that there was such possession.

As their Lordships are of opinion that the equity of the ultimate mortgagee should be preferred, it becomes unnecessary to consider further the order of the High Court that there should be an inquiry on the footing that the ultimate mortgagee's security was bad, to ascertain whether any part or the whole of the money lent by the ultimate mortgagee was used to pay off an encumbrance then existing on the property, that is, the registered mortgage of the English, Scottish and Australian Bank. But on the basis that the ultimate mortgagee's security is good, but was created by the Heavener beyond or contrary to their rights as between themselves and the original proprietors, there will need to be an adjustment between the Heavener and the original proprietors; their Lordships have no figures as to the value of the two properties or as to the value of the other properties included in the ultimate mortgagee's mortgage, nor do they know how much, if any, of the debt in respect of which the properties were charged to Mrs. Heavener remains outstanding. But it is clear that the original proprietors will have a claim against Mrs. Heavener if, or to the extent that, they are now unable, by reason of the encumbrance created in favour of the ultimate mortgagee, to get reconveyance of their properties on payment to Mrs. Heavener of principal, interest and costs.

As some reflections seemed to be directed by counsel for the original proprietors

against the ultimate mortgagee in the course of the argument before this board, it seems right to say that no ground appears for any such reflections; which find no countenance in any of the judgments; indeed, the trial judge, as already observed, accepted his evidence. It has not been thought necessary here to deal in any detail with the plea based on the Moneylenders and Infants Loan Act, 1905, except to say that in their Lordships' opinion the trial judge properly applied the provisions of the Act to the facts as he found them; but as the full court and the High Court have supported his decision, this concurrence of findings would in itself, in the absence of any error in law, conclude the matter before this board.

In the result their Lordships are of opinion that the appeal should be allowed, the order of the High Court should be set aside and the order of the trial judge, as varied by the order of the full court, should be restored; the cross-appeal should be dismissed; the original proprietors should pay the costs of the appeal to the High Court and of these appeals.

They will humbly so advise His Majesty.

Appeal allowed.

Solicitors: *Galbraith & Best; Birkbeck, Julius, Edwards, & Co.*

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

KISCH v. HAWES BROS., LTD.

[CHANCERY DIVISION (Farwell, J.), November 13, 1934]

[Reported [1935] Ch. 102; 104 L.J.Ch. 86; 152 L.T. 235]

Landlord and Tenant—Lease—Forfeiture—Denial of landlord's title—Statement of claim by landlord pleading his title—Defence by tenant pleading "the defendants are in possession of the premises"—Defence amended at trial—Effect by amendment—Rules of Supreme Court, Order XXI, r. 21.

Landlord and Tenant—Lease granted by tenant for life—Lease not taking effect in possession within twelve months of grant—Effectiveness as agreement to grant valid lease—Burden of proving best rent reasonably obtainable—Settled Land Act, 1882 (45 & 46 Vict., c. 38), ss. 7, 8, 54—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 152 (1), (2); s. 154.

Owing to the provision of Order XXI, r. 21, that "it shall be taken to be implied in" [a statement in defence to an action for recovery of land that the defendant is in possession of the land] "that he [the defendant] denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim," a plea that "the defendants are in possession of the premises" in such a defence by a tenant to a statement of claim pleading his landlord's title amounts to a denial of the landlord's title and so entitles the landlord to forfeit the tenant's lease.

On Oct. 19, 1919, a tenant for life of certain premises granted a company a new twenty-one years lease of the premises, which were then let, under a lease expiring on Dec. 24, 1920, to a firm whose business the company had taken over. The new lease was at an increased rent, but was not to take effect until Dec. 25, 1920. The tenant for life died in 1933, and the new landlord, her successor as tenant for life, brought an action against the tenant company for possession of the premises, claiming that the new lease was invalid as it was not within the power, conferred on a tenant for life by the Settled Land Act,

1882, s. 6 and s. 7 (1), to grant a lease "made to take effect in possession not later than twelve months after its date." The landlord in her statement of claim pleaded her title as tenant for life, and the tenant company in its defence pleaded "the defendants are in possession of the premises." In her reply the landlord claimed to re-enter on the ground that the plea in the defence denied her title, and so was a forfeiture. At the trial the defendants amended their defence by adding to the plea of possession of the premises the words "under the lease" above referred to, and relied on s. 152 (i) (a) of the Law of Property Act, 1925 (which section is printed below), to make the lease "take effect in equity as a contract for the grant . . . of a valid lease," and so entitle the tenant company to remain in possession. No evidence was given by either side whether the rent reserved by the lease was "the best rent that can reasonably be obtained," as required by s. 7 (2) of the Act of 1882.

Held: the landlord was entitled to possession because (i) the plea of possession was, for the reasons above set out, a forfeiture.

(ii) this forfeiture was not cured by the subsequent amendment of the defence.

(iii) even if the lease was not forfeited, and even assuming that s. 152 of the Law of Property Act, 1925, applied to the lease, in the circumstances of the case it was for the tenant company to prove, in order to bring itself within s. 152, that, apart from the non-compliance with s. 7 (1), the lease was within the powers of the grantor.

(iv) the tenant company had failed to show that the rent was the best rent within the meaning of s. 7 (1), and, therefore, it had failed to show that it could properly claim the benefit of s. 152 (1).

Quære: whether s. 152 applies to a lease not taking effect in possession not later than twelve months after its date.

Notes. Sections 6, 7, and 54 of the Settled Land Act, 1882, correspond respectively to s. 41, s. 42 (1)-(3), and s. 110 (1) of the Act of 1925. The dictum of FARWELL, J., as to the burden of proving that the lease is within the powers of the grantor (post, p. 742) must be read subject to the explanation of it given by the Court of Appeal in *Davies v. Hall*, [1954] 2 All E.R. 330 at p. 331, letter D, to p. 332, letter H; and p. 334, letters A to F.

As to forfeiture for a plea of possession, see 20 HALSBURY'S LAWS (2nd Edn.) 778, para. 1076, note (q), and 248, para. 281; as to a tenant for life's statutory powers to grant leases, see *ibid.* 27, 28, para. 32. For the Settled Land Act, 1925, s. 41, s. 42, s. 110, see 23 HALSBURY'S STATUTES (2nd Edn.) 108, 110, 233. For the Law of Property Act, 1925, s. 152, see 20 *ibid.* 172.

Action for recovery of land.

The facts are sufficiently stated in the headnote. The relevant provisions of s. 152 of the Law of Property Act, 1925, are as follows:

"(1) Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted which by reason of any failure to comply with the terms of the power is invalid, then—(a) as against the person entitled after the determination of the interest of the grantor to the reversion; or (b) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease; the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power: Provided that a lessee under an invalid lease shall not, by virtue of any such implied contract, be entitled to obtain a variation of the

lease if the other persons who would have been bound by the contract are willing and able to confirm the lease without variation.

"(2) Where a lease granted in the intended exercise of such power is invalid by reason of the grantor not having power to grant the lease at the date thereof, but the grantor's interest in the land comprised therein continues after the time when he might, in the exercise of the power, have properly granted a lease in the like terms, the lease shall take effect as a valid lease in like manner as if it had been granted at that time."

Fergus Morton, K.C., and *G. D. Johnston* for the plaintiff landlord, the tenant for life.

A. C. Nesbitt for the defendant company, the tenants.

FARWELL, J.—This is an action which gives rise to a curious question between the plaintiff, who is now tenant for life, and the defendant tenants, who are in occupation of certain premises in Notting Hill under a lease which was granted by the plaintiff's predecessor, who was herself during her lifetime tenant for life.

[His Lordship stated the facts, and continued:] The plaintiff, in her statement of claim, pleads her title to the property as tenant for life, and claims possession and mesne profits since Oct. 9, 1933, that is to say, since the death of the prior tenant for life. The defendant tenants put in a defence, and the first paragraph of that defence is in these terms:

"The defendants are in possession of the premises No. 160, High Street, Notting Hill Gate, referred to in the statement of claim."

That is how the defence was drawn; that is how the defence was delivered on July 13 of this year, and that is how the defence has stood, unaltered, down till to-day. For the effect of such a plea it is necessary to refer to Order XXI, r. 21, which is in these terms:

"No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends upon an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned."

On that the landlord submits that she is entitled to re-enter on the ground that the first paragraph of the defence amounts to a denial of the plaintiff landlord's title, and that a denial of the landlord's title by a tenant is a ground upon which a landlord is entitled to forfeit the lease. When the case was opened before me the defendant tenants sought leave to amend their defence by adding to the end of the first paragraph the words "under the lease hereinafter referred to," and, with some hesitation, I permitted the defence to be amended accordingly. In my judgment, however, notwithstanding the amendment, the defendant tenants cannot escape from the result of their own plea. As soon as the defence was delivered on July 13, 1934, the plaintiff landlord became entitled to forfeit the lease, and she made it plain, on July 18 when the reply was delivered, that she was claiming the right to re-enter on that ground. It is impossible by amendment now to destroy the effect of what was done as soon as the defence was delivered. Accordingly, on that short ground, the plaintiff landlord is entitled to possession of the property, and to payment of the rent of £160 a year under the then existing lease down to the forfeiture. As from that date the defendants have been in possession as trespassers, and the plaintiff is entitled to mesne profits and to an inquiry as to the mesne profits payable from July 13, 1934, down to the date of possession. That in itself is sufficient to dispose of this action.

However, another point has been taken and argued before me, and I think I ought quite shortly to state my view on it, because this matter, which is of importance to the parties, may go elsewhere. The point taken is this: It is said that, assuming that there has been no forfeiture, nevertheless the plaintiff landlord is entitled to succeed in this action, because the lease of Oct. 9, 1919, was not such a lease as Mrs. Ramus, as tenant for life, could have granted. Under s. 7 of the Settled Land Act, 1882, provision is made for the grant of leases by tenants for life. Section 6 provides that the tenant for life may lease the settled land or any part thereof for any term not exceeding, in the case of such a lease as this, twenty-one years, and s. 7 provides:

"Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date."

Sub-clause 2 provides:

"Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case,"

and sub-cl. 4 provides:

"A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence."

It is said on behalf of the plaintiff that this lease is not such a lease as the tenant for life could effectually grant, because it is not a lease "to take effect in possession not later than twelve months after its date." That, on the face of it, would seem to be a good plea. This was a lease which was granted on Oct. 9, 1919, and it was not to take effect until Oct. 25, 1920. Obviously, therefore, it is not a lease made to take effect not later than twelve months after its date, and that being so, it is not such a lease as a tenant for life could grant so as to be binding on the persons entitled in reversion. Apart from any other question, that, on the face of it, would appear to entitle the plaintiff to claim possession of the property.

It is said on behalf of the tenants, however, that the plaintiff is not entitled to succeed on that ground because the tenants' rights are preserved and their position is safeguarded, by ss. 152 and 154 of the Law of Property Act, 1925. So far as s. 154 is concerned, its only relevance is that it makes the earlier section retrospective. [His Lordship read the relevant portions of s. 152, and continued:] It is said that here is a case where a lease has been granted which is invalid because of a failure to comply with the terms of the power, and that, that being so, s. 152 saves the lessees and entitles them, as against the plaintiff, to remain in occupation under it. Section 152 is a reproduction, in somewhat different language, of a similar provision in the Leases Act of 1849. It is not necessary for me to refer to that Act in any detail, but one of the preambles to that Act is in these terms:

"And whereas leases granted in the intended exercise of such powers are sometimes invalid, as against the successors in estate of the persons granting the same, by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power."

I find it difficult to suppose that the Law of Property Act, 1925, intended to cut down in any way the benefit given under it to lessees by the earlier Act, and, therefore, it may be that s. 152 applies to a case of this kind although I have felt some doubt about it. I do not, however, propose to decide that question, and for the purpose of this judgment I will assume that the lease which Mrs. Ramus purported to grant in October, 1919, is a lease to which s. 152 applies. Even

assuming that, however, the section, in my judgment, does not assist the tenants, and for this reason. It is essential, in my judgment, for the tenants to prove that, apart from the fact that the lease is to take effect more than twelve months after its date, it is otherwise such a lease as Mrs. Ramus could properly have granted on Dec. 25, 1919, and in this respect s. 54 of the Settled Land Act, 1882, does not assist them.

I have been referred to authorities for the proposition that the fact that the rent reserved is not the highest rent obtainable is not in itself sufficient to invalidate the lease. I am not concerned with that; I have no means of knowing whether this lease was granted at the best rent or not, and in my judgment it is for the tenants to show that they can properly claim the benefit of s. 152, and that they have not attempted to do.

Under those circumstances, in my judgment, the tenants have not brought themselves within the ambit of the section, because they have not shown what it was essential for them to show, that even if the lease is one which could be validated under s. 152 notwithstanding that it is a lease granted outside the twelve months, it was, apart from that, a proper lease in all other respects and one which the tenant for life could properly have granted. In the absence of such evidence, the tenants cannot rely upon s. 152.

Judgment for the plaintiff landlord for possession of the premises, rent down to the forfeiture, and mesne profits from the forfeiture to the date of possession.

Solicitors: P. S. Solomon, Archer & Co.; Neve, Beck, & Crane.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

OWEN AND SMITH (TRADING AS NUAGIN CAR SERVICE) v. REOMOTORS (BRITAIN), LTD.

[COURT OF APPEAL (Scrutton, Greer and Maugham, L.JJ.), May 17, 1934]

[Reported 151 L.T. 274]

Trespass to goods—Damages—Measure—Bailor with right of entry and of seizure—Entry and seizure without notice.

By a written "display agreement" made between manufacturers and dealers, manufacturers delivered a motor chassis to the dealers on the terms that it should remain the property of the manufacturers and should not be taken out on the road. The dealers made a deposit of £10 and were entitled by prepayment to purchase the chassis. The manufacturers were to be at liberty to remove the chassis at any time, but "if the dealer shall have constructed a body on the vehicle he shall be at liberty to dismantle the said body before removal of the vehicle under the provisions of this clause." The dealers took the chassis out on the road, and the manufacturers, without notice to the dealers, entered their garage, and, seizing a chassis in the possession of the dealers, took it into the street, where they dismantled a body that had been fixed thereto by the dealers, and then took away the chassis. The dismantling

was observed by a creditor of the dealers and others, and the dealers' credit accordingly suffered.

Held: no term that the manufacturers, before removing the chassis, would give the dealers sufficient notice to give the dealers a reasonable time to purchase the chassis should be implied in the agreement, but the dealers should be awarded substantial, but not exemplary, damages, because a term must be imported into the agreement that the manufacturers must give such notice of the removal to the dealers that they could remove their body from the chassis in the garage and, therefore, the manufacturers had committed a trespass to goods.

Per **Scrutton and Maugham, L.JJ.** (GREER, L.J., expressly refraining from expressing an opinion on this point): Exemplary damages may be awarded for trespass to goods, if the manner of the trespass justifies them.

Per **Maugham, L.J.**: The original entry of the company's servants on the dealers' premises was justified by the terms of the agreement. The company were therefore not trespassers ab initio, and the damages must be reduced accordingly.

Harvey v. Pocock (1) (1843), 11 M. & W. 740; and *Canadian Pacific Wine Co. v. Tuley* (2), [1921] 2 A.C. 417, applied.

Notes. Considered: *Interoven Stove Co. v. Hibbard and Painter and Shepherd*, [1936] 1 All E.R. 263.

As to exemplary damages for trespass to goods, see 11 HALSBURY'S LAWS (3rd Edn.) 262, para. 434, text and note (s), and 33 HALSBURY'S LAWS (2nd Edn.) 28, para. 48, text and note (d). As to trespass ab initio, see *ibid.* 14, 15, para. 21, and for cases on the subject see 43 DIGEST 422, 469-473. As to the implication of terms into a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124, paras. 212-215, and for cases on the subject see 12 DIGEST (Repl.) 681 et seq., 5251 et seq.

Cases referred to:

- (1) *Harvey v. Pocock* (1843), 11 M. & W. 740; 12 L.J.Ex. 434; 1 L.T.O.S. 290; 152 E.R. 1003; 18 Digest 368, 1090.
- (2) *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 97 T.L.R. 944, P.C.; 43 Digest 395, 176.
- (3) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, 5266.
- (4) *Bayliss v. Fisher* (1830), 7 Bing. 153; 131 E.R. 59; sub nom. *Bayliss v. Usher*, 4 Moo & P. 790; 9 L.J.O.S.C.P. 48; 18 Digest 392, 1337.
- (5) *Brewer v. Dew* (1843), 11 M. & W. 625; 1 Dow & L. 383; 12 L.J.Ex. 448; 1 L.T.O.S. 290; 7 Jur. 953; 152 E.R. 955; 5 Digest 972, 7963.
- (6) *The Mediana*, [1900] A.C. 113; 48 W.R. 398; 69 L.J.P. 35; 82 L.T. 95; 16 T.L.R. 194; 9 Asp.M.L.C. 41; 41 Digest 801, 6618.
- (7) *Vaux v. Newman, the Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 77 E.R. 695; 18 Digest 324, 537.

Appeal from a decision of ATKINSON, J., sitting alone without a jury, by which the awarded the plaintiffs £750 damages.

The plaintiffs were dealers in motor cars, and the defendants were a subsidiary company of foreign manufacturers of motor cars. The plaintiffs' action, originally in detinue, was by amendment at the trial based on a claim for trespass to goods. The facts of the case and the material terms of the written "display agreement" made between the parties are set out in the judgment of SCRUTTON, L.J.

The defendants appealed.

Maxwell Fyfe, K.C., and *Nyholm Shawcross* for the manufacturers, the defendants.

J. I. Parry for the dealers, the plaintiffs.

SCRUTTON, L.J.—The argument on this appeal has taken a long time, but the facts on which the decision turns are short. Some complication has, however, arisen because the contractual documents used by the parties do not fit in well with the course of business which both parties knew was going to be carried out. This court therefore has to consider whether the documents represent the contractual relationship between the parties, and, if so, to examine them. It has further to consider whether the dealers' case that the documents are mere forms is the real case or whether the real case is not on the documents at all, but on an oral agreement between the parties. However, I have arrived at a conclusion, although I feel the difficulty of the case, and I understand the difficulty felt by **ATKINSON, J.**, who has given a detailed judgment.

The position arises from a system, which has grown up recently, whereby people with no or little money take lorries for the transport of goods, or charabancs, for purchase on the hire-purchase system, relying for the payment of the instalments upon expected profits. By the creation of hire-purchase companies, a new form of industry has grown up, which is intended to overcome the difficulty of a man who wants to buy a lorry or charabanc and who has not the money to do so.

The two plaintiffs in this case are motor dealers, who purchase from manufacturers on terms that will allow them to sell at the list price while they themselves receive a discount which constitutes their profit. The defendants are **Reo Motors, Ltd.** (I call them the manufacturers, although they are a subsidiary company of foreign manufacturers); the actual form of the action is that the plaintiffs, the dealers, are alleging against the defendants, that, whilst they, the dealers, had in their possession vehicles which the manufacturers were going to sell to someone, presumably the dealers, the manufacturers seized the vehicles, but were not entitled to do so under the contract between the parties. That, say the dealers, was a trespass and an aggravated trespass, because, while the manufacturers supplied the chassis, the dealers generally built, on each chassis, a cab and, also, a body or receptacle into which to put goods. The plaintiffs, the dealers, say that the defendants, the manufacturers, not only trespassed upon the chassis but also trespassed upon the cabs and bodies which the dealers had put on the chassis. The trespass, say the dealers, was aggravated by the fact that it entirely destroyed their credit.

That has been discussed here. Matters are not made easier by the fact that, when the dealers' business had collapsed owing to this trespass, no one took any trouble about the documents, which are in a state of confusion, some of them being in fact missing. A further difficulty arises from the fact that the hire-purchase finance company, which was financing the business, also ceased suddenly to operate. What that company was actually doing is also a matter of some uncertainty.

In order to decide whether the seizure was wrongful or not, it is necessary to look at two documents passing between the dealers and the manufacturers and signed by the dealers. The dealers, while arguing on the documents, also say that the documents mean nothing, and say further that the documents have all been superseded. There is no doubt about the fundamental principle on which the manufacturers have framed the documents. Their case is that they had no intention of parting with the property in these chassis until the dealers had paid for them. The first printed agreement between the parties was the "dealers' agreement" by which the dealers had to pay cash on delivery. There was no provision for credit, and nothing was said about credit. By that contract the dealers bound themselves to sell at list prices. The substituted agreement, between the parties, the "display agreement," provided for the delivery of a chassis to the dealers on a deposit by them of £10. The trouble is that, while it was no secret between the parties that nine-tenths of the business to be done in respect of these chassis was letting them on hire-purchase to people who could not pay for them at once, there is no doubt that on any extended course of business the dealers could not pay for them.

The hire-purchase arrangement for this kind of business seems to have spread rapidly and to an enormous extent, nine-tenths of the business being done with persons who cannot pay at once. Unfortunately, the scheme does not always work. The dealer to whom the chassis is to be delivered looks out for persons who will be ready to take it under a hire-purchase agreement. These persons want a cab and a body put on to the chassis. In most cases the dealer undertakes to do that. He secures a person who seems a likely purchaser; he inquires into his financial position, and generally finds that he cannot pay, but expects that what he makes each month will enable him to pay the instalment due for that month. Knowing that there are finance companies who will carry out this part of the business, the dealer gets the intending buyer to sign a hire-purchase agreement by which the finance company purports to sell to the hirer, payment generally being completed in some two years' instalments. The dealer, getting that agreement signed in the first place by the hire-purchaser, then gets him to sign a document saying he has received the chassis. This the dealer takes to the finance company. They make their own inquiries, and, if they think the position satisfactory, they accept responsibility for the sum which has to be paid to the manufacturers. This is done by the finance company purporting to buy from the dealer, the dealer not having, however, any property in the chassis until he has paid the manufacturer, which in fact he has not done. The finance company give a cheque to the dealer, who then pays the manufacturer. The property in the chassis then passes to the dealer, the hirer goes on paying instalments, if he can, and, sometimes, the finance company takes a guarantee, or re-purchase agreement, from the dealer. It follows that sometimes the finance company does not give the dealer a cheque until the latter has actually handed over the chassis to the hirer. Sometimes it goes through regularly, that is, the cheque goes from the finance company to the dealer before the chassis has been handed over. As far as profit is concerned, the finance of it is this: The manufacturer binds the dealer not to sell below the manufacturers' list price, say £600. The dealer need not pay that amount, as he receives a discount of 20 per cent. The finance company secures its profit by charging the hirer more than £600. There are, therefore, three profits concerned in the transaction.

The plan appears to work well in most cases. Here it failed to work in several cases, with the result that, after three years' working, it occurred to the manufacturers to ask where the chassis they had delivered to the dealers were. They found that five vehicles which ought to have been in the dealers' possession were not there. Then a chassis, of which the manufacturers had allowed the dealers to have possession under the "display agreement" and which should have been in the dealers' possession, suddenly turned up by chance at the manufacturers' garage, running and damaged, although, as it had never been paid for, it ought not to have been on the road at all. Inquiry showed that the dealers were thinking of running a subsidiary company of their own for carrying goods, and that they were arranging to work that company by procuring people without money to enter into hire-purchase agreements with the finance company. It was, of course, an unpleasant surprise to the manufacturers that this vehicle turned up at their premises, damaged by an accident and in charge of a gentleman who said that he was the owner and who had no money at all. Then, further, before the seizure, the manufacturers discovered this unpleasant feature: The dealers, in order to induce the finance company to think that this was a genuine transaction, had inflated the price that it was represented the hirer was giving, by adding a sum to the list price as an alleged deposit paid by the hirer, and they had given the hirer a receipt representing him to have paid this deposit when in fact there had been no such payment. There was a representation made to the finance company that the hirer was substantial enough to pay this deposit, when he had in fact not paid it.

This discovery made the manufacturers determine at once to remove the chassis from the possession of the dealers. They did so, however, in a way that was most unwise. They had not, until that time, made any complaint because they had

no knowledge of the transaction in question. They wanted to seize as quickly and as effectively as possible, and they took a very unsatisfactory course. They entered into a discussion with the two dealers, who were explaining that difficulties had arisen with the finance company owing to the death of the managing director. The discussion continued for some time and was then adjourned to a certain house of entertainment in Liverpool. The manufacturers objected and another restaurant was accordingly agreed upon. While all the parties were there, an army of the manufacturers' employees dashed in and seized the chassis from the dealers' garage. This army took all the chassis out into the street, including those which had on them cabs and (or) bodies placed there by the dealers. A hasty message arrived at the restaurant and the dealers returned to see what was happening. An animated discussion in the street as to what the manufacturers were about attracted much local attention. One of the dealers' creditors happened to live just opposite: the dealers' credit was accordingly damaged in Liverpool, and, in a comparatively short time, the dealers had to close down.

Those are the facts; the question then arose whether the manufacturers had any right to seize in that way (1) the chassis referred to in the "display agreement," (2) those on which cabs and (or) bodies had been fitted by the dealers.

When the dealers had signed the dealers' agreement, which contemplated that the dealers should not have possession of the chassis until they were paid for, they, the dealers, explained that with the class of business which they intended to carry on, they could neither buy nor sell until they had the chassis in their possession to show to prospective buyers. Accordingly thereafter, when any chassis went forward, the dealers signed the "display agreement," one such agreement being signed for every chassis which was delivered. The agreement provided (cl. 2 (b)):

"That the dealer will not take the vehicle out on the road nor permit the same to be so taken out for demonstration purposes or otherwise, and will keep the same in perfect condition."

The agreement also provided (cl. 2 (c)):

"The company [i.e., the manufacturers] is to be at liberty to remove the vehicle at any time, and the dealer will pay the cost of such removal to the company's place of business for the time being in London except that in the event of the company removing the vehicle within six weeks of the date hereof and the dealer having complied with the terms hereof, the cost of the removal shall be borne by the company. If the dealer shall have constructed a body on the vehicle, he shall be at liberty to dismantle the said body before removal of the vehicle under the provisions of this clause";

and also (cl. 2 (d)):

"The vehicle is and shall remain the property of the company until purchased and paid for by the dealer under the provisions of para. 3 hereof, and that until so purchased and paid for, the dealer has no right to deal with or dispose of the vehicle in any manner whatsoever or to remove therefrom or obscure any plate indicating that the ownership of the vehicle is vested in the company."

By cl. 3:

"The company agrees that, provided the company shall not already have disposed of the said vehicle, the dealer shall be entitled by prepayment to purchase the vehicle at any time while it shall be in his possession on the terms and conditions set forth in the company's standard order form . . ."

less a specified discount and credit being given to the dealer for the deposit of £10.

The first part of cl. 2 relates to the chassis, and the last part to the body which the dealer may have built upon it. The dealers' case was that admittedly they had signed all these documents, one for each chassis, but that they were told at the time that the documents were merely a form, and that they had themselves made it clear that such a document did not fit in with their business, and they

said that the business, in fact, proceeded as a result of the vehicles being shown, and persons induced to enter into hire-purchase agreements. There is no doubt about the terms of the "display agreement." It provides that the manufacturers shall be at liberty to remove the vehicle. There was, therefore, no trespass in the manufacturers' removing the vehicles. That is, the chassis. The manufacturers might do so at any time. On the other hand, as to the cabs and bodies, the agreement provides:

"If the dealer shall have constructed a body on the vehicle he shall be at liberty to dismantle the said body before removal of the vehicle under the provisions of this clause."

Now the view taken by the learned judge in the court below is not so clear as I should wish. In some way or other, he has implied into the legal relation between the parties three terms not expressed. With the first, namely, that the power to seize cannot be exercised if the dealer has entered into a binding agreement to dispose of any of the chassis, we are not concerned. The next two do relate to the matter before us and have to be considered. In the clause about cabs, the judge has implied an obligation on the manufacturers to give notice to the dealers that they are about to seize the chassis on which the cabs are, and to allow the dealers sufficient time to remove the cabs or bodies which they have placed on them. The learned judge, further, finds that the manufacturers, not having given the dealers any opportunity to remove the cabs and bodies in the garage, took the chassis straight out into the street in such circumstances that there was discussion in the street about them. Another and much more important matter is this: The judge has implied a further term that the manufacturers shall not remove the chassis without giving notice to the dealers, and without allowing them sufficient time in which to purchase under the agreement, cl. 3 of which reads as follows: [His Lordship again read this clause, which is printed at p. 746, ante.] The learned judge has taken the view, therefore, that the manufacturers have trespassed not only by removing the chassis with cabs without giving the dealers an opportunity to remove the cabs, but also, in respect of the chassis, by removing them immediately without notice instead of giving the dealer reasonable time to purchase them by repayment under cl. 3. I think I have stated correctly the view taken by the judge, although it is sometimes expressed in rather vague language.

The agreement expresses its terms clearly enough, but the learned judge relies on the observations of LORD ESHER, M.R., in *Hamlyn & Co. v. Wood* (3) ([1891] 2 Q.B. at p. 491) and other authorities. As I understand those cases, one cannot imply a term in a written contract unless it is obvious that both parties must have assumed it as essential to the business they were carrying out. It must be such an obvious condition that if one says to both parties, "You have not provided for this," they both reply, "Of course not, because it is so obvious."

As to the provision which the learned judge has imported as regards the bodies, it is an express provision of the agreement that the dealers shall be at liberty to dismantle the bodies, and if the dealers are to be at liberty to dismantle the bodies they must be given a reasonable time to do so, and taking the chassis out into the street does not give them such time. Such a seizure would be sufficient to affect the credit of the dealers. This provision must involve peaceable information to the dealers while the bodies are in their possession. There must be some such notice as this: I am about to remove the chassis, please remove your bodies. Therefore, I agree with the inference which the learned judge has drawn with reference to the bodies, that the dealers must have notice that the manufacturers propose to remove the chassis to which bodies have been affixed, in order that the dealers may have the opportunity of removing them.

The other much more serious additional term implied by the judge would be a reasonable contract for the parties to make, but I cannot think it is in any way a necessary term of this contract. I am not sure that the manufacturers would have agreed to give the dealers a reasonable time in which to pay. No doubt it is, as

has been argued, a harsh term that the manufacturers are to be at liberty to remove the chassis at any time, but one can well understand that the manufacturers regard it as vital that they should not be deprived of property in their chassis without being paid for them, and when the question comes to be considered whether the manufacturers were harsh in this case, I think the dealers have only themselves to blame for what has happened. I decline to think that the manufacturers' action, when they discovered that the hire-purchase agreements were being carried out by means of this fictitious deposit, was harsh. I can conceive of their wishing to retake possession of the chassis at once when they found that the system was being worked by running on the road the vehicles they left in the possession of the dealers under the "display agreement," and when they found bodies upon them with no hire-purchase agreements signed. The learned judge may have thought his addition was a reasonable term, but terms cannot be implied in a contract merely because they are reasonable. I am unable to agree that in some way or other he can import into the contract a term that the manufacturers shall give notice and allow the dealers a specified time in which to purchase. I have come to the conclusion that the learned judge was right in holding that time should have been given for the removal of the bodies. I do not take his view that the vehicle ought not to have been removed until the dealer had had time to purchase.

It follows that, as the learned judge awarded the plaintiffs £750 damages for the wrongful seizure of the chassis and also of the chassis with the bodies, the damages must now be reduced. We had a long discussion as to whether, in a trespass on chattels, a judge or jury could give damages for the effect on credit of the wrongful seizure, and we had a discussion also upon the grounds for giving damages of a punitive character in respect of trespass. I have no doubt myself that a judge or jury may give punitive damages in view of the nature of the trespass, and that they may do so in trespass to goods or land. The example usually given is that of a harmless wanderer where the damages are nominal. If he makes contemptuous gestures in the course of his trespass, the judge may give damages for the nature of the trespass. The way in which this trespass took place, the taking of the lorries and the removing of the chassis in the absence of the dealers, is the kind of trespass for which a judge or jury could give such damages. The credit of the dealers must have been affected, and, while I think the learned judge was right on his view in giving £750 damages, on the view we are taking the damages must be very much reduced. I come to the conclusion that if the sum of £750 is reduced to £100, the circumstances of the case will have been properly met.

GREER, L.J.—In the result I agree with my Lord, although, speaking for myself, I would not put the damages so high as £100. This is an unfortunate case; when the facts and the documents are properly understood, two simple questions emerge, (1) whether, having regard to the contract which both parties signed, there was a trespass when the chassis with the bodies on them were taken away from the dealers' premises, and (2) assuming that they were taken away, the power to do so having arisen at the moment they were taken away, what damages should be allowed?

I should be loath to encourage the notion that, if people are presented with a document which they are to sign in order to evidence in writing what their rights and obligations are, that document should be set aside because of some conversations which took place before the document was signed, because it is common knowledge that the law will only take notice of the conversations in order to establish completed evidence as to what the agreement is. There are some cases where what purports to be an agreement will not be enforced by the court. There is the case of *non est factum* where the contracting party signs what he is told is not a document. There is another case where a document signed as a contract can be said not to be signed as a contract, but merely as an escrow, and where

the event contemplated has never taken place. Apart from these two instances, if people sign a document as representing their contract, they cannot go behind it and say that a further arrangement was made at the same time, unless they are in a position to show that it constituted a collateral contract.

There is no such suggestion here. On Feb. 28 the manufacturers wrote to the dealers that the terms on which they were prepared to do business were those set out in this new document called the "display agreement." You must pay on delivery—that was the "dealers' agreement"; and if you are not prepared to do that you must accept the contract contained in the "display agreement" and take delivery of the chassis which we are about to deliver on the terms of that agreement. Thus it is not open to the dealers to say that there was any other contract except that contained in the "display agreement." No representatives of the manufacturers had any authority from the manufacturers to enter into any agreement except the "dealers' " or the "display agreement." The mere fact that a man is a secretary of a company does not carry with it authority to make a different agreement from that recorded in the documents handed to him. It became obvious as the pleadings were opened that the dealers could not succeed without amendment. The necessary amendment was duly made at the last moment. It was said that, after the "display agreement" was signed, when two of the chassis afterwards seized had been delivered, there was a meeting between Mr. Smith on behalf of the dealers, and Mr. Grout on behalf of the manufacturers, and that by their conversation the parties agreed that no attention was to be paid to the agreement in writing, and set up in place of the agreement in writing an agreement arrived at after it had been signed. I cannot help thinking that that is not business: the manufacturers were merely recognising that, if the "display agreement" gave them rights from time to time, they would have to consider whether they would exercise those rights and that, if everything went well, no advantage would be taken of the expressed rights reserved by the agreement.

There are frequently agreements giving exceptional rights which it is not policy to exercise. There is therefore no verbal agreement in opposition to the written agreement.

The whole question here is whether the manufacturers were entitled to act on the terms of the "display agreement." Business was going satisfactorily and the dealers had not been asked to pay the full price. They had paid the deposits under the "display agreement." This provided that, while it was in operation, the chassis were to be in the possession of the dealers, and I do not accept the argument pressed on us by counsel that the possession remained in the manufacturers throughout. Clause 2 (e) of the "display agreement" provided that:

"The dealer shall on the signing of this agreement deposit with the company by way of security the sum of £10, which shall be returned to the dealer on the vehicle being removed by the company, provided the same shall then be in perfect condition. If the vehicle shall be damaged in any way whilst in the custody of the dealer, the company shall be entitled to retain out of the said deposit the cost of restoring the vehicle to perfect condition, and if the said deposit shall not be sufficient for that purpose, the dealer will pay the excess to the company on demand."

The last clause involves that the manufacturers are treating the dealers, while they have the goods on their premises, as being in possession of them. The effect of cl. 2 (e) is this. We give you possession until we remove the vehicle under cl. 2 (c) and we will not remove the vehicle without giving you first an opportunity of dismantling the said body. You are to retain possession until we remove the vehicle, giving you suitable opportunity to dismantle the cabs and the bodies. In some cases, the cab was the property of the manufacturers as well as the chassis.

Now what damage have the dealers suffered by reason of the fact that these vehicles were removed without the dealers being given the opportunity which was provided for in the contract? There was no damage. Even if the dealers had

been given the opportunity, they would still have suffered a loss of reputation to the dealers in their business. It does not follow that if the opportunity had been given the bodies would have been removed. It would only have meant the dealers having a reasonable time in which to remove all the cabs and bodies which were theirs. The creditor looking out from the opposite side of the street would have seen just as much, if the contract had been strictly carried out, as he did in fact see. No authority has been cited to show that punitive damages could be recovered for trespass to chattels. I prefer not to express an opinion on that somewhat difficult matter, but I do think that in this case there must be something in the nature of substantial damages. A B

MAUGHAM, L.J.—This action started as one of detinue. The facts have been stated at some length, and I shall not find it necessary to repeat them. The question which emerged at the trial was that of damages for trespass, and the learned judge came to the conclusion that there had been a trespass by removing certain chassis and bodies from the garage of the dealers in circumstances which led him to give exemplary damages. The entry upon the premises was justified by the manufacturers as being authorised by the terms of a "display agreement" entered into each time a chassis was handed over by the manufacturers to the dealers. The question, further, for us to determine is as to the true construction of the "display agreement," coupled with the question whether it can be relied upon at all, and the question whether it has been varied by the conversations, and perhaps a further question with regard to waiver which resulted in further complications. It seems to me to be necessary to clear one's mind on such a topic, and to distinguish very carefully between the different accounts given in evidence. The only point on which I differ from the careful and elaborate judgment of the learned judge is as to whether any of the evidence given justifies the view that the parties had agreed that the right to take possession of the chassis conferred in express terms by cl. 2 (c) of the "display agreement" was not to be exercised without giving reasonable notice to the dealers, so as to give them time to exercise the right of purchase given by cl. 3 of the agreement. C D E

In my opinion, for the reasons given and without citing the authorities, the evidence does not justify the view that any such term was imposed to the prejudice of the manufacturers. I will, however, myself add this, that if any such term could be implied, I think it could only be implied subject to a condition that the dealers were in other respects properly complying with the terms of the agreement. The necessity for the manufacturers to be at liberty to remove the vehicles at any time was, in my opinion, one which was not altered at all by the evidence as to the course of business. Some of the terms were indeed vague, but I am unable to see how the manufacturers could be held to have agreed that they were bound to give notice, which might have resulted in the dealers removing the vehicles to some other place. The circumstances surrounding agreements such as the "dealers' agreement" or the "display agreement" are such that terms which would otherwise be of extreme harshness must obtain, in such a trade as this, for the protection of a company parting with valuable chassis or cars without payment and without security. F G H

Having said that with regard to the questions which this court has to decide, I now come to the true construction of the "display agreement." As to the construction of cl. 2 (c), I have come to the conclusion that the last sentence: I

"If the dealer shall have constructed a body on the vehicle he shall be at liberty to dismantle the said body before removal of the vehicle under the provisions of this clause,"

is in the nature of a proviso to the first words in the sub-clause, which is to the effect that the company is to be at liberty to remove the vehicle at any time.

[The learned judge then recited the facts of the seizure which have already been stated in the judgment of SCRUTTON, L.J., and continued:] It is true that an opportunity was given to the dealers to remove the bodies in the street, but

removal cannot be effected in a few minutes. The time necessary was three hours for each body, and it was probable that some objection would be made by the police if the road, which was public, was to be occupied all that time by operations on the vehicles in question. It is, of course, unfortunate, and one cannot help having some sympathy with the manufacturers and with their not having realised what their duty was with regard to the bodies. If they had walked into the premises through the open door and had said that they came to remove their vehicles under the terms of the "display agreement" and that the dealers could remove their bodies, there would have been no cause of action on the part of the dealers whatever. That, however, was not done, and the result is that in law the dealers have a right to damages for trespass to goods, and the real question, which I consider to be one of great difficulty, is whether, in the circumstances of this case, the damages should be anything greater than nominal damages. The bodies were driven away, but were returned before the action came on for trial, and certainly damages in respect of deprivation of the use of the bodies could not have been very substantial.

In the first place it seems to me clear, on the authorities up to the House of Lords, that there may be exemplary damages given for trespass to goods arising out of the manner of the taking, just as every student knows that there may be damages for breaking into a man's close even though no damage was done there. A malicious motive, an arrogant or insolent manner are things which justify exemplary damages being given by judge or jury.

The cases seem to show that the same rule applies as to a trespass to goods. *Bayliss v. Fisher* (4) is not a very good instance of that, because the damages given in the first instance by the jury were very small and, when the matter came on appeal to the Exchequer Chamber, the court refused to deal with the matter because they were under £25. However, *Brewer v. Dew* (5) is an authority that the jury may, in a case upon a claim for trespass to goods, where the seizure of the goods was made under a false pretence of a legal claim, the plaintiff being thereby annoyed and disturbed in the carrying on of his business, give vindictive damages beyond the value of the goods. That is a very high authority, and the observations of LORD HALSBURY, L.C., in *The Mediana* (6) ([1900] A.C. at p. 118) go to show that that view is correct.

The difficulty I feel is founded upon the fact that in this case there was in my opinion trespass to goods, but that there was an independent ground which sufficed to justify the entry upon the premises; and in such a case the damages are in my opinion greatly reduced. The authority for that is to be found in *Harvey v. Pocock* (1) ((1843) 11 M. & W. at p. 740), and the decision there was followed in this respect in the Privy Council in *Canadian Pacific Wine Co. v. Tuley* (2). In *Harvey v. Pocock* (1) a landlord distrained and took, amongst other things, goods which were not distrainable at law, and the decision of the court was that in such a case the distrainer was not a trespasser ab initio as to the whole of the distress, LORD ABINGER, C.B., saying that *Vaux v. Newman, the Six Carpenters' Case* (7) left this an open question. In *Canadian Pacific Wine Co. v. Tuley* (2) police officers entitled to enter the appellants' premises, under the British Columbia Prohibition Act (1916, c. 49, B.C.) and amending Acts (consolidated for convenience in 1920), seized not only their stock of liquor, but also papers and books and marked money. The Privy Council judgment, delivered by LORD BIRKENHEAD, referred to *Vaux v. Newman, the Six Carpenters' Case* (7), and approved *Harvey v. Pocock* (1). There was, therefore, in my opinion, a lawful entry upon the premises in this case and the defendant manufacturers were not trespassers ab initio as regards their chassis. The only damage suffered by the plaintiff dealers was to be deprived of their bodies.

On the other hand I feel that it would be a strong thing for me to express an opinion contrary to that of my brother SCRUTTON, L.J., who has such great experience. His view is that, if opportunity had been given to the dealers to remove the bodies in the garage, and if it be assumed that the manufacturers had

acted reasonably and allowed the chassis to be driven away peaceably, there would have been no such additional injury to the dealers as seems to have been suffered by them in the circumstances of this case. On the whole, I am not prepared to differ from his view that the damages may be properly assessed at the sum of £100 and I accordingly concur in the judgment preferred.

Judgment for the plaintiffs varied.

Damages reduced from £750 to £100.

Solicitors: *Edward Lloyd*, Liverpool; *Thomas Gee & Co.*

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

REVELL v. LONDON GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), November 19, 1934]

[Reported 152 L.T. 258]

Insurance—Motor insurance—Proposal—Statement that insured had not been convicted of offence “in connection with the driving of a motor vehicle”—Convictions for driving without reflecting mirror, and for using car without policy against third-party risks—Statement basis of policy—Ambiguous question in proposal.

Insurance—Motor insurance—Condition—Forfeiture of benefit unless action commenced within three months of rejection of claim—Avoidance of condition—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 38.

A policy of insurance against third-party risks was based on a proposal which contained the question: “Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?”, to which the insured answered “No.” The truth of the answers on the proposal form was the basis of the policy. The insured’s driver had been convicted of two offences, namely, (i) of driving a motor vehicle without any suitable reflecting mirror, and (ii) of unlawfully using a motor vehicle without having in force an insurance policy against third-party risks.

Held: a reasonable person might honestly consider that neither of the two convictions was in connection with the driving of a motor vehicle, and the insurers could not, therefore, rely on this answer as entitling them to avoid the policy.

Per **Curiam**. If there is an ambiguity in a question in a proposal form, so that upon one view of the reasonable meaning which is conveyed to the reasonable reader of it the answer was not false, the insurers cannot say that on the other meaning of the words the answer was untrue, so as to invalidate the policy.

The policy contained a condition whereby it was provided that, if a claim under the policy was made and rejected and an action was not commenced within three months of such rejection, all benefit under the policy should be forfeited. The insured’s driver knocked down and injured two policemen, who made claims against the insured. The insurers rejected the insured’s claim for indemnity in both cases more than three months before the insured brought this action to enforce it. The insurers relied on this condition, the insured contended that the condition provided “that . . . liability . . . shall cease, in the event of some specified thing being . . . omitted to be done after the

happening of the event giving rise to a claim," and was, therefore, by virtue of s. 38 of the Road Traffic Act, 1930, "of no effect in connection with such claims as are mentioned in s. 36 (1) (b)" of the Act.

Held: the insurers were liable to indemnify the insured because (i) the condition was within the above definition contained in s. 38, (ii) the reference in s. 38 to "such claims" was to claims "in respect of any liability which may be incurred by [the insured] in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road," and, therefore, covered these claims to indemnity in respect of the injuries to the policemen.

Notes. The current regulations under s. 3 (1) are the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482).

As to the effect of answers in a proposal form, see 18 HALSBURY'S LAWS (2nd Edn.) 416-418, para 597, and for cases on the subject see 29 DIGEST 393-395, 3136-3142. As to the avoidance of conditions subsequent in a third-party risks policy, see *ibid.* 566, para. 915, text and notes (f)-(i). For the Road Traffic Act, 1930, s. 3, s. 35, s. 36, s. 38, see 24 HALSBURY'S STATUTES (2nd Edn.) 574, 602, 605, 607.

Action claiming a declaration that the plaintiff, the insured, was entitled to be indemnified by the defendants, the insurers, against claims made against her by two persons who had been injured through the negligent driving of a motor car by her servant.

The insured was, in the year 1933, the owner of a Ford motor van, and entered into a policy of insurance with the insurers insuring the van itself and also her liability for third-party risks. During the currency of the policy two claims by third parties arose, both due to the negligent driving of the insured car by the insured's chauffeur, one Edward Davis. Both claimants recovered judgment against the insured, one for £8,000 and the other for £4,500, and neither judgment had been satisfied.

The proposal on which the policy was based contained the following question:

"Have you or any of your drivers ever been convicted of any offence in connection with the driving of a motor car?"

to which the insured answered "No." The insurers contended that this answer was untrue, because in August, 1932, the insured and her driver had been convicted (a) of driving a motor car without any suitable reflecting mirror, contrary to the regulations made under s. 3 of the Road Traffic Act, 1930, and (b) of unlawfully using a motor vehicle without having in force an insurance policy in respect of third-party risks, contrary to s. 35 of that Act. The insurers said that it was a condition of the policy that the truth of the statements in the proposal form should be its basis, and that, as the answer was untrue, the policy was avoided. The insured said that the answer was not untrue, as the offences of which she had been convicted were not "in connection with the driving of a motor vehicle."

The insurers further relied on a clause (cl. 6) of the conditions of the policy, which provided that if a claim were made, and rejected by the insurers, and

"an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited, and the company will not be in any way liable thereunder."

In fact the claims were both rejected on July 19, 1933, and the action was commenced on July 23, 1934, and the insurers contended that they were excused from liability. The insured contended that the condition was void under s. 38 of the Road Traffic Act, 1930.

The relevant sections of that Act, and the arguments of counsel, appear in the judgment.

H. D. Samuels, K.C., and A. F. Engelbach for the insured.

Sir W. Jowitt, K.C., and G. J. Paull for the insurers.

MACKINNON, J.—This is a case of importance and of some little difficulty. In the year 1933, Mrs. Revell, the insured, was the owner of a Ford van built in 1929, which was used in her business as a haulage contractor. She took out a policy with the defendant insurers, insuring that van and also insuring her liability to third persons. On March 4, 1933, during the period covered by the policy, her van, while being driven by a man named Davis, ran into a policeman and seriously injured him, and the insured became liable to pay damages to that unfortunate man. Not content with that, Mr. Davis, while driving the same van, on May 18 ran into another policeman, and the insured became liable to pay damages in respect of that accident. She had not paid, being, I suppose, unable to pay. The result is that this action was commenced on July 23, 1934, claiming a declaration that the insurers are liable to indemnify the insured against the amount for which she is liable to these two unfortunate policemen. The action is brought because on July 19, 1933, the insurers wrote to the insured and repudiated all liability under the policy. The action is no doubt brought in the interest of the victims of the insured's car in order that they may get the damages which they are entitled to against her, but which they cannot get from her.

The claim on the face of it is a perfectly simple one. The policy was in existence, and the first liability arose on March 4, 1933, within its currency; the second liability arose on May 18, 1933, also within its currency. *Primâ facie* the insurers have promised to indemnify the insured against these two cases or amounts of liability.

The defence that is raised is twofold. In the first place, the policy provides this:

"Whereas the person (hereinafter called the 'insured') . . . has made to [the insurers] a proposal in writing signed by or on behalf of the insured which the insured has agreed shall be the basis of this contract and which is deemed to be incorporated herein,"

and so on. "The company hereby agrees," and so on. There is a proviso:

"That this policy is granted and issued upon the express condition . . . that all information and statements made in the said proposal are true in every respect."

It is said that one of the questions in the proposal was untruly answered and that therefore the insurers are entitled to avoid the policy and to disclaim any liability under it. There are thirteen questions in the proposal form, and the ninth of them is this: Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?" And the answer is "No." It is said that that answer is untrue because Davis, the man who drove so badly on these two occasions which I have mentioned, had been convicted of two offences in connection with the driving of a motor car. On Aug. 10, 1932, he was convicted of unlawfully driving a motor car "on the highway without having a suitable reflecting mirror as prescribed," and of unlawfully using "a motor vehicle without having in force an insurance policy in respect to third-party risks." Those are offences which arise under the Road Traffic Act, 1930. That Act by s. 3 provides:

"(1) Subject as hereinafter provided, it shall not be lawful, to use on any road a motor vehicle or trailer which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, as to the construction, weight and equipment thereof."

"(3) If a motor vehicle or trailer is used on a road in contravention of this section, any person who so uses the vehicle or causes or permits the vehicle to be so used shall be guilty of an offence."

It is under that section that Mr. Davis was charged with not having a proper reflecting mirror, because the regulations made under s. 3 (1) provide in reg. 13:

"As from January 1, 1932, every motor vehicle, other than a motor cycle, shall be equipped with a reflecting mirror, so constructed and fitted to the

motor vehicle as to enable the driver of such motor vehicle to be or become aware of the presence in the rear thereof of any other vehicle, the driver of which is desirous of passing such motor vehicle."

Then reg. 14, which is similar, provides that windcreens must be constructed of safety glass. Just as he was convicted of not having his reflecting mirror, similarly by using this Ford van which had not got safety glass, Mr. Davis might have been convicted under sub-s. (3) of s. 3 of using the vehicle in contravention of that section. This first offence was with regard to the reflecting mirror.

The second offence arose under s. 35, which provides as follows:

"(1) Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

Subsection (2) is:

"If a person acts in contravention of this section, he shall be liable to a fine,"

and so on. That is the other section under which Mr. Davis was convicted of using a motor car without there being in force a third-party risks insurance policy.

Counsel for the insured is right when he says that if there is an ambiguity in a question in the proposal form, so that upon one view of the reasonable meaning which is conveyed to the reasonable reader of it the answer was not false, the insurers cannot say that on the other meaning of the words the answer was untrue, so as to invalidate the policy. The question in the proposal form is: "Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?" It is not "convicted of any offence under the Road Traffic Act." It is "any offence in connection with the driving of any motor vehicle." Davis was convicted of two offences. One, as is stated in the conviction, was in regard to driving a motor car "without any suitable reflecting mirror." In the terms of the section under which the offence arises, his offence was using on the road a motor vehicle which did not comply with the regulation issued under the earlier subsection: that is to say, with this regulation about a reflecting mirror.

The other offence in the record of conviction is

"did unlawfully use a motor vehicle without having in force an insurance policy in respect to third-party risks."

The section dealing with that provides that it shall not be lawful for any person to use a motor car on the road without such a policy of insurance, and the offence is to act in contravention of that section.

Moreover, there is this to be remembered. A reasonable person, reading this question, might quite reasonably regard the purpose of the question as being directed to the carefulness of the driver who is likely to be driving cars under this policy. The most expert and careful driver in the world, who has never been convicted of any offence of careless driving, who never for a moment has departed from the most perfect standard of good and careful driving, could still become liable to a conviction of an offence under these two sections for being in a stationary motor car which had not got a reflecting mirror and for being out on the road in a stationary motor car which did not have in regard to it a third-party insurance policy in existence.

The real offence, taking these two types of offence, is using a car without a reflecting mirror or without an insurance policy. In itself the offence has nothing to do with the careful or skilful manner or the careless or unskilful manner in which the car is being driven on the road, or its danger as a moving object. I think that the ordinary reasonable man in the street, asked this question, not only might quite honestly say: No, neither I nor my driver has ever been convicted of an offence in connection with driving this motor car, but when the questioner says,

Well, but were not you convicted of not having a mirror? he might quite reasonably say: Yes, but I never thought of that. I do not call that an offence in connection with the driving of the car. As a matter of fact the mirror had fallen off and I had not noticed it and I had not appreciated it, and it happened when the car was stationary at the side of the road. However, I do not know that I need go into illustrations of that sort. I am not satisfied that reading this question as a reasonable person would and ought to have read it that it was untrue or inaccurate to reply "No" and to omit to say "Yes," by reason of these two convictions, one about the reflecting mirror and the other about the insurance policy.

That being so, I do not think that the insurers can rely on this negative answer to the question as a breach of a condition of this policy, thereby entitling them to avoid the policy. That is the first question.

Then there arises a totally different ground of defence, which is this. It is provided by cl. 6 of the conditions as follows—I am leaving out a lot of things which are not material: If a claim under this policy is made and rejected by the company and

"an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited, and the company will not be in any way liable thereunder."

The facts are that the claim was rejected by the company, the insurers, on July 19, 1933. This action was not commenced within three months of that date but was in fact commenced rather more than twelve months after that date, namely, on July 23, 1934. The insurers, therefore, say that there has been a breach of that condition and that the insurers, therefore, are not in any way liable for this claim.

With regard to that contention, it is necessary to refer to two sections of the Road Traffic Act which make provisions as to third-party risks of insurance. First, it is provided by s. 38:

"Any condition in a policy or security issued or given for the purposes of this Part of this Act providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in para. (b) of sub-s. (1) of s. 36."

Part of that is perfectly plain, and if the claims of these two policemen on the insured, which arose respectively on March 4 and on May 18, 1933, are such claims as are referred to in the end of that section, it seems to me quite clear that the condition in this policy, providing that her liability arising out of the negligent driving of Davis shall cease because the writ was not issued within three months of their rejection of the claim, would be going counter to the provisions of s. 38. The condition would therefore be of no effect if, and if only, the claims of the injured persons are such claims as are mentioned in para. (b), sub-s. (1), of s. 36. Section 36 provides as follows:

"(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road."

Then there is a proviso:

"Provided that such a policy shall not be required to cover—(i) liability in respect of the death arising out of and in the course of his employment . . . ; or (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability

in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise; or (iii) any contractual liability."

Counsel for the insurers contends that s. 38 refers to such claims as are mentioned in para. (b), and that it refers only to that passage at the end of para (b), sub-cl. (ii), where the words appear "out of which the claims arise." I do not agree with that. I think the reference in the words "such claims as are mentioned in para. (b) of sub-s. (1) of s. 36" refers to the passage

"liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road."

It is true that the wording is perhaps not very happy, but I think that that is the meaning of the provision in s. 38. It applies to what I may call the third-party liability referred to in para. (b) of sub-s. (1) of s. 36.

The result is that, although the facts as specified in No. 6 of these conditions have occurred, namely, the writ was not issued till more than three months after the claim was rejected by the company, that clause in the policy is rendered invalid by virtue of s. 38 of the Road Traffic Act of 1930, and, therefore, the second defence also fails.

There must be judgment for the insured for the declaration asked for in this case.

Declaration accordingly.

Solicitors: *Ponsford & Devenish; Kingsley Wood, Williams & Co.*

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

Re F. D. SASSOON. INLAND REVENUE COMMISSIONERS v.
RAPHAEL

Re R. E. D. SASSOON. INLAND REVENUE COMMISSIONERS v.
EZRA

[HOUSE OF LORDS (Lord Blanesburgh, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Wright), July 15, 18, 19, 21, 22, 25, 26, November 23, 1934]

[Reported [1935] A.C. 96; 51 T.L.R. 152; 104 L.J.Ch. 24; 152 L.T. 217]

Will—Forfeiture—Direction to beneficiary to make a settlement in terms of will—Words of will literally followed—Intention to comply with will recited—Compliance not achieved—Effect of recitals.

Settlement—Construction—Recitals—Recital of intention—Intention not achieved by operative part—Effect of recitals.

By his will a testator who died in 1917 gave a legacy to each daughter of his and gave his residuary estate upon trust for such son of his as should be living at the date of the testator's death and should attain the age of twenty-one years, and in default of any such son, on trust for such daughter of his as should be living at his death and should attain the age of twenty-one years or marry under that age. The testator was survived by one son, R., and one daughter, both of whom attained the age of twenty-one. By cl. 7 of his will the testator directed that his trustees should retain each daughter's legacy and the residuary estate on a series of trusts for the benefit of each child respectively, viz., on protective trusts for the benefit of the child during his or her lifetime, with a power to the child to appoint the relevant fund in

favour of his or her issue, and a trust in favour of children of the child in default of appointment. In cl. 7 (f) the testator provided: "If a child of mine shall not have any child who under the trust in default of appointment . . . shall attain a vested interest then [his or her fund] shall be dealt with as if such child had died in my lifetime without leaving any child living at my death." In cl. 8 of his will the testator recited that his children might become entitled under the testator's marriage settlement and under the will of their grandfather, and directed that each of his children should, before the expiration of six months after the testator's death (or if he or she were under twenty-one years old at the date of his death, then within six months of attaining that age), settle his or her interest under those documents "and shall make such settlement to the satisfaction of my trustees . . . and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable, but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees . . . shall approve." The testator further provided that if a child of his should fail to make such a settlement, he or she should forfeit his or her interest under the testator's will. R. made a settlement accordingly in which it was recited that in accordance with cl. 8 of the testator's will R. was desirous of settling his interests under the said two documents and that the settlement had been prepared in order to give effect to the said desire "and contain such powers and provisions as the will trustees approve and the will trustees are satisfied with the settlement herein contained and that it is so far as possible on the lines of the settlement contained in cl. 7 of [the testator's will] so far as applicable with the modification mentioned in [cl. 8] and such approval and satisfaction is testified by the will trustees being parties to and executing these presents." The operative part of the settlement reproduced the provisions of cl. 7 of the testator's will so far as they related to R., his children and issue, and then, by cl. 5, reproduced cl. 7 (f) of the testator's will as follows (so far as relevant): "If [R.] shall not have any child, who, under the trust in default of appointment . . . shall attain a vested interest in the trust fund then . . . the trust fund . . . shall be held as to one-half thereof in trust for such person or persons or purposes as [R.] shall by will or codicil appoint, and as to the other half and in default of . . . any appointment also as to the first-mentioned half shall be dealt with as if [R.] had died in the lifetime of the [testator] without leaving any child living at the death of the said [testator]." The settlement was accepted by the trustees of the testator's will as a proper compliance with the testator's requirements, and R. enjoyed his interest under the will until his death in 1924 intestate and a bachelor, when estate duty was paid on the corpus of the testator's residuary estate on the footing that it passed on R.'s death. R.'s sister was his sole next-of-kin. Subsequently, LUXMOORE, J., held that the settlement made by R. did not comply with the testator's requirements and that his interest under the testator's will had been forfeited six months after the testator's death. It followed that there had been no passing of the testator's residuary estate on R.'s death and that the duty ought to be repaid. The Crown was not a party to the proceedings before LUXMOORE, J., and it was accepted that the Crown was, therefore, not bound by them. The taxpayers petitioned for repayment of the estate duty paid on R.'s death.

Held (LORD BLANESBURGH dissenting): the estate duty ought to be repaid because R. had forfeited his interest under the will for the following reasons:

(i) on the true construction of cl. 8 of the testator's will the satisfaction of the trustees with R.'s settlement was not conclusive that the settlement was as far as possible on the lines of the will; and

(ii) the disposition in cl. 5 of R.'s settlement was imperfect, giving rise to a resulting trust to R., and, therefore, even if R. had sufficiently shown a desire

to settle the fund in pursuance of the testator's will, he had not in fact so settled it, and the operative clause, cl. 5, could not be re-moulded so as to make it fulfil a general intention expressed in the recitals.

Dictum of LORD ESHER in *Re Moon* (1) (1886), 55 L.T. at p. 119, considered. *Mackenzie v. Duke of Devonshire* (2), [1896] A.C. 400, applied.

Notes. Referred to: *Shipley Urban District Council v. Bradford Corpn.*, [1935] W.N. 111; *Sir Lindsay Parkinson & Co. v. Works and Public Buildings Comrs.*, [1950] 1 All E.R. 208; *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1950] 2 All E.R. 390.

As to the effect of recitals on construction, see 11 HALSBURY'S LAWS (3rd Edn.) 418-421, paras. 677-679; and for cases on the subject see 17 DIGEST 362-365, 1737-1759.

Cases referred to:

- (1) *Re Moon, Ex parte Dawes* (1886), 17 Q.B.D. 275; 55 L.T. 114; 34 W.R. 752; 3 Morr. 105, C.A.; 4 Digest 525, 4794.
- (2) *Mackenzie v. Duke of Devonshire*, [1896] A.C. 400; 23 R. (Ct. of Sess.), H.L. 32; 32 Sc.L.R. 628; 4 S.L.T. 12; 44 Digest 576, 3946 vi.
- (3) *Young v. Smith* (1865), L.R. 1 Eq. 180; 35 Beau. 87; 11 Jur.N.S. 963; 55 E.R. 827; 17 Digest (Repl.) 371, 1770.
- (4) *Orr v. Mitchell*, [1893] A.C. 238; 9 T.L.R. 356; 1 R. 147, H.L., 17 Digest (Repl.) 371, 1775.
- (5) *Bath and Montague's Case* (1693), 3 Cas. in Ch. 55, 96; 22 E.R. 963, 988; 22 Digest (Repl.) 154, 1399.
- (6) *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469; 91 L.J.Ch. 17; 126 L.T. 145; 66 Sol. Jo. (W.R.) 7, C.A.; 17 Digest (Repl.) 259, 632.
- (7) *Re Akeroyd's Settlement, Roberts v. Akeroyd*, [1893] 3 Ch. 363; 63 L.J.Ch. 32; 69 L.T. 474; 7 R. 405, C.A.; 5 Digest 670, 5941.
- (8) *Beaumont v. Marquis of Salisbury* (1854), 19 Beau. 198; 3 Eq. Rep. 369; 24 L.J.Ch. 94; 24 L.T.O.S. 166; 1 Jur.N.S. 458; 52 E.R. 325; 17 Digest (Repl.) 263, 678.

Appeals by the Commissioners of Inland Revenue from two orders of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.) reported 149 L.T. 217; [1933] Ch. 858, on two petitions claiming repayment by the Inland Revenue of moneys paid for estate duty on the death of Ronald Edward David Sassoon. The facts which are sufficiently summarised in the headnote are, together with the relevant clauses of the will and of the settlement, fully set out in the opinion of LORD BLANESBURGH.

The question at issue in both cases was the same. The question was whether a settlement made by Ronald Edward David Sassoon (hereinafter called "Ronald") complied with conditions stated in the will of his father, Frederick David Sassoon (hereinafter called "the testator"). The solution of that question depended on the construction of the will of the testator and of Ronald's settlement. The contention of the respondents (the taxpayer) in both appeals was that there were two conditions imposed by the testator's will, and that Ronald's settlement did not comply with one of them.

The Court of Appeal held, affirming the judgment of FARWELL, J., that though recitals in Ronald's settlement plainly disclosed that Ronald's intention was to make such a settlement as would avoid a forfeiture of his share under the testator's will, the operative part clearly showed that he had failed to effect his purpose, as, when framing the ultimate trusts in default of issue, it had not been realised that the settlement was dealing with the property of the settlor and not with the property of the testator. The objects were insufficiently defined by the ultimate trust, thereby causing a resulting trust in favour of Ronald, the settlor. The court could not replace or misread the words used in order to repair the settlor's mistake and give effect to his intention as shown by the recitals: (*Young v. Smith* (3); *Orr v. Mitchell* (4), [1893] A.C. at p. 254). The motive of

a settlor could not be used to alter the ordinary effect of words in the deed: *A (Mackenzie v. Duke of Devonshire)* (2) [1896] A.C. at p. 406; *Re Moon, Ex parte Dawes* (1), 17 Q.B.D. 275).

The Crown appealed.

The Attorney-General (Sir Thomas Inskip, K.C.), *F. D. Morton*, K.C., and *J. H. Stamp* for the appellants, the Commissioners of Inland Revenue.

Wilfrid Greene, K.C., *Gavin T. Simonds*, K.C., *Andrewes-Uthwatt*, and *Arthur T. Macmillan* for the respondents, the taxpayer.

R. L. Daniell for parties interested.

The House took time for consideration.

Nov. 23. The following opinions were read:

LORD BLANESBURGH.—These are appeals by the Commissioners of Inland Revenue from orders of the Court of Appeal, dated April 11, 1933, affirming orders of the Chancery Division of the High Court of Justice (*FARWELL, J.*), dated Nov. 30, 1932. By these orders repayment is directed to the respondents of sums amounting in all to £308,285 8s. 3d. in respect of estate duty paid in the months of October and December, 1924, and April, 1925, on the death on June 11, 1924, of Ronald Edward David Sassoon. He was the only son of Frederick David Sassoon, who had died on May 4, 1917, and under whose will, dated Dec. 18, 1912, he was largely interested. It will be convenient in what follows to refer to the son as Ronald and to the father as the testator.

The circumstances in which the claim for repayment of this duty is now made are unusual, possibly unique. Summarily stated they are as follows.

The testator had, by his will in the event which happened, bequeathed to Ronald, in settlement, his residuary personal estate. On Ronald's death, a bachelor, and intestate, letters of administration to his estate were granted to his only sister, the respondent, Mrs. Ezra, as his sole next-of-kin. The payment of the estate duty now sought to be recovered was made on Ronald's death without hesitation or question. It was made in part by the trustees of the testator's will, and in part by Mrs. Ezra, as Ronald's legal personal representative. Ronald had during his life been in undisputed enjoyment of the residuary estate of the testator, and there was apparently no room for doubt that that estate passed again on his death. On the same footing, Ronald's own property was ascertained and taken to by Mrs. Ezra as his legal personal representative, and sole next-of-kin, and estate duty paid, and thereafter for another six years, on the basis that Ronald's interest had under the terms of the will passed in settlement to Mrs. Ezra for life with remainder to her children, the residuary estate of the testator continued to be administered by his trustees.

Then, for the first time, the question was raised whether Ronald retained at the time of his death any interest whatever in the testator's residuary estate; whether indeed his entire interest therein had not been lost by forfeiture six months after the testator's death for that he had failed within that time to make such a settlement of certain property to which he was entitled under his parents' marriage settlement and his maternal grandfather's will, as, on pain of forfeiture in case of default, was required of him by the testator's will. A settlement of that property purporting on its face to be a complete compliance with the conditions imposed on Ronald in that behalf and to which the testator's other trustees were also parties had on July 23, 1917, been executed by him. But apparently in 1930 it struck some diligent student of its provisions that, notwithstanding all appearance to the contrary it failed to be the effective instrument for its purpose that by all parties it had been both intended and supposed to be, and the doubt was raised whether, on its true construction taken in connection with the terms of the conditions imposed on Ronald by the will, the settlement was really effective to save the forfeiture. If Ronald's interest in residue had in fact been lost so long before his death as Nov. 14, 1917, there would, or might, be a right to recover the large sum of estate duty paid on the footing that his interest continued until his death,

and, in the events which had happened, and with that possibility in view, it was to the direct interest of Mrs. Ezra as Ronald's sole next-of-kin, although not, it would seem, to the direct interest of her children, to set up that case and, as his legal personal representative, to assert that his interest, notwithstanding that he had continued to enjoy it during his life, had been actually forfeited long before his death.

Any such action called for some courage because in all certainty the suggestion had it been made in his lifetime would doubtless with some heat have been repudiated by Ronald himself. But the will trustees, although Ronald's settlement had had the full approval of their predecessors, lent their aid and the unusual situation has resulted that the forfeiture of Ronald's interest which he must himself have strenuously resisted is in these proceedings being asserted by those who represent his estate, while the Commissioners of Inland Revenue, perhaps for the first time in history, appear as the champions of the dispossessed. These facts, however, are only relevant in this that the court leans against forfeiture, and it must be more and not less vigilant for principle in a case in which the normal position of parties with reference to the forfeiture here alleged are so completely reversed.

In order to have the question thus raised settled, at least in part, a friendly summons was taken out to ascertain the true construction of Ronald's settlement from the forfeiture point of view, and on that summons LUXMOORE, J., placed on the settlement a construction which on the view of the will of the testator now taken below would show the settlement to have been ineffective to prevent a forfeiture. And if the settlement was thus ineffective it is agreed that the respondents' present claims for the recovery of these estate duties must succeed. But the Crown was not a party to the proceedings before LUXMOORE, J., and, although FARWELL, J., in this litigation considered that it was nevertheless bound thereby, that position is no longer maintained by the respondents. They agree that the Crown is not so bound and that the whole question as to the true construction and effect of Ronald's settlement is still and now open. Counsel for the commissioners accordingly contended that, irrespective of its actual provisions, Ronald's settlement was by reason of its being satisfactory to the testator's designated trustees a sufficient compliance with the conditions imposed by his will. They contended further that the construction placed on its dispositive provisions by LUXMOORE, J., was erroneous, and that properly construed the settlement was in all respects and on any construction of his will a complete compliance with the conditions to avoid forfeiture imposed by the testator. These two questions of interpretation are essentially distinct; the first depends mainly on the true construction of one of the clauses of the will; the second on the true construction of Ronald's settlement. They are both of them questions of nicety, and have by the courts below been determined in the respondents' favour: one, the first of them, by FARWELL, J., the second by LUXMOORE, J., and both by the Court of Appeal.

The questions can, I think, only be answered after a critical examination of the will and the settlement, and I fear that I must, if only for convenience of reference, set forth in some detail sundry provisions of both instruments. Assuming, however, as perhaps I may, that your Lordships are in possession of the facts of the case generally, I will endeavour to confine my citations to those provisions only which have a direct influence on the conclusions at which I have arrived.

By his will the testator appointed his wife, his brother-in-law, Louis Edward Raphael, his nephew, David Aaron Gubbay, and Ronald, if he attained twenty-one, to be his executors and trustees. Ronald had attained twenty-one at the testator's death. By cl. 3 of his will the testator gave to each daughter who should be living at his death and should attain twenty-one or marry, a legacy of £50,000. Mrs. Ezra, his only daughter, an infant at his death, in due course became entitled to this legacy. The bequest of the testator's residuary estate to his trustees was made by cl. 5, and, confined to the event which happened of his having only one son and one daughter living at his death, was in these words:

"Upon trust for such son . . . of mine as shall be living at my death and shall attain twenty-one. . . . And in default of any such son upon trust for such daughter . . . of mine as shall be living at my death and shall attain twenty-one or marry under that age."

Then the testator, by cl. 7, directed that his trustees should retain the share of each of his children under cl. 5, and the legacy to each daughter under cl. 3 on a series of trusts contained in sub-clauses which, ultimately of first importance on the second question, may conveniently be summarised now.

By sub-cl. (a) and sub-cl. (b) each child is given a protected life interest in his or her share and the income of the share is made subject to a discretionary trust, should the life interest determine in the child's lifetime. By sub-cl. (c), sub-cl. (d), and sub-cl. (e) each child's share is made subject to a power of appointment among the child's issue, and there is a trust for the child's children in default of appointment with a hotchpot provision and a power of advancement in favour of issue limited to one-quarter of each share. Sub-clause (f) must be emphasised. It is in its phraseology of significant importance on the issues now raised. Its terms are as follows :

"If a child of mine shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest then [his or her portion] shall be dealt with as if such child had died in my lifetime without leaving any child living at my death."

It will be found that the exact transcription of these words appearing in Ronald's settlement is the provision thereof which has originated the main difficulty in this case. As applied to Ronald's settled share under the will the effect of the words, assuming no forfeiture, was on Ronald's death unmarried to carry that share to Mrs. Ezra and her children, as an accretion to her own settled legacy, the testator's residuary dispositions having, in effect, to be read as if Ronald had never been born. Sub-clause (g) and sub-cl. (h) need not here be specially detailed.

Clause 8 of the will which immediately follows may be termed the forfeiture clause. It is now set forth in full :

"Whereas my children, or some or one of them, may under one or both of the following documents, namely [my marriage settlement and the will of my father-in-law, Edward Lewis Raphael] become entitled under any appointment, or in default of appointment on the death of either, my wife or myself, or partly in the one event and partly in the other, to interests in the funds subject to the trusts of these documents respectively. Now for the protection and benefit of my children I will and direct as follows :

"(a) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death, or if he or she shall be under twenty-one at my death before the expiration of six calendar months after he or she shall attain twenty-one, by deed settle the interest, whatever it may be, and whether under any appointment or in default of appointment absolute, contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable, but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve.

"(b) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement, then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death.

"(c) That the provisions in sub-cl. (a) of this present clause contained shall not apply to any such interest as aforesaid of which any child of mine shall in my lifetime have made a settlement which as it stands at my death or as it is subsequently modified before the expiration of such period as aforesaid shall be satisfactory to my trustees (other than as aforesaid) or which such child cannot for any reason satisfactory to my trustees other than as aforesaid modify as aforesaid.

"(d) Provided also that my trustees other than as aforesaid shall have power to waive the provisions of the said sub-clause to such an extent that they (other than as aforesaid) shall think fit in order to enable any son of mine to obtain for the purpose of paying or discharging any debts, liabilities or obligations, whether legally binding or not, incurred before my death and whether before he attains twenty-one or afterwards."

Now it is on that clause, in its true meaning, that the answer to the first question before the House depends. Was a settlement in due time made by Ronald to the satisfaction of the other will trustees a compliance of itself with the conditions thereby imposed? Alternatively, were these will trustees, themselves satisfied with the settlement actually made, to be the judges whether that settlement was "so far as possible on the lines of the settlement contained" in cl. 7 of the will "so far as applicable" or had Ronald's settlement to be one which objectively answered that description irrespective of the trustees' satisfaction with its terms? These in substance are the questions for determination. And the material for their consideration is complete when to the above clause of the will there are added the two last recitals taken from Ronald's settlement as actually executed. These are also directly relevant on the second question of interpretation raised by this appeal; and will again be referred to in that connection. They are as follows:

"And whereas in accordance with the provisions [of cl. 8 of the will of the testator] the settlor [Ronald] is now desirous of settling his interest, whatever it may be, and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in all the property funds and moneys subject to the trusts of the settlement and the Raphael will respectively. . . ."

"And whereas these presents have been prepared in order to give effect to the aforesaid desire of the settlor and contain such powers and provisions as the will trustees approve and the will trustees are satisfied with the settlement herein contained and that it is so far as possible on the lines of the settlement contained in the said cl. 7 of the [testator's] will so far as applicable . . . and such approval and satisfaction is testified by the will trustees being parties to and executing these presents."

Before proceeding to examine in the light of these recitals in the settlement the forfeiture clause of the will as a whole, I would again emphasise the form of words in which the consequences of forfeiture are described in sub-cl. (b):

"My will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death";

once more, with the substitution of "issue" for "child," the very words used in cl. 7 (f) of the will and in Ronald's settlement are employed. Here again their effect as applied to Ronald's share, if forfeited, would have been to carry it to Mrs. Ezra on her majority or marriage as an accretion to her own settled legacy.

I proceed now to examine the will and in particular the forfeiture clause, cl. 8, already quoted. The courts below, as has been stated, have placed on the requirements of that clause a construction which makes the dispositive provisions of Ronald's settlement, as they interpret these, completely ineffective to save the forfeiture of his interests under the will. Is their construction of this clause justified? That is the first question.

In your Lordships' House that question has been discussed with an elaboration which perhaps for the first time critically tests, not only the correctness, but the

basis in that regard of the orders appealed from. As a result it has gained a new prominence, entitling it at your Lordships' hands, to a consideration which it has not perhaps so far received. If the contentions to which attention must now be directed are well founded, the appeals must succeed without more. Accordingly, while it would always have been logical, it has become convenient also to deal with this forfeiture clause at once.

That the clause is well drawn no one will dare to affirm. Interpretation is necessary, if its true meaning is to appear. Its principal sub-cl., (a), in particular is both clumsily and carelessly framed, and it must be the first task of construction to bring its provisions into harmony, if at all possible, with other sub-clauses less ambiguous in expression. In the accomplishment of this task the nature of the clause as a whole and the class of instrument in which it is found are not to be disregarded. Indeed they assist construction, for cl. 8, a forfeiture clause, is contained in a will. As a forfeiture clause it is strictissimi juris to be approached with a leaning against forfeiture in the construction of any phrase or provision of doubtful import. As a clause in a will its words are, in aid of the intent, more easily moulded so as to be susceptible of construction than are those of a deed. These well-authenticated principles are in sharp contrast with those governing the construction of Ronald's settlement with which the other branch of the appeal is concerned. ROMER, L.J., in his judgment, speaking of that deed, says that the principles of construction applicable require that the true meaning of the words employed

"should be ascertained without reference to the question of the consequences that the use of such words may have upon the dispositions contained in the will"

of the testator. That doubtless is so, subject always to the terms of the settlement itself. But the statement has no application to the forfeiture clause of the will, and it is noticeable that the learned judges below have apparently construed that clause uninfluenced either by its special character or by the nature of the instrument in which it is discovered. In the result and not even, it is said, under any compelling necessity of language, they have attributed to it an effect which, while opening at its widest the door to a forfeiture of Ronald's settled interest, has done nothing for the cause of harmonious construction.

The call for such a construction of the clause and the objections taken to the construction so far adopted will be very pointedly disclosed by a preliminary survey of its provisions with regard to two things, first, the position of the testator's trustees under it; and separately, their position with reference to any child's settlement executed before the testator's death. As to the first, it is not, I think, possible to draw from a perusal of the whole clause any other than the clear conclusion that a final responsibility in all matters committed to them in relation to a child's settlement rests with the testator's disinterested trustees. His selection of trustees strikes me as specially significant in this connection. Their close relationship to himself at least suggests a belief on his part in their full sympathy with the aim of the clause, namely, to tie up in the hands of his descendants as much family property and for as long a period as possible. One trustee, as has been seen, was the testator's widow; the second, who, however, died in his lifetime, was his brother-in-law; the third was his nephew and the fourth was Ronald. But close relationship was not a sufficient qualification for this special duty. It might not be proof against self-interest. A settlor, accordingly, although for other purposes a trustee, was not to share the trustees' responsibilities under cl. 8—a definite exclusion emphasised by its repetition no less than five times in the four subsections of the clause. And the importance—may it not be said the last importance—in the testator's eyes of the responsibilities he was here laying on his independent trustees is further emphasised by the fact that, to secure the discharge of these responsibilities in the case particularly of a child of age at his death, he went so far as to risk that child's ability to comply with the clause at all. For a

settlement avoiding a forfeiture which had to satisfy the independent trustees had to be executed within six months of the testator's death. What if probate were not obtained for more than these six months; what if it were renounced altogether and administration with the will annexed granted to a stranger? These risks of nullity were not run for nothing. It is difficult to believe that they would have been run at all if the expression of satisfaction on the part of these trusted relatives had been required and given was not to have effect.

And in the case of a child's settlement executed before the testator's death and referred to in sub-cl. (c) the trustees' expressed satisfaction is final, irrespective of the actual provisions of the deed and even if it remained revocable at the testator's death. The contrary of this is not suggested by any of the learned judges, and it was not contended for in this House. But, does it not follow that language free of all ambiguity will alone justify a construction of the clause which, in the case of settlements under sub-cl. (a), and in no way relevantly distinguishable, would in like circumstances, and while still requiring it to be expressed, deprive the trustees' satisfaction of any effectiveness at all? I suggest that any legitimate interpretation of that sub-clause producing uniformity in this respect with sub-cl. (c) is to be preferred to one which in the normal case of a child's settlement, executed after the testator's death, would reduce to an empty ceremony in any instance where that expression of satisfaction was still required the expressed satisfaction of his independent trustees.

It is now convenient to state in detail, for it is at length possible intelligibly to canvass, the construction placed on cl. 8 in the courts below. In the view of the learned judges, the clause requires that the following conditions must be observed if a forfeiture is to be avoided: (a) In a case under sub-cl. (c) the settlement must be satisfactory to the independent trustees. But—(b) In the case of a settlement under sub-cl. (a): (i) It must be to the satisfaction of the independent trustees; and (ii) it must be so far as possible with stated modifications on the lines of the settlement contained in cl. 7 of the will so far as applicable; and (iii) it must contain such powers and provisions as the independent trustees shall approve. In this statement I refer, of course, only to those conditions with reference to which questions have been raised in this case.

Now, the construction of the clause so adopted certainly results in this, that for a settlement, even a revocable settlement, under sub-cl. (c) to be effective the satisfaction of the trustees is sufficient, while for the effectiveness of a settlement under sub-cl. (a) the trustees' satisfaction, of itself quite ineffective unless the other conditions are complied with, is nevertheless required to a settlement whose provisions are objectively fully specified in condition (ii), and to one, moreover, which is by condition (iii) to contain also "such powers and provisions as my trustees other than those (sic) as aforesaid shall approve." In other words, the trustees' expression of satisfaction with a child's settlement under sub-cl. (a), so far from being final, as in the case of one under sub-cl. (c), has, while always still essential, become gratuitous when both of the other conditions are fulfilled and ineffectual if either of them is unfulfilled. And this construction, so open to criticism, has been adopted on purely grammatical grounds. The learned judges have made no reference to any contradictions or redundancies attending it, and they have not thought it necessary to consider the claims of any alternative construction as a result of which the forfeiture of Ronald's interests would be avoided and the various provisions of the clause would remain consistent. They have in effect reached their conclusion merely by supplying as words to be understood in sub-cl. (a) those which I now enclose in square brackets.

"Each child of mine shall . . . by deed settle the interest . . . and [each child] shall make such settlement to the satisfaction of my trustees . . . [and each child shall make such settlement] so far as possible on the lines, &c.,"

when construing the whole clause literally. The question now is whether the suggested words, or words of similar import, are either the only words, or, in the

context and circumstances, are the words most proper to be understood. After very careful consideration I have come to the conclusion that they are neither, and I now feel satisfied, on the form of the subsection itself, as well as with a view to harmonise the provisions of the section as a whole, that the words best to be supplied may be such words as (I again include them in square brackets) "and [so that it is] so far as possible on the lines," &c.

Now, as is shown by the recital in Ronald's settlement already set forth, this is the construction of the clause on which the trustees acted. Is it not justifiable, even grammatically? I think it is. There is no invincible grammatical objection to the implication of these words, and the result of implying them is to bring harmony into the whole, at least in every essential respect, and to remove from a testamentary forfeiture clause a contradiction not capable and a want of effectiveness not easy of rational explanation. For the provisions of the subsection which immediately follow then become provisions to be required, it is true, by the trustees, but provisions with which it is they who are to be satisfied. Their satisfaction is to be the touchstone of effectiveness for a settlement under sub-cl. (a), just as it is for one under sub-cl. (c). And this construction is enough in the present case to save the forfeiture of Ronald's interests under the will.

FARWELL, J., found the strongest argument against this view in the fact that the testator

"thought it necessary to state the one modification which he was prepared to allow, that is the general power of appointment over half the fund in the event of there being no children."

I cannot myself think this difficulty to be serious. It does not seem to touch the construction suggested. Moreover, to the effectiveness of a settlement with this modification omitted no objection could have been raised. For it is a mere power, which could have been effectually released by the settlor the moment after the settlement was executed.

Being satisfied that this view of the sub-clause is permissible, and that, if permissible, it is for this testamentary forfeiture clause obligatory, I need not express any concluded opinion on the question whether a complete solution of all difficulty may not here properly be found by reading the words of this ill-drawn clause "and so far as possible" as if they were "or so far as possible." FARWELL, J., refers to this solution as a possibility, but he rejects it as inadmissible. He does not, however, allude to the difficulties which its adoption would remove.

Now, it must, of course, be agreed that this substitution of the disjuncture for the conjuncture is not lightly to be made, even in the construction of a clause like this, in a will where so much latitude in aid of intent is allowed. And if the views be correct which I have already expressed as to the permissible meaning of its words, as they stand, no resort to this solution is essential. But if these views are not tenable, and if the only proper construction of this clause as it stands is that adopted below, then I would hesitate long before I declared myself precluded in the cause of harmonious construction from here reading the word "or" for the word "and." It is a substitution which in the case of a will has been often made by courts of construction to remove contradiction or redundancy. In the present case it would eliminate both, and its effect in each direction would be as complete as it would be convincing. For, with the substitution made, harmony full toned and not merely partial, results and the clause as a whole has attributed to it an effect corresponding to that which is, to me at least, its plain intention, as disclosed by the considerations to which reference has been made in this judgment. A settlement, whether under sub-cl. (c) or sub-cl. (a), becomes completely effective to avoid a forfeiture if framed to the satisfaction of the independent trustees. But a settlement under (a) will also be equally effective if it complies with the conditions (ii) and (iii) already stated—the intervention of the trustees on that alternative being confined, as is rational, to their approval referred to in the third condition. As a result in no case is the expressed satisfaction of the trustees without effect when as a condition of effectiveness it is required. Nor is it ever

gratuitously required where the terms of the settlement are objectively prescribed and the trustees must approve of its powers and provisions. I need not say more. My judgment on this forfeiture clause alone would be for the Crown.

But I must not leave unconsidered the second question arising on the appeal which is concerned with the true construction of the words of Ronald's settlement prescribing the manner in which, in the event of his death without issue, the trust fund is to be dealt with. These words, already referred to, are to be found in s. 5 of the settlement. I will deal with them textually after I have adverted to such of the recitals and other provisions of the deed as may have a bearing on the effect to be attributed to them. These recitals are copious but selective. They strike a reader as being all there for some relevant purpose. It is made clear, for example, that neither under his parents' marriage settlement nor under the Raphael will—the two sources of the trust fund—did Ronald's interest in default of appointment vest during infancy, and he must, it appears, have been at least nine years old at his grandfather, Mr. Raphael's, death—facts, under the very eye of the draftsman, going far to absolve him in advance from the suggestion made of a serious confusion of thought on his part. Again in the recitals of the testator's will the interests of daughters under cl. 3 and cl. 5 are quoted with direct reference to their position under the latter clause, while cl. 7 is recited with as full a reference to a daughter's position thereunder as to a son's—indications going to show, as was suggested on behalf of the Crown, that these recitals are framed so as properly to introduce a cl. 5 which would reserve to daughters some potential interest in the trust fund and not one, such as the respondents contend for, which excludes daughters in every event from any participation at all. Then there is a complete recital of the forfeiture clause, cl. 8, of the will and, in the words already quoted, a statement of the consequences to the settlor of non-compliance with its provisions. Finally there are the two last recitals already set forth in another connection. To these I invite your Lordships' attention afresh as possessing an influence all their own in the solution of the question now at issue. It is, however, for the moment enough to say that the narrative on which the operative provisions of the settlement proceed makes it plain that the only occasion for the settlement was to save the forfeiture of Ronald's interests under the testator's will, that with a view thereto both the trustees and he had set out to comply in the fullest sense with the conditions detailed in the forfeiture clause, and that by the terms of the settlement as executed they were satisfied that they had done so.

It is, I suggest, beyond argument that any permissible construction of operative provisions following such recitals and which would fulfil them is to be preferred to one, however otherwise plausible, which would defeat them. And it is agreed on all hands that apart from the difficulty created by the wording of cl. 5 the satisfaction of the trustees was fully justified. The operative clauses follow in their order the corresponding sub-clauses of cl. 7 of the will. In the case of every clause, other than cl. 5, the correspondence is effected by a substantive or direct disposition of the trust fund by words which, with necessary modification required by the changed circumstances, are a translation of the effect in the same event of the words of the opposite sub-clause of cl. 7. Every one of these clauses might accurately be prefaced by the words from the final recital

"following the lines of the settlement as contained in the [corresponding] sub-clause of cl. 7 of the testator's will."

This is true of cl. 2, cl. 3, cl. 4, and cl. 6—clauses both preceding and following cl. 5. That clause, however, the final dispositive clause, makes a new departure. There, the direct method of disposition is abandoned in favour of one that is referential as will be seen by this citation of its relevant provisions:

5. "If the settlor shall not have any child who under the trusts in default of appointment hereinbefore contained shall attain a vested interest in the trust fund then . . . the trust fund shall be held as to one-half thereof in trust for such person or persons or purposes as the settlor shall by will or codicil appoint

and as to the other half part . . . shall be dealt with as if the settlor had died in the lifetime of the testator without leaving any child living at the death of the said [testator]."

In this referential disposition, the words of reference—whatever their effect—are, as has been already noted, the very words of cl. 7 (f) of the will by which in the same event the ultimate destination of the settled fund thereunder is directed.

Now, if it can be accepted—and the contrary is not suggested in any quarter—that it was the purpose of the draftsman—whether attained or not is another matter—to follow the lines of the will settlement in this as in the other dispositive clause of Ronald's settlement, his change in this clause from the direct to the referential method of disposition is not difficult to account for. The task of translating accurately this provision of the will and transferring the result to cl. 5 of the settlement was not too simple. The provisions of cl. 7 (f) are themselves referential: and their precise effect, clear enough now, is not immediately obvious. So the draftsman in this instance seems over-anxious perhaps to have aimed at a disposition which, in the event, would make the destination of the trust fund the same, in every particular, as was the destination of the settled will fund in the same event. By this expedient any risk of inaccurate translation would be avoided. And such in the submission of the Crown is, on its true construction, the effect of cl. 5.

In the respondents' submission, however, this construction is not admissible. The words used will not, they say, permit of it. These cannot be treated otherwise than as words of disposition of the trust fund itself, and not the less so, that when so treated they become completely ineffective as words of disposition and must in construction be either ignored or regarded as struck out of the clause, with the result that the trust fund in the event is by the settlement undisposed of and results to the settlor.

With the issue of construction thus sharply defined, the first, and for me the only, question to be answered is whether, on the words of the clause alone effect can be given to the result for which the appellants contend. This question, strangely enough, turns on the true effect of two small words, of themselves to all appearances, relatively unimportant—the words "as if." These words, as is pointed out by ROMER, L.J., are elliptical, some words between them are left out. What are these words? The lord justice says they must be either (i) "*As the trust fund would have been dealt with if*": or, (ii) "*As the settlor's portion under the will would have been dealt with if*." In this I agree with him subject to one slight reservation which, however, may not be without some importance. I would phrase the alternatives thus: either (i) "*As the trust fund would be dealt with if*": or (ii) "*As the settlor's portion under the will would be dealt with if . . .*" Now ROMER, L.J., was not prepared to say more for the second alternative than that it was arguable, and his impression clearly enough was that the first was preferable to it. But he gave no reason for this preference, and apart from it altogether he excluded the second alternative even from consideration for a reason which he gives. This alternative, he says,

"need not be further considered as it would lead to nothing. For if the settlor had died in the lifetime of his father without children he would never have had a portion at all, and the settlement of which he is following the lines would not have existed.

"In these circumstances it must be the trust fund that becomes the subject-matter of the inquiry how it would have been dealt with upon the hypothesis referred to. Now unfortunately this inquiry cannot be answered."

I do not know whether that deliverance of the lord justice was to any extent induced by the paulo-post form in which he framed his alternative ellipses. It may be that if these had been framed in the future, as I have suggested they ought to be, his conclusion on this point would have been different. But however the two alternatives are, in this respect, couched, I very respectfully suggest that the

asons adduced by the lord justice for rejecting the second out of hand cannot be justified. For myself, I am unable to appreciate them.

The hypothetical words in cl. 7 (f) of the will are found in a settlement directed that clause which, so far as Ronald was concerned, became operative because in fact he survived the testator. The hypothesis is inserted in the sub-cl. (f) merely to be the basis, on which, in the event, and according to the terms of the will, the ultimate destination of the fund would be ascertained. And this hypothetical event, on Ronald's actual death, no forfeiture being then suspected, did not become effective, as has been seen, to carry in terms of the will the enjoyment of Ronald's settled share to Mrs. Ezra and her children. Why should not the trust directed in the same event be validly directed to the same destination? In my judgment it is not possible, for any such reason as that adduced, to rule out the second alternative, certainly not in the form in which I have phrased it. The question whether the first alternative or the second is that which is proper to be adopted must be determined by quite different considerations.

Now, on this it must, I think, be conceded that the words of the clause, merely in words, lead more easily to the acceptance of the first alternative than of the second. The projection into the void of the "trust fund" just mentioned seems a matter of first impression fully to satisfy what is required. But applying LORD MACNAGHTEN's observations in *Orr v. Mitchell* (4), to the effect that where words are susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning—a rule which applies even though one of the two meanings is the more obvious and would necessarily be preferred if no light could be derived from the rest of the deed. Applying these observations it becomes clear that in the present instance something more than a superficial reading of the section itself is required before the choice between the two alternatives can be definitely made. It must be ascertained which of them will best fulfil or realise the recited purpose of the settlement: which of them will best accord with the recital that that purpose has been in fact achieved by the settlement. Again, if following cl. 2, cl. 3, cl. 4, and cl. 6, there may be implied before the words "be held" in this clause, as I think there may, the preface "following the lines of the settlement in cl. 7 (f) of the said will as modified by cl. 8 (g)," it must be asked which alternative will justify that statement? These are the questions which must be put: and to each of them there is only one answer—the second alternative. By the adoption of the first with its consequential resulting trust to the settlor every recited purpose of the settlement is frustrated: the dispositive words become meaningless and completely ineffective: the recital of its actual effect is contradicted: the implied words in the preface are falsified. By the adoption of the second alternative every purpose of the settlement is attained: every recital of effect is verified: every word of the preface is fulfilled. So far as cl. 5 is concerned, Ronald's settlement is one "on the lines" of the will settlement, not only "so far as possible" but exactly: not merely "so far as applicable" but completely.

For these reasons I reach the conclusion that as a matter almost of necessary implication the second alternative is really the only alternative to be adopted. So soon as it is recognised that the words "as if" are elliptical, it lies as open to be chosen by a court of construction as does the first. When it has been chosen the case of the Crown is complete.

In this view of cl. 5 an argument adduced in support of the first alternative construction is deprived of much of the importance which it assumed at the hearing. The final justification for the adoption of the first alternative, it was urged, was that the clause was the work of a draftsman who had blundered in failing to recognise that the destination of the trust fund by reference to the words of cl. 7 (f) of the will would be quite different from the destination of the settled will and directed by these same words—an obvious blunder, but one sufficient to fix the sense in which the words were actually used in the section.

If the construction which I have placed on cl. 5 be correct no such blunder is

attributable to the draftsman, but speaking for myself I could not, in any circumstances, have accepted that explanation of the wording of the clause. It is to me almost inconceivable that a conveyancer of the disclosed calibre of the draftsman of this otherwise well-drawn settlement could have made such a blunder. Its extent is almost infinite. It implies, first of all, that to him the words of cl. 7 (f) were words of disposition of the will fund easily converted into words of disposition of Ronald's own trust fund. But the words were not in the will words of disposition: they do not affect Ronald's property in any way: it was quite irrelevant to their effect whether he died testate or intestate, married or single. All that was necessary was that the hypothesis had it happened would suffice to extinguish Ronald's interest in the testator's residuary estate, and leave that estate free to be dealt with as if he had never lived. But if such a mistake could be imputed to this draftsman—a sufficiently damaging imputation—what of the further suggestion that he supposed that these words might be utilised so as to become original words of disposition of the trust fund. As to this, it will be remembered first of all that by the date of the settlement the hypothesis of the will that Ronald dead should have left no issue living at the testator's death had ceased to be a hypothesis. There had in fact been no such issue. The only remaining hypothesis thereafter was that of Ronald's death in the testator's lifetime. But is it to be supposed that this conveyancer believed that that hypothesis could of itself carry Ronald's trust property in any definite direction, and in particular in the direction required by the forfeiture clause? This seems to me impossible. What if Ronald had died leaving issue who predeceased the testator? The hypothesis did not cover that contingency. But the draftsman's so-called blunder does not even stop there. The hypothesis put was satisfied by Ronald's death at any time prior to the death of the testator. But for nine years of that period Ronald had, as is clear from the draftsman's own recitals, no interest whatever under the Raphael will, while he had during his twenty-one years of minority no interest under either will or settlement which could pass on his death to anybody as part of his estate. All of which really goes to confirm the view that what I have called the first alternative construction of cl. 5 leads to a complete absurdity, to be rejected if one more sensible is open. All of it shows, also, as I suggest, that the mistake the draftsman made, if such it can properly be called, was not of the kind so far suggested, but consisted in his failure to intimate clearly that in that final dispositive cl. 5 the direct method of disposition employed in the earlier sections had been abandoned and the referential method of achieving the recited object of the settlement and satisfying the implied introductory words of the section had been adopted in its place. In other words, the elliptical words of the second alternative ought for clearness to have been expressed. It was to say the least rash to leave them to the working even of a necessary implication. Had the draftsman been less reserved in this matter the complete satisfaction with the settlement, as I believe well justified, which continued for thirteen years would have remained permanently undisturbed.

My Lords, all this is pure construction. If that which I have placed on cl. 5 be tenable there is, as I have said, no further question, and I must not in a judgment already too long proceed to discuss the problem which does not for me arise, whether, if the first alternative construction of the section is alone possible the second cannot be restored by introducing into the section words to produce its effect. On that question, while I might say much, I will only say this. This case in one respect most material, differs from, I think, all of those in which a similar difficulty has arisen. In these the choice has usually been between leaving dispositive words to operate according to their natural signification and supplying words to vary that meaning. Here the choice lies between supplying some words in order to give dispositive effect to words of disposition and treating these words as non-existent. Here both sides do violence to the actual terms of the deed. But there is this difference between them. The respondents by the omission of some words which are there would defeat its manifest intention. The appellants by the insertion of some few words which are not there would secure the fulfilment

the declared purpose of the settlement. Which alternative is a court of construction to choose? I leave the question in suspense.

For the other reasons already given, I would on this second question also allow the appeal.

LORD WARRINGTON (read by LORD THANKERTON): These are appeals by the Commissioners of Inland Revenue from orders of the Court of Appeal (LORD HANFORTH, M.R., and LAWRENCE and ROMER, L.JJ.) dated April 11, 1933, affirming orders of the Chancery Division of the High Court of Justice (FARWELL, J.) dated Nov. 30, 1932, ordering repayment to the respondents of sums amounting in all to £308,285 8s. 4d. in respect of the estate duty paid in the months of October and December, 1924, and April and June, 1925, on the death of Ronald Edward David Sassoon (hereinafter referred to as Ronald) who died on July 11, 1924. Both appeals raise the same question, namely, whether on the true construction of a settlement of certain funds of his own made by Ronald in pursuance of directions in that behalf contained in the will of his father, Frederick David Sassoon (hereinafter called the testator), the result was to create in Ronald a resulting trust in his favour and, in consequence, to cause a forfeiture of his interest in the testator's estate under his the testator's will. This question has been answered by the courts below in the affirmative and the Commissioners of Inland Revenue appeal.

Before proceeding further it will be convenient to state certain facts relating to the testator and his family with the relevant dates. The testator died on May 4, 1917, leaving him surviving, his widow, Jeannette Sassoon, and two children, Ronald and the respondent, Muriel Helene Ezra, then a spinster and a minor of the age of twenty or thereabouts. His will was dated Dec. 28, 1912, and was proved on July 3, 1917. Ronald died on July 11, 1924, a bachelor and intestate, leaving him surviving his sister, the said Muriel Helene Ezra, his sole next of kin, to whom letters of administration of his estate were granted in due course. On attaining the age of twenty-one Muriel Helene Ezra executed a settlement of her funds referred to in the testator's will in all material respects identical with that made by Ronald. She has two children, Ruth Muriel Ezra and Aline Mozelle Ezra, respectively, infants and spinsters.

By his will (cl. 3) the testator (in the events which have happened) gave to his daughter Mrs. Ezra a legacy of £50,000 and (cl. 5) he gave, devised and bequeathed to his trustees all the remainder of his property whatsoever and wherever upon trust in the events which have happened for Ronald. He then directed (cl. 7) that his trustees should retain the share (if any) of each child under cl. 5 and the legacy under cl. 3 of each daughter and should stand possessed thereof and any accumulations of income and the investments representing the same (all hereinafter included in the description of such child's portion) and the income thereof upon the trusts and subject to the power and provisions following so far as applicable thereto. It is unnecessary to state the whole of these trusts in detail; it is enough to say that (sub-cl. (a) and sub-cl. (b)) he gave each child what is commonly called a protected life interest, and (sub-cl. (c)) after the death of such child his or her share was to be in trust for his or her issue as he or she should by deed or will appoint, and in default of appointment for his children who should attain the age of twenty-one years or being female should marry under that age and if more than one in equal shares. Sub-clause (d), a hotchpot clause, and sub-cl. (e), an advancement clause, are both in common form. He then proceeded as follows (sub-cl. (f)):

"If a child of mine shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in his or her portion, then subject to the trusts and powers hereinbefore contained in favour of such child and his or her issue, such portion and all accumulations of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be dealt with as if such

child had died in my lifetime without leaving any child living at my death."

Sub-clause (g) and sub-cl. (h) are not material for the present purpose. By cl. 8, after stating that his children respectively might under his own marriage settlement and the will of his father-in-law, Edward Lewis Raphael, become entitled to interests in the funds, subject to the trusts of those documents respectively, he proceeded as follows :

"Now for the protection and benefit of my children I will and direct as follows : (a) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or, if he or she shall be under twenty-one at my death, before the expiration of six calendar months after he or she shall attain twenty-one, settle the interest, whatever it may be, and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them, and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled, and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve."

"(b) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without having any issue living at my death.

"(c) Provided always that the provisions in sub-cl. (a) of this present clause contained shall not apply to any such interest as aforesaid of which my child shall in my lifetime have made a settlement which as it stands at my death or as it is subsequently modified before the expiration of such period as aforesaid shall be satisfactory to my trustees (other than as aforesaid) or which such child cannot for any reason satisfactory to my trustees (other than as aforesaid) modify as aforesaid."

Sub-clause (d) gives power to his trustees (other than as aforesaid) to waive the provisions of sub-cl. (a) to enable a son to obtain money for payment of debts, liabilities or obligations incurred before his (the testator's) death.

Ronald's settlement was dated July 23, 1917, and was made between himself (thereinafter called the settlor) of the first part, Jeannette Sassoon and David Gubbay (thereinafter called "the will trustees") of the second part, and the said David Gubbay and Cecil James Longcroft (thereinafter called the original trustees) of the third part. It contained recitals indicating the interests Ronald took under his father's and mother's marriage settlement and under the will of Louis Edward Raphael. It also contained a recital of parts of the will of Frederick David Sassoon showing the gift to the settlor of his portion and the direction contained in cl. 7 for the retention of his children's portions upon the trusts in the said will contained. Clause 8 (a) and (b) are recited in full. After further statements not necessary to be here repeated the deed contains the following recital :

"And whereas in accordance with the provisions of cl. 8 of the Sassoon will the settlor is now desirous of settling his interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession reversion or otherwise in all property funds and moneys subject to the trusts of the settlement and the Raphael will respectively. . . . And whereas these presents have been prepared in order to give effect to the aforesaid desire of the settlor and contain such powers and provisions as the will trustees approve and the will trustees are satisfied with the settlement

herein contained and that it is so far as possible on the lines of the settlement contained in cl. 7 of the Sassoon will so far as applicable with the modification mentioned in sub-cl. (a) of the said cl. 8 and such approval and satisfaction is testified by the will trustees being parties to and executing these presents."

the operative part of the deed "in pursuance of the said desire" the settlor assigned his interests under the settlement and the Raphael will respectively in the widest terms to the original trustees on usual trusts to get in receive or obtain transfer thereof or the investments representing the same with common form directions for re-investment and so forth and a direction to stand possessed of the premises thereinbefore assigned and the investments for the time being representing the same (all thereafter referred to as "the trust fund") and the income thereof on the trusts and subject to the powers and provisions thereafter contained concerning the same. The deed then reproduces textually the provisions of cl. 7 of the testator's will so far as they refer to the settlor, his children, and issue, including the hotchpot and advancement clauses. Then follows cl. 5 reproducing cl. 7 (f) of the testator's will. This must be set out in full.

"If the settlor shall not have any child, who, under the trust in default of appointment hereinbefore contained, shall attain a vested interest in the trust fund then subject to the trusts and powers herein contained in favour of the settlor and his issue, the trust fund and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be held as to one-half thereof in trust for such person or persons or purposes as the settlor shall by will or codicil appoint, and as to the other half part and in default of and until and subject to any appointment also as to the first-mentioned half shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

This is the provision which has caused the trouble. The draftsman obviously thought that by reproducing the words of the testator's will he was fulfilling his task, but he omitted to notice that in the will those words referred to the son's portion, whereas in the settlement he was preparing they referred to the trust fund and that trusts and provisions applicable to the former were not applicable to the latter. It was an unfortunate blunder and the principal question for decision is whether it can be set right by construction, as the appellants maintain or whether, as has been decided in the courts below, the only possible remedy if there be one could be rectification.

Before dealing with this question, however, I will dispose of another contention on the part of the appellants which, if successful, would render discussion of it unnecessary. The appellants contend that on the true construction of cl. 8 of the testator's will the "satisfaction" of the trustees is conclusive, and that having been expressed by them the sufficiency of Ronald's settlement cannot be questioned. I am unable to accept this view. In my opinion the main direction of the testator was that the settlement he directs shall be so far as possible on the lines of the settlement contained in cl. 7 of his will so far as applicable with the particular modification specified, and he has required the satisfaction of the trustees merely as a further assurance that the settlement actually made is of that nature. I think this view is further borne out by the fact that in sub-cl. (a) which applies to a possible settlement already existing he has given a real discretion to the trustees, which contrasts strongly with the provision in sub-cl. (a) connected as it is with the precise directions in regard to the nature of the settlement. The powers and provisions" as to which the approval of the trustees is sufficient are, in my opinion, administrative powers and provisions usually inserted in such instruments, and are just those which would naturally be left to the discretion of the trustees.

It will be noticed that the trustees express themselves satisfied that the settlement is so far as possible on the lines of the settlement contained in cl. 7 of the Sassoon will, so far as applicable with the special modification above mentioned, thus recognising, as I think, the nature of the duty cast on them. Unfortunately they were ill-advised, but the mistake on their part, or rather on the part of their advisers, cannot in my opinion override the express directions of the testator.

I now come to the question, argued on behalf of the appellants with much ingenuity and force, whether the words in the operative part of the deed are capable as a matter of construction to be controlled and modified so as to give effect to the intention of the settlor declared by the recitals, the terms of which are quoted above.

The principle of law in this respect is perfectly settled, and it may be thought unnecessary to re-state it or to refer to authority on such a point. But in deference to the arguments addressed to the House I will cite the opinions of certain noble and learned Lords, expressed in *Mackenzie v. The Duke of Devonshire* (2). In that case an attempt was made, similar to that made by the appellants, to modify as a matter of construction clear and unambiguous words in the operative part by reference to the intention of the settlor as expressed in the narrative part of the deed. LORD HALSBURY said ([1896] A.C. at p. 405):

"If the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified or modified by the initial statement of what the motive of the author of the deed was. It would, to my mind, be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made."

LORD WATSON in the same case said (*ibid.* at p. 407):

"The narrative words come to no more than this, 'My intention is to do so and so,' and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which follow and to read them according to their natural and just construction."

LORD DAVEY said (*ibid.* at p. 408):

"I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous terms are not to be controlled, cut down, or qualified by a recital or narrative of intention."

The fact is that the narrative and operative parts of a deed perform quite different functions, and "intention" in reference to the narrative and the same word in reference to the operative parts respectively bear quite different significations. As appearing in the narrative part it means "purpose." In considering the intention of the operative part of the word means significance or import—"The way in which anything is to be understood" (OXFORD DICTIONARY) supported by the illustration, "The intention of the passage was sufficiently clear."

To apply these principles to the present case:

"The trust fund shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

In themselves the words are clear and unambiguous. They involve a single hypothesis only, namely, the death of the settlor under the circumstances supposed. But as applied to the trust fund there cannot be found any directions as

how on the hypothesis mentioned it is to be dealt with. The result is a resulting trust for the settlor and the forfeiture of his interest in the "portion" bequeathed him by the testator.

The contention on the part of the appellants inevitably involves the introduction of a second hypothesis in addition to that contained in the actual words. That this also is admitted by the appellants, and they have suggested many formulæ which they say would effect their purpose. They all involve the introduction of a second hypothesis. It would be waste of time to consider them all; they are merely variations on the same theme. I will take one as an illustration.

'As if the trust fund had been property held by the trustees upon the same trusts as those declared by cl. 5 to cl. 7 inclusive of the will of Frederick David Sassoon and the settlor had died.'

For the reasons stated above it is in my opinion impossible without departing from the settled principle mentioned above thus to alter the words of the clause in question.

Very many cases were cited on behalf of the appellants. I do not refer to them, for they are merely illustrations of what has been done under other circumstances. The principle of law is settled and the duty of the courts is to act in accordance therewith. In the present case I am of opinion that the courts below have arrived at the correct conclusion and that this appeal should be dismissed with costs.

LORD THANKERTON.—For my own part, I desire to express my full concurrence in the opinion about to be delivered by my noble and learned friend **LORD WRIGHT**, which I have had the privilege of considering.

LORD WRIGHT.—My noble and learned friend, **LORD ATKIN**, desires me to say that he has read in print my opinion which I am now about to deliver and agrees with it.

The questions in this appeal involve the construction of certain provisions in the will dated Dec. 18, 1912, of Frederick David Sassoon, whom I shall call the testator, and the construction and effect of certain provisions in a settlement dated July 23, 1917, made by the testator's son, Ronald Edward David Sassoon, whom I shall call Ronald Sassoon. The parties to the present dispute are on the one hand the appellants, the Commissioners of Inland Revenue, and on the other the trustees of the testator's will and the administratrix of Ronald Sassoon. The question is whether Ronald Sassoon had forfeited his interest under the testator's will, so that it was not property passing on his death: if it was not, the death duties paid on the basis that it was are admittedly recoverable from the appellants. I need not recapitulate the facts or the documents.

It is on cl. 5 of Ronald Sassoon's settlement that the issue mainly turns. The respondents contend that it is far from being a settlement on the lines as far as possible of the testator's will in the assumed event, because its effect is to create a resulting trust in favour of Ronald Sassoon, instead of creating the limitation which, in the assumed event would come into effect under the corresponding provision of the testator's will, which would be in substance a limitation in favour of Mrs. Ezra and her issue or in default of her issue a resulting trust in favour of the testator. The appellants contend that the clause is a compliance with the intentions of the testator's will, partly because it was to the satisfaction of the trustees under that will; and secondly, and alternatively, that in its true construction it was as far as possible on the lines of the settlement, either in its literal construction or as it should be understood with such words as by necessary implication must be read in to give effect to the intention expressed in the recitals which was to achieve as far as possible the same limitations as those which would, in the assumed event, take effect under the testator's will.

Each limb of this argument needs to be separately considered. The questions must be dealt with simply as questions of construction. The appellants are not in any event parties who could claim rectification: the administratrix does not claim rectification. Indeed, her case is that there was a forfeiture.

The first contention which the appellants advance is based on the words of cl. 8 of the testator's will: it is not disputed that the settlement under cl. 5 was to the satisfaction of the trustees of the testator's will; indeed, it is so recited. The question is whether such satisfaction is conclusive that the settlement is as far as possible on the lines of the testator's will settlement or whether the latter is a separate condition, superadded to the trustees' satisfaction. In my judgment the question must be answered in favour of the respondents, as it has been in the courts below. The appellants' contention cannot, I think, be made to fit in with the actual words of the clause, which appear to me to be only susceptible of the meaning for which the respondents contend. To achieve the meaning for which the appellants contend, some paraphrase or substitution appears to be unavoidable: thus, in place of "and" must be read some such words as "that it is"; or it might have been "and to the satisfaction of the trustees that, &c." Without some paraphrase I find it impossible to read the second requirement as merely directory or as merely an indication to the trustees of what they ought to look for; I think it is a peremptory direction to "each child of mine," defining the lines on which he is to make his settlement. In fact, there are three requirements in the three sentences in cl. 8: (i) to the satisfaction, &c.; (ii) and so far as possible, &c.; (iii) and so that such settlement, &c. Whatever their relative importance may be, they are textually put on the same level, and are all conditions to be severally complied with. I cannot follow the argument that if the trustees are honestly satisfied the matter is concluded and the condition fulfilled. Nor can I agree that the trustees have been, as it were, empowered to make a bargain with Ronald Sassoon as to what settlement he should make, or that it is a sort of precatory trust, so that if the trustees of the will are satisfied nothing more is required. On the contrary, I think it is a governing term of the settlement that it is to be as far as possible on the lines of the settlement in the will. No doubt the testator wanted to secure that substantially the whole property should remain in the family, save in so far as he has specifically provided to the contrary, as in respect of the child's power of appointment over one-half of the capital fund, and in respect of the special permission that there might be a settlement on other lines, if made before his death, and in respect of the further proviso that in regard to some part of the fund the trustees might waive the condition in order to discharge the testator's son's debts and liabilities incurred before the testator's death. These permitted variations show clearly that except where they apply it is a condition of the will that Ronald Sassoon should settle the fund as far as possible on the lines of the settlement in the will. This is further confirmed by the use throughout of the word "shall." I cannot find anything unreasonable in the condition. There seems to be no insuperable difficulty (or there would not have been but for the peculiar terms of Ronald Sassoon's settlement) in finding the required dispositions, which, it is to be observed, are to be "as far as possible on the lines, &c." A reasonable latitude is allowed. Nor can I feel any difficulty even if the satisfaction of the trustees is on this view pointless. Even if it were, though I do not think it is, that would not change the construction of the words: the testator may simply have required that the trustees should be satisfied that there was a settlement, and that its terms were such as they could fairly approve. But their satisfaction cannot, on the true construction of the will, dispense with the binding force of the other condition.

The question then arises whether that condition has been broken by the term of cl. 5 of Ronald Sassoon's settlement, so that a forfeiture has occurred. On this the argument on behalf of the appellants has fallen, as already stated, under two heads.

That argument has been that on the literal words of cl. 5 read with the settlement as a whole there is a settlement as far as possible on the lines of the settlement, under the will. The clause, it is argued, embodies a hypothetical referential limitation which must be construed along with all the other terms of the settlement and in particular with the recital that the settlement was intended

fulfil the conditions of the testator's will so as to avoid a forfeiture. Great stress was also laid on the close correspondence between the provisions of the testator's will and those of the settlement. This argument takes two forms. It is contended that on its face cl. 5 might, if it stood alone, have no effect save to create a resulting trust in favour of the settlor, since the disposition does not give the trustees any sufficient or certain directions, in particular because there is no statement whether or not the settlor is to be treated as dying intestate and a bachelor. But it is said the condition antedates the settlor's death and treats it as anterior to that of the testator, and on that hypothesis it must be taken that the settlor was intestate and a bachelor and solvent at the date of his hypothetical death as in fact at the assumed time he was: at the date of the settlement all the facts were known, and hence the limitation would have the effect of throwing the fund into the testator's estate, in which event it would be dealt with on the terms of the settlement under the will; thus Ronald Sassoon must be taken to have made such a settlement as the will requires. I cannot accept this argument. It is not merely that no evidence is forthcoming as to whether Ronald Sassoon was actually intestate, a bachelor and solvent during the testator's lifetime; I think it illegitimate in this way to confuse hypothesis and fact, and furthermore I think the effect of cl. 5 must be ascertained by what it expresses; the disposition is imperfect because on its terms, by which it must be judged, it is too vague and uncertain. The appellants then rely on an alternative argument on the words of cl. 5, read in the context, which is that the cl. 5 is referential and must contemplate a settled fund to which the hypothetical death of Ronald Sassoon before the testator could be relevant, and in such event a definite scheme of limitation is to be found in the references in the settlement to the testator's will: in that way, it was contended, cl. 5 follows on the lines of the testator's settlement and fulfils the condition. I find it impossible to accept this argument. It is, I think, too remote from the actual language. Indeed, the words of cl. 5 seem to me to create rather a direct disposition than a referential limitation in any sense.

But it has been contended further on behalf of the appellants that, if the bare literal construction of cl. 5 does not give the effect which is claimed, the true meaning is to be ascertained by regarding the clause as elliptical and on its face calling for a supplement which will express the settlor's true intention. It is said that the words "as if" are clearly elliptical, and hence some words must be supplied: what then these words are must be gathered in part from the close correspondence of the provisions of the settlement with the testator's will throughout and also from the stated hypothesis of the settlor dying without leaving issue in the testator's lifetime; it is also said that the words "shall be dealt with" point to an intended chain of limitations, the nature of which is further defined by that part of the recital which expresses the settlor's desire to settle the funds in accordance with the provisions of the testator's will and by the further recital that the settlement is in pursuance of that desire. Hence, it is contended, that the true meaning of cl. 5 can be fully expressed if the elliptical words are regarded as completed in some such form (to take one of several suggestions made on behalf of the appellants) as the following: "Shall be dealt with as [in the like event the settlor's portion would be dealt with under the testator's will on the hypothesis] if the settlor had died, &c." The result would be to import in favour of Mrs. Ezra and her issue the various trusts, powers, and provisions declared by the testator's will and the settlement would thus be on the lines as far as possible of that will. This result, it was contended, would be thus achieved as a matter of construction and not of rectification.

In support of the argument, a number of authorities have been cited for the propositions that in construing the clause the document as a whole and all parts of it must be taken into account, and that the clause must be controlled by the recitals and that if the intention is clear the court must mould the refractory words in order to give effect to that intention. I have considered the various cases cited, but can find no authority which justifies the appellants' contentions or which

justifies under the guise of construction so drastic a re-writing and amplification of the actual words used. The views propounded on behalf of the appellants mean that whereas the earlier part of the relevant sentence is dealing with the trust fund, there is to be introduced into the part following the words "as if," a different subject-matter, that is, the settlor's portion under the will. It seems, however, to me that the only legitimate or, indeed, possible construction is one which continues the same universe of discourse, that is, the trust fund, throughout the sentence. The change proposed, which is a change not merely in words, but an idea, could only be effected, if at all, by rectification. The essential feature of the appellants' case is, in fact, an attempt to ask the court to do what the settlor might have done but has not done. Even if the settlor has sufficiently shown a desire to settle the fund in pursuance of the provisions of the will, he has not in fact so settled it; indeed the desire or purpose to do so which is stated in the recitals is simply a general desire to achieve a result without any indication of the particular form in which he was minded to carry out that desire. The particular form embodied in the operative clause is what in fact he adopted. How he might have framed the limitations so as to comply with the will, if he had not adopted the words he has, must be matter of mere conjecture.

I must, however, deal shortly with the authorities which have been so strenuously urged on behalf of the appellants as leading to the contrary conclusion. It must be remembered at the outset that the duty of the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word "intention" in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them: such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise as far as possible all the parts: particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention; these matters may be established, as they generally are, by extrinsic evidence. The court will thus reform or re-write the clauses in order to give effect to the real intention. But that is not construction, but rectification.

The appellants' counsel have here relied on the statement in the recitals that the settlement is intended to be in pursuance of the provisions of the testator's will and have argued that the operative words must somehow be treated as carrying out that intention, however refractory from that aspect these words may be. Reliance has been placed on LORD ESHER's dictum in *Re Moon, Ex parte Dawes* (1) (17 Q.B.D. at p. 286):

"If the recitals are clear, and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

It in that case the court looked at the recitals simply in order to identify what was intended to be conveyed, and what was in contemplation of the parties; there was no idea of re-moulding the words of the operative clause so as to make it fulfil the general intention expressed in the recitals but not carried out in the operative words. I think that such a course would be in truth as illegitimate as to use expressions of intention brought from any other source than the recitals, and to admit evidence not admissible except on an issue of rectification. As was said by LORD, L.C.J., in *Bath and Montague's Case* (5) (3 Ch. Cas. at p. 99):

"The reciting part of a deed is not at all a necessary part either in law or in equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation."

The nature of recitals as statements of facts which are in the contemplation of the parties, is illustrated by the Scottish term "narrative." An authority which emphasises the distinction between such a case as *Re Moon, Ex parte Dawes* (1), where the recitals helped to define the scope of doubtful words and a case where it was sought to use recitals (or narrative) to "control" or change the directions of a deed, is *Mackenzie v. Duke of Devonshire* (2); there was in that case a final limitation to the "heirs female" of the settlor's body. There were two daughters. In Scottish law these words meant "heirs portioners"; it was argued that the deed should be construed as leaving the property to the elder daughter because it was recited as the main purpose of the deed that it was intended to enable the heirs to support the dignity and title of the earldom. The House rejected the contention; LORD HALSBURY, L.C., said:

"I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made."

LORD WATSON said:

"The narrative words come to no more than this: 'My intention is to do so and so,' and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction."

LORD SHAND said:

"Although it might appear that there was a failure to fulfil the intention of the trustee, I should still give effect to the operative words of the deed, because his directions are given in distinct terms."

I regard this authority as affording direct guidance in the present case. The converse type is illustrated by another decision of this House, *Orr v. Mitchell* (3), to which LORD WATSON was also a party, in which it was held that the narrative clauses did control the dispositive or operative clauses; the problem there was to identify what was conveyed, whether or not the conveyance was to be read in a wider or narrower sense; the narrative was held to give a key to ascertain what the deed was conveying; LORD MACNAGHTEN put the issue on a broad canon of construction, common to the law both of England and Scotland, namely, that when the words in the operative part are

"susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning." He adds that

"the rule applies though one of the two meanings is the more obvious one and would necessarily be preferred if no light could be derived from the rest of the deed."

It in the settlement under discussion the actual words of cl. 5, however read, are not, in my opinion, susceptible of the meaning of which the appellants contend,

however the context and all the parts of the deed are read with it. The language of cl. 5 apart from drastic reconstruction is clear enough, though it is only susceptible of a meaning which renders it nugatory.

I need not go through other cases in which with varying results the effect of recitals has been considered. I find many cases in which the canon of construction stated in *Orr v. Mitchell* (4) has been applied, so that general words in the operative clause have been treated as limited by a more restrictive description of the subject-matter in the recitals, but I have found no case which is contrary to the principles laid down in *Mackenzie v. Duke of Devonshire* (2); a later case on these latter lines is in *Re Bostock's Marriage Settlement*, *Norrish v. Bostock* (6), where a general intention appeared in the settlement to give to the children absolute interests in the freeholds, but it was held on the actual language that the children took life estates only, there being no question of reforming or rectifying the instrument. "In these circumstances," said YOUNGER, L.J., ([1921] 2 Ch. at p. 459), "all that the court can do is to construe it according to the import of the words used." It is true that there the reason why the words were not susceptible of any other meaning was that their construction was determined by a rule of law. But that is only one means of deciding whether words are or are not susceptible of a particular meaning. In *Mackenzie v. Duke of Devonshire* (2) the test put is that of "the ordinary natural meaning of the words," which does not exclude a meaning affixed by a rule of law.

Nor is it necessary to examine in detail the various authorities of another type quoted on behalf of the appellants. These authorities appear to me merely to illustrate a common rule of construction which may be thus stated in the words of LORD WATSON in *Mackenzie's Case* (2) ([1896] A.C. at p. 407) :

"Where words are capable of being modified or qualified in the context in which they occur, it may be legitimate to ascertain how far one reading or another would best promote the intention of the maker of the deed."

This principle, namely, that the meaning of a document must be ascertained by reading it as a whole and with the result in many cases of qualifying the *prima facie* meaning of a clause if it were taken by itself, is frequently applied in all contracts, whether in the studied productions of equity draftsmanship or the cruder efforts of men of business. Illustrations of its application might be multiplied almost indefinitely, but it is indeed rare that the decision on one contract is a direct guide to a decision on another. I shall refer to one case as a sample. In *Re Akeroyd's Settlement*, *Roberts v. Akeroyd* (7) funds were settled to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or until his death, whichever should first happen, and after the decease of the survivor of the wife or husband upon trust for the children of the marriage. The husband became bankrupt before his wife's death; he survived his wife. It was held that the words "until he (the husband) shall become bankrupt," referred to his bankruptcy even before she died, so that in that event he had forfeited all interest. LINDLEY, L.J., did indeed say that it was a piece of bad drafting, but he held that that particular flaw did not require a suit for rectification. Perhaps a simpler case of the same type is *Beaumont v. Marquis of Salisbury* (8), where an estate conveyed to trustees and their heirs was held to be limited to an estate *pur autre vie* because that limitation was necessitated by the rest of the deed; the words as they stood were capable of that meaning, when read in their context. But these and similar cases seem to me to be far removed from the present.

In my judgment it is impossible to construe the settlement in the way contended for on behalf of the appellants. The words they seek to add cannot be written in by way of construction. The case is peculiar; its like may never occur again. But it must be decided in accordance with recognised and established principles. No doubt there has been a blunder by the draftsman. He has adopted in the settlement a correspondence merely textual and verbal with the provisions of the

will, forgetting that he is dealing with a distinct and different fund, belonging not to the testator but to the settlor, vested in different trustees and the subject of a different settlement. The various and differing attempts of the appellants' counsel to introduce a form of words which will give the desired result, merely emphasise how wide a departure they seek to effect from the actual words of the settlement. I do not dwell on certain minor difficulties which might arise if the language of the settlement could be changed into any of the formulæ suggested in argument. In my judgment the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue; Sanderson, Lee, & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

PIDDINGTON v. CO-OPERATIVE INSURANCE SOCIETY, LTD.

KING'S BENCH DIVISION (Lawrence, J.), March 21, 27, 1934]

[Reported [1934] 2 K.B. 236; 103 L.J.K.B. 370; 151 L.T. 399;
50 T.L.R. 311; 78 Sol. Jo. 278; 39 Com. Cas. 221]

Insurance—Motor insurance—Exception where car used for other than private pleasure purposes—Exception where car carrying goods other than personal luggage—Carriage of wooden laths for use in garden.

A policy of insurance indemnifying the owner of a motor car against "third-party risks" contained exceptions whereby the policy was not to apply when the car was being used for "other than private pleasure purposes" or when it was "conveying goods other than personal luggage." While carrying on the car two wooden laths which he intended to use for the purpose of repairing a trellis in his garden, the insured collided with and fatally injured a pedestrian.

Held: the risk was covered by the policy because (i) the laths were "personal luggage" and not merchandise; *Buckland v. R.* (1), [1933] 1 K.B. 767, distinguished; (ii) the car was being used for "pleasure," and not for business.

Notes. As to limitations in the policy as to the circumstances in which the vehicle may be used, see 16 HALSBURY'S LAWS (2nd Edn.) 560, para. 905; and as to construing the words of a policy, see *ibid.* 430, para. 616.

Cases referred to:

- (1) *Buckland v. R.*, [1933] 1 K.B. 767; 102 L.J.K.B. 404; 148 L.T. 557; 49 T.L.R. 244; Digest Supp.
- (2) *Provincial Insurance Co. v. Morgan*, [1933] A.C. 240; 102 L.J.K.B. 164; 49 T.L.R. 179; 38 Com. Cas. 92; 148 L.T. 385, H.L.; Digest Supp.

Motion to set aside the award of an arbitrator for error in law appearing on the face of it.

In an arbitration between the insurers, the Co-operative Insurance Society, Ltd., and Mr. William Piddington, the insured, the arbitrator had awarded that the society were liable to pay Mr. Piddington (hereinafter called the insured) the amount of a judgment recovered against him by the widow of a man whom the insured had run over and fatally injured whilst driving a motor car insured against "third-party risks" with the insurers. The arbitrator stated his award in the form of a special case, and the insurers moved to set aside the award.

The material facts were as follows: on Feb. 4, 1931, the insured entered into a policy of insurance with the insurers, whereby the insurers agreed to indemnify

him for one year against all sums which he might become liable to pay in respect of accidental injury caused to any person while the insured was driving a motor car named in the policy. The policy contained the following exception:

"Loss, damage, and (or) liability caused or arising while" (the motor car) "is being used for other than private pleasure . . . or is conveying any load in excess of that for which it was constructed, or is conveying goods other than personal luggage; or whilst it is being driven in an unsafe or damaged condition."

On Oct. 17, 1931, the insured, who lived at Handsworth, and was a designer employed by a firm of brassworkers, drove home from work at midday in the insured car. Fastened to the top of the car were two wooden laths which he intended to use to repair the trellis work in his garden. In the afternoon of the same day he drove the car on a pleasure run from Handsworth to Stirchley. The laths were still on the car, and during the journey it occurred to him that he might use them to measure up some brasswork which his firm were about to execute at Stirchley. He found on arrival, however, that the work was not sufficiently advanced for that purpose, and he did not in fact remove the laths from their position on top of the car. On the return journey from Stirchley to Birmingham he collided with and fatally injured a man walking in the road.

In a subsequent action under Lord Campbell's Act the widow of the deceased man obtained judgment against the insured for £1,000 and costs, and the insured claimed to be indemnified by the insurers under his policy. The insurers repudiated liability on the grounds that the car was being used for other than private pleasure purposes; that it was conveying a load in excess of that for which it was constructed; that it was conveying goods other than personal luggage; and that it was being driven in an unsafe condition.

Van Den Berg, K.C., and *Coley* for the insurers.

Norman Birkett, K.C., and *John Wylie* for the insured.

Cur. adv. vult.

Mar. 27, 1934. **LAWRENCE, J.**—This is a motion to set aside an award made by an arbitrator on Jan. 12, 1934, awarding to the claimant, the insured, the amount which had been recovered against him in an action by the widow of a man whom he had killed in a motor accident.

The insured was insured with the insurers in respect of his motor car, which was involved in the accident, but the insurers repudiated liability on the following grounds: (i) That the car was being used at the time of the accident for other than private pleasure purposes; (ii) that it was conveying a load in excess of that for which it was constructed; (iii) that it was conveying goods other than personal luggage; and (iv) that it was being driven in an unsafe condition. Grounds (ii) and (iv) were abandoned before me. [His Lordship then stated the facts as set out above and continued:] The two exceptions relied on are closely allied. It is said that the user of the car for the carriage of the laths in the circumstances was for other than a private pleasure purpose, and also that the car was conveying goods other than personal luggage. In my judgment the word "pleasure" is used in this policy in contradistinction to "business," and the words "personal luggage" in contradistinction to "merchandise." The insured's garden was his pleasure and not his business, and the laths were personal luggage and not merchandise. Any other construction seems to me to lead to the conclusion that the carriage of a packet of seeds or a rose bush, or the various other articles which ordinary users of private motor cars habitually carry home for the adornment or use of their families, their homes or their gardens, would entail the use of the car for something which is not pleasure and would constitute the conveyance of "goods other than personal luggage" within the meaning of this policy.

However, it is argued that, even if this were so while the laths were being carried to the insured's home, the user of the car in the afternoon was for the insured's business, and his intention to use the laths in measuring the brasswork is further confirmation of this. I am unable to accept this contention. The

insured was merely going, so far as his visit to Stirchley was concerned, to look for a job he might have to do. He was not on a job which he had to do, and it is to be observed that the car was covered while the insured was driving it to and from his place of business. The idea that crossed his mind of using the laths to measure the work did not, in my view, turn pleasure into business or the laths into goods, nor could it in any event affect the user of the car after the idea had been dismissed from his mind. As the accident happened on the journey home, even if the car had, during part of its journey to Stirchley and while there, been used for other than private pleasure, it was no longer being so used at the time of the accident, and the principle of *Provincial Insurance Co. v. Morgan* (2) would be applicable.

My attention was called to *Buckland v. R.* (1), where MACARDIE, J., reviewed a number of cases in which words such as "baggage" and "personal luggage" had been construed by the courts, but they were all cases in which the question was either whether a certain railway rate was applicable to the objects under consideration or whether they had to be entered or were dutiable under the Customs Acts.

In my judgment, the meaning which is to be attached to such words in a policy of insurance in respect of a private motor car is not necessarily the same as in those cases. A policy of insurance deals with risks, not rates; railway travel is not motor travel, and different considerations apply. It may be that in cases where a railway company affords two different facilities, at different rates, for carriage of goods by themselves and for goods carried with a passenger, the words "personal luggage" have a narrower sense than in a policy of insurance on a motor car against the risks of modern motor-car travel.

For these reasons I reject the contentions of the insurance company and dismiss the motion.

Solicitors: *Freeland & Passey*, Birmingham; *R. Evans Parr & Co.*, Birmingham.

[*Reported by V. R. ARONSON, Esq., Barrister-at-Law.*]

HAIN STEAMSHIP CO., LTD. v. SOCIEDAD ANONIMA COMERCIAL DE EXPORTACION E IMPORTACION

[KING'S BENCH DIVISION (MacKinnon, J.), April 30, May 1, 1934]

[Reported 151 L.T. 305; 50 T.L.R. 387; 78 Sol. Jo. 384]

Shipping—Charterparty—Running days—"Sundays and holidays excepted"—Holidays—Local law forbidding loading of ship after 1 p.m. on Saturday.

A charterparty provided that the ship should be loaded at the rate of a fixed number of tons per running day, "Sundays and holidays excepted." The law of the Argentine Republic (in which the loading port was situated) prohibited the loading of ships on Saturdays after 1 p.m., and, consequently, no loading took place then.

Held: the period from 1 p.m. to midnight on Saturday was not a "holiday" within the meaning of the charterparty, and, therefore, that period could not be excluded in computing the date at which the lay days expired.

Love and Stewart, Ltd. v. Rowtor Steamship Co., Ltd. (1), [1916] 2 A.C. 527, applied.

Notes. As to the meaning of "running days," see 80 HALSBURY'S LAWS (2nd Edn.) 342, para. 523, and for cases on the subject, see 41 Digest 301 et seq.

Cases referred to:

- (1) *Love and Stewart, Ltd. v. Rowtor S.S. Co., Ltd.*, [1916] 2 A.C. 527; 86 L.J.P.C. 1; 115 L.T. 415; 13 Asp.M.L.C. 500, H.L.; 41 Digest 310, 1712.
- (2) *Nielsen v. Wait* (1885), 16 Q.B.D. 67; 54 L.T. 344; 34 W.R. 33; 2 T.L.R. 34; 5 Asp.M.L.C. 553; 55 L.J.Q.B. 87, C.A.; 41 Digest 527, 3555.

Special Case stated by umpire.

By a charterparty dated Nov. 8, 1932, the ship *Trevarrack* was chartered to proceed to ports in the Argentine, and there receive a cargo of grain for carriage to Antwerp or Rotterdam.

The material clauses of the charterparty were as follows:

"13. The steamer shall be loaded at the rate of 225 tons per running day up to the first 3,000 tons and at the rate of 400 tons per running day for any quantity above 3,000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers at the rate of twopence sterling per gross register ton per running day for steamers of up to 4,000 tons deadweight cargo capacity and threepence sterling per gross register ton per running day for steamers of over 4,000 tons deadweight cargo capacity. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents on any day (Sundays and holidays excepted) between 9 a.m. and 6 p.m. to the charterers or their agents that the steamer is ready to receive cargo, but the said notice shall be given at the first port of loading only.

"16. Dispatch money (which is to be paid to charterers before steamer sails) shall be payable for all time saved in loading (including Sundays and holidays saved) at the rate of £10 sterling per day for steamers up to 4,000 tons bill of lading weight, and £15 sterling per day for steamers of over 4,000 tons bill of lading weight. . . .

"17. The cargo to be brought to and alongside at charterers' risk and expense."

The ship arrived at San Lorenzo, and gave notice of readiness to load at 9 a.m. on Nov. 14, and the lay days, therefore, began at 9 p.m. on that day. She proceeded to Rosario on Nov. 22, and to La Plata on Nov. 28, and the loading was completed at the latter port at 11 a.m. on Dec. 1. The total cargo was 7,607 tons,

The lay days under the charterparty being, therefore, twenty-four days twenty hours.

The shipowners said that the lay days expired at 6.30 p.m. on Dec. 16, making the time saved in loading fifteen days seven-and-a-half hours. The charterers said that the lay days expired at 2.30 p.m. on Dec. 19, making the saving eighteen days three-and-a-half hours. The difference in the two computations was due to the shipowners including the whole of the Saturdays between Nov. 14 and Dec. 16, whereas the charterers said that time only ran on Saturdays until 1 p.m., and that Saturday afternoons must be excluded.

The umpire found as a fact that by Argentine law the work of loading vessels was prohibited after 1 p.m. on Saturdays. He held, nevertheless, that Saturdays were to be computed as full days under the charterparty, and he made an award based on that construction.

The question for the court was whether the umpire's construction of the charterparty was correct in law.

Willink for the charterers.

Sir Robert Aske, K.C., and *F. M. Vaughan* for the shipowners.

MACKINNON, J.—This is a Special Case stated by an arbitrator. A dispute arose between shipowners and charterers on a charterparty dated Nov. 8, 1932, on a printed form known as "Centrocon," in regard to the carriage of a cargo of grain from the Argentine by the steamship *Trevarrack*. By that charterparty, as by any charterparty, the shipowner engages to carry the cargo from one port to another at a certain rate of freight per ton. The services which the shipowner provides for that payment, in addition to the carriage of the goods across the sea from port to port, include the service of the steamship lying in the port of loading and the port of discharge for the loading and discharge of the cargo. In calculating the freight he includes a certain estimated time of stay in the port of loading and the port of discharge, and usually if that time exceeds the basis on which the freight per ton is calculated, he is to receive further remuneration by way of demurrage. In this, as in many forms of charterparty, there is an added provision that if the charterers do the work of loading or discharge in less than this agreed standard time, the shipowners shall make payment to them for the saving in delay of the ship in the form of dispatch money.

Accordingly, rather an elaborate provision is inserted in this charterparty to ascertain what is the standard time that the ship is to stay in the port of loading. If that standard is exceeded the ship is to receive demurrage; if the standard time is not all occupied the charterer is to receive dispatch money. The parties provide for the ascertainment of that standard time, not by saying so many days or so many hours, but by reference to the size of the steamer, saying that the steamer shall be loaded at the rate of a certain number of tons, namely, 225 tons, per "running day" up to 3,000 tons and at the rate of 400 tons per "running day" for any quantity above 3,000 tons. As the cargo in this case amounted to 7,670 tons an arithmetical application of that figure at the rate I have mentioned shows that the standard time for loading was twenty-four days twenty hours. The ship in fact was loaded in some six "running days," or six periods of twenty-four hours. It is obvious therefore that so far from the ship having earned demurrage dispatch money was payable by the shipowner to the charterer.

This dispute arises as to the amount of the dispatch money. That is because the shipowner says the time saved was fifteen days seven-and-a-half hours, and the charterers say that it was eighteen days three-and-a-half hours. That difference arises in this way. The clause runs:

"The steamer shall be loaded at the rate of" (so many tons per running day)
"Sundays and holidays excepted. . . . Time for loading shall commence to count twelve hours after written notice has been given by the master or agents."

Now a "running day" *primâ facie*, as was pointed out by LORD ESHER in *Nielsen v. Wait* (2) (16 Q.B.D. at p. 72) means a consecutive day, and, as he points out, a "running day" is a nautical phrase. "Running days" in those days were days on which the ship in the ordinary course was running. It therefore means the whole of every day when a ship is running and *primâ facie* means every calendar day, including Sundays. In this case the "running days" are clearly not calendar days. They are periods of twenty-four hours, because time is to begin twelve hours after a certain notice, and from that moment when time begins consecutive periods of twenty-four hours are to be taken as "running days." However, the contract provides that not all consecutive periods of twenty-four hours are to be taken, because Sundays and holidays are to be excepted. Therefore, when you have started at any particular hour, counting your consecutive twenty-four hours, if a Sunday or a holiday intervenes, you cut that out and omit from the calculation the twenty-four hours of the Sunday or the holiday.

The charterers say that, in addition to that express exception of Sundays and holidays, a further period is to be cut out from the computation of the consecutive twenty-four hours, namely from 1 p.m. on Saturday until midnight, or rather, as Saturday precedes Sunday, the period from 1 p.m. onwards is to be added to the hours of the ensuing Sunday. They say that because, in the Argentine, Saturday afternoon after 1 p.m. is not only a non-working time, or a holiday, but a compulsory holiday, in that by Argentine law it is illegal to work after 1 p.m. on Saturday. The charterers argue that that period, when it was illegal to work, must be cut out of the period of twenty-four hours which is to constitute a "running day."

I think that this contention is erroneous. In the first place, there is not any undertaking by the ship, or by the charterers, that they will work on Saturday afternoon contrary to Argentine law. This provision in this clause is simply an artificial arbitrary method of calculating the mean period, standard time, for loading at this port. If they had chosen to do it they might have fixed a period of so many consecutive hours. They do it by calculating that amount of time with reference to the size of the steamer and "running days." They provide that out of that calculation of consecutive periods of time, Sundays and holidays shall be excepted. It would have been perfectly easy to say "Sundays and holidays and Saturday after one o'clock shall be excepted." They have not done so, and it was settled in *Love and Stewart, Ltd. v. Rowtor Steamship Co., Ltd.* (1) that Saturday afternoon is not included in the term "holiday." LORD SUMNER in that case says ([1916] 2 A.C. at p. 536):

"I think that time during which the weather is wet, which is time that may be measured by minutes or by hours, and the half of each Saturday, which though half of a calendar day, may not be the same as a variety of the number of working hours on an ordinary day, cannot be brought within the exception 'Sundays, general or local holidays.' They are not days within the exception in the clause. A wet day, even if it rains all day, is not a day in the sense in which Sunday or Monday or Bank Holiday is a day. Consecutive days are running even though rain may prevent the receiver from getting any benefit from them. Saturday afternoons are the more plausible case of the two, but the exception in the charter is clearly based on days, not on parts of days. I do not think the term extends to the latter part of a weekday, on which it is usual not to work, although we all call it and enjoy it under the name of a Saturday half-holiday."

Similarly, in ascertaining what is the meaning of the language used by the parties here, the period on Saturdays from 1 p.m. onwards is not to be included in the Sundays and holidays, and must not be taken to be impliedly included, merely because in the Argentine a holiday is sanctioned by something more stringent than custom or usage, namely, by a local law which says that it is illegal to work. It is purely a question of the meaning of this clause and of the

language used by the parties. Having regard to the decision in the *Rowtor* case (1) I think that the proper construction of this clause is to exclude from the consecutive periods of twenty-four hours only Sundays and full general holidays, and not to exclude the period from 1 p.m. on Saturdays.

In the result I think that the learned umpire was right when he held that the time saved in loading was only fifteen days seven-and-a-half hours, and not, as the charterers contend, eighteen days three-and-a-half hours, and that therefore the award should be upheld.

Award upheld.

Solicitors: *Richards, Butler, Stokes, & Woodham Smith; Sinclair, Roche, & Temperley.*

[Reported by V. R. ARONSON, Esq., Barrister-at-Law.]

SNOWDON v. ECCLESIASTICAL COMMISSIONERS

[CHANCERY DIVISION (Luxmoore, J.), October 25, 1934]

[Reported [1935] Ch. 181; 104 L.J.Ch. 153; 152 L.T. 417; 78 Sol. Jo. 820]

Sale of Land—Covenant running with land—Covenant to compensate for mining damage—Purchase of land—Right of purchaser to compensation for damage suffered before conveyance.

By a conveyance made in 1864 the vendors of a farm reserved the mines and minerals, with full power to work the same, and a proviso that the vendors, their successors, assigns and lessees, owners or occupiers of the minerals, should pay compensation for damage occasioned by the mine-working. In 1878 the E. Commissioners, in whom the vendors' estate had vested, granted a lease of the mines, by which the lessee covenanted to pay the commissioners and their tenants, and other the owners or occupiers for the time being, compensation for damage occasioned by the mine-working, and to keep the commissioners indemnified from all actions in respect thereof. In 1900 S. became tenant of the farm to the successor in title of the 1864 purchaser, and in 1921 the freehold, subject to the 1864 reservations, was conveyed to S. The farm suffered damage due to the mine-working both before and after the conveyance to S., who claimed damages from the commissioners.

Held: the claim in respect of the damage suffered before the conveyance to S. failed because

(i) the benefit of the covenant to pay compensation for damage in the 1864 conveyance ran with the land, and, therefore, before the conveyance to S. the then owner of the farm was entitled to recover such damage;

(ii) in the absence of express assignment thereof this right to recover for damage already done did not pass to S. merely by the conveyance to him of the land with the benefit of the 1864 covenant.

Lewes v. Ridge (1) (1601), Cro. Eliz. 863, *Johnson v. St. Peter's, Hereford (Churchwardens)* (2) (1836), 4 Ad. & El. 520, and dictum of SWINFEN EADY, L.J., in *Wedd v. Porter* (3), [1916] 2 K.B. 91, applied.

(iii) this right was not within the general words of s. 6 (1) of the Conveyancing and Law of Property Act, 1881, and so did not pass thereunder without assignment.

(iv) it was immaterial that at the time, before the conveyance, in respect of which damages were claimed, S. was tenant of the farm.

Notes. The provisions of the Conveyancing Act, 1881, have been replaced by s. 141 of the Law of Property Act, 1925, but the change does not appear to have affected the principles stated in this case.

As to rights of an assignee of a covenant to sue for damages for breach of the covenant accrued due before the assignment, see 29 HALSBURY'S LAWS (2nd Edn.) 438, para. 642, and 440, para. 646. As to covenants by mining lessees running with the land, see 22 HALSBURY'S LAWS (2nd Edn.) 610, para. 1921, and as to the benefit of covenants to pay compensation for damage by subsidence so running, see *ibid.* 635, para. 1874. For the Law of Property Act, 1925, s. 141, see 20 HALSBURY'S STATUTES (2nd Edn.) 730.

Cases referred to:

- (1) *Lewes v. Ridge* (1601), Cro. Eliz. 863; 78 E.R. 1089; 81 Digest (Repl.) 472, 5983.
- (2) *Johnson v. St. Peter's, Hereford (Churchwardens)* (1836), 4 Ad. & El. 520; 1 Har. & W. 720; 6 Nev. & M.K.B. 106; 5 L.J.K.B. 116; 111 E.R. 883; 31 Digest (Repl.) 376, 5055.
- (3) *Wedd v. Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243, C.A.; 31 Digest (Repl.) 396, 5233.
- (4) *Dyson v. Forster*, [1909] A.C. 98; 78 L.J.K.B. 246; 99 L.T. 942; 25 T.L.R. 166; 53 Sol. Jo. 149; 34 Digest 686, 799.
- (5) *Westhoughton Urban Council v. Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; 88 L.J.Ch. 60; 120 L.T. 242, C.A.; 34 Digest 686, 800.
- (6) *Defries v. Milne*, [1913] 1 Ch. 98; 82 L.J.Ch. 1; 107 L.T. 593; 57 Sol. Jo. 27, C.A.; 31 Digest (Repl.) 398, 5277.
- (7) *Dawson v. Great Northern and City Railway*, [1905] 1 K.B. 260; 92 L.T. 137; 74 L.J.K.B. 190; 69 J.P. 29; 21 T.L.R. 114, C.A.; 1 Digest 79, 636.

Action for declaration.

The plaintiff, owner of Merrington Grange Farm, Durham, claimed a declaration that he was entitled to recover from the defendants damages for injury resulting from the working of the underlying minerals both before the conveyance to him of the farm on June 2, 1921, and thereafter.

The property, originally held by the Dean and Chapter of Durham, was on Dec. 23, 1864, conveyed to Sir William Eden, Bart., his heirs and assigns; the mines and minerals being reserved, with full power to win, work, get, and carry away the same, with a proviso that the Dean and Chapter, their successors, assigns and lessees, owners or occupiers of the minerals, should pay Sir William, his heirs and assigns, reasonable compensation for spoil of ground or damage to the buildings on or to the surface of the ground which should be done or occasioned by the exercise of the excepted powers, to be determined by agreement or arbitration. By Order in Council made in 1872 the interests of the Dean and Chapter of Durham had been vested in the defendants.

Sir William died in 1873 and his estate passed to his son, Sir William Eden the younger, as tenant for life. In 1878 the defendants granted to Bolckow, Vaughan, & Co. a lease of the mines, and the latter covenanted to pay the lessors and their tenants, and other the owners or occupiers for the time being, compensation for any spoil or damage as aforesaid and to keep the lessors indemnified from all actions in respect thereof. In 1900 Sir William Eden the younger let the farm to the plaintiff as tenant from year to year. In 1910 the estate was disentailed, and in 1919, on resettlement, passed to Sir Timothy Eden as tenant for life and was sold by him to the plaintiff on June 2, 1921, and conveyed subject to the exception and reservation of the minerals contained in the conveyance of Dec. 23, 1864. In 1929 the defendants gave permission for Bolckow, Vaughan, & Co. to

assign their lease to Dorman, Long, & Co. The plaintiff alleged that the damage progressively increased, both before the date of his purchase and subsequently down to the present time.

He now brought the action to recover the damage suffered. The defendants admitted his right to recover for damage suffered since he became owner, in 1921, but denied his right in respect of that suffered before that date.

Gover, K.C., and *L. W. Byrne* for the plaintiff, the surface owner. The covenant in this case runs with the land: (*Dyson v. Forster* (4)). The plaintiff claims for damages accrued when he was lessee, because the covenant with his predecessor included his heirs and assigns. There has been a continuing breach.

Archer, K.C., and *Waite* for the defendants, the lessors of the mine. The question is: Where a surface lessee purchases the reversion, does he get any rights of action vested in him as successor to his lessor? That was settled as long ago as *Lewes v. Ridge* (1). At common law causes of action were not assignable, and the same in equity. This is an a fortiori case. There is no continuing breach: (*WOODFALL'S LANDLORD AND TENANT*, 22nd Edn., p. 804; *Johnson v. St. Peter's, Hereford (Churchwardens)* (2)). The plaintiff can only get damages suffered in the past by suing the person who did the trespass: (*Westhoughton Urban Council v. Wigan Coal and Iron Co.* (5)). The lessee is not an assign and is not mentioned in the covenant. He bought damaged land. The deed did not assign a pre-existing cause of action: (*Wedd v. Porter* (3); *Defries v. Milne* (6)).

Gover, K.C., replied and referred to *Dawson's Case* (7) and Conveyancing and Law of Property Act, 1881, now Law of Property Act, 1925, s. 62 (1), s. 78 (1).

LUXMOORE, J.—The question is: Is a grantee of land entitled to recover under a covenant by a third party with the grantor compensation for damages caused by working minerals where the right to such compensation accrued before the date of the conveyance to the grantee? There is no dispute as to the facts. [His Lordship stated them and continued:] As a result of the conveyance to the plaintiff, he obtained the benefit of the covenants which run with the land. My attention has been called to the fact that for some years previous to the purchase the plaintiff was lessee of the property, but this seems to be immaterial to the point which I have to determine. The plaintiff has brought this action to have the point determined whether he is entitled to recover damages in respect of injuries which have resulted, or which may have resulted, from the working of the underlying minerals before, as well as after, the date of the conveyance of June 2, 1921. The defendants admit that any damage resulting to the land by reason of working after June 2, 1921, is recoverable by the plaintiff, but they challenge his right to damages in respect of injuries which had occurred before that date. It is plain that the benefit of the covenant to pay compensation for damage runs with the land. But this does not decide the question. The damages which accrued before the conveyance to the plaintiff were something which the then owner was entitled to recover. Without express assignment of those damages to the plaintiff, it is difficult to see how he could have any claim to them. The question whether such an assignment would be good or bad does not arise here, and I say nothing about it for the moment. It is difficult to see on what principle damages which have accrued before the date when the benefit of the covenant was assigned passed by a simple assignment of the covenant itself. There is no difference in principle in the position of parties in such a case and that of the grantor and grantee of the reversion of property subject to a lease with regard to the lessee's covenants. It has long since been settled that the grantee of a reversion has no right of action against the lessee, whether for arrears of rent due at the date of the grant or for breaches of covenant (although they run with the land) committed before that date. If authority be required for this proposition, it is to be found in the well-known cases of *Lewes v. Ridge* (1) and *Johnson v. St. Peter's, Hereford (Churchwardens)* (2). The authority of those cases has been frequently recognised. They are referred to by *SWINFEN EADY, L.J.*, in *Wedd v. Porter* (3), where he states that

for any breaches which occurred before conveyance the grantee cannot sue, as causes of action which had accrued to the grantors do not pass to the grantee by conveyance.

Plaintiff's counsel suggested that this right passes without any assignment, as being within the general words of s. 6 (1) of the Conveyancing and Law of Property Act, 1881. I think that the words need only be read to find that the answer is in the negative. Then he says that this covenant is in the nature of a continuing covenant, and that therefore the right to enforce it passes to the plaintiff. If the right to damages or compensation is in the nature of a continuing right, the plaintiff's ability to enforce it arises not in respect of anything which happened before the conveyance of the property to him, but by reason of the fact that the right, being a continuing right, arose after the property became his. I am unable to see any ground on which it can be said that the right to recover damages or compensation which accrued before the property was conveyed to the plaintiff has passed to him.

In my judgment the action fails and must be dismissed with costs.

Solicitors: *Tarry, Sherlock, & King*, for *Trotter, Bruce, & Loft*, Bishop Auckland; *Milles, Jennings, & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

UGLEEXPORT CHARKOW v. OWNERS OF STEAMSHIP ANASTASIA RUSSIAN WOOD AGENCY, LTD. v. DAMPSKIBSSELSKABET HEIMDAL

[HOUSE OF LORDS (Lord Tomlin, Lord Wright and Lord Russell), March 13, 15, April 16, 1934]

[Reported 151 L.T. 261; 50 T.L.R. 361; 78 Sol. Jo. 297; 39 Com. Cas. 238; 18 Asp.M.L.C. 482]

Shipping—Charterparty—Construction—“Icebreaker assistance to enable ship to reach or leave loading port.”

By a charterparty charterers undertook, in the event of the loading port being inaccessible by reason of ice on the vessel's arrival at the edge of the ice, to provide icebreaker assistance to enable her to reach the loading port.

Held: the express obligation to supply the vessel with icebreaker assistance to enable her to enter or leave the port of loading was absolute and peremptory, in that it obliged the charterers both to supply icebreakers and not merely to do their best to supply them, and also to supply continuous assistance until the vessel was enabled to enter or leave the port.

A charterparty provided that charterers were to supply the ship with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading. Such assistance was to be rendered within forty-eight hours after the steamer's arrival at the ice edge or readiness to leave the port of loading.

Held: (i) “leave the port” meant leave it in such a way as to be able to proceed clear of the ice on her voyage, and not merely to cross the threshold

of the port if the vessel were then at once held up by an obstacle,

(ii) the obligation was to supply assistance sufficient or satisfactory for the specified purpose,

(iii) this obligation involved a due regard both to the vessel's safety and to her dispatch, and was paramount,

(iv) the convoy system, therefore, could only be justified as far as could be reconciled with this paramount obligation, and could not be relied on as an excuse for non-fulfilment of this obligation.

Per **Curlam**: it is immaterial whether or not the icebreakers were controlled by the charterers, because their responsibility was the same in either event. There might, however, be contingencies, such as perils of the seas, which, without anyone's fault, hindered or interrupted the [icebreaker] service, without any liability attaching to the charterers.

Notes. Considered: *Danneberg v. White Sea Timber Trust, Ltd.*, [1935] All E.R. Rep. 328. Referred to: *Sanguineti Fu Davide v. Ugleexport of Moscow* (1933), 150 L.T. 140; *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *Ugleexport of Moscow v. Sanguineti (Andrea) Davide of Genoa* (1935), 40 Com. Cas. 309; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E.R. 577.

As to undertakings to provide icebreaker assistance, see 30 HALSBURY'S LAWS (2nd Edn.) 356-357, para. 534.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.J.J.) in two appeals which were heard together, reported 149 L.T.Rep. 342, affirming the decision of ROCHE, J.

The facts in the first action were these: the steamship *Anastasia* was a Greek vessel trading at Russian ports. She was chartered by a charterparty dated Nov. 20, 1920, which contained a clause dealing with delay caused by ice. That clause was as follows:

"In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of ice, or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide icebreaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance."

The charterparty further provided for payments for demurrage.

The *Anastasia* arrived at the port of Berdiansk on Jan. 30, 1931, and found that port inaccessible by reason of ice. She remained there waiting for assistance until Feb. 7, when an icebreaker was provided, but it was subsequently withdrawn for a period of seventeen days, and in consequence the steamer was delayed.

The arbitrator decided that the delay was caused by a breach on the part of the charterers of their obligation to provide icebreakers, and he made an award in favour of the shipowners. The charterers submitted that they had discharged their obligation by providing an icebreaker on the arrival of the ship at the ice edge, and that the subsequent withdrawal for seventeen days was not a breach of contract. The owners contended that the obligation of the charterers was continuous and that their duty was to provide an icebreaker which would remain in attendance on the ship until she reached port.

The Court of Appeal held that the charterers had undertaken to provide icebreaker assistance to enable the vessel from the edge of ice to reach its loading place and that they did not provide such assistance if the icebreaker did not enable the steamer to reach its loading place.

The charterers appealed.

Sir William Jowitt, K.C., and *H. Atkins* for the charterers.

Le Quesne, K.C., and *Sir Robert Aske, K.C.*, for the shipowners.

In the second action the owners of the steamship *Asko* claimed from the charterers damages sustained through detention by ice at the port of Leningrad.

In January, 1930, the parties entered into a freight agreement by which the owners undertook to carry timber from Leningrad to certain named ports, a separate charter to be drawn up for each steamer employed. In pursuance of that agreement a charterparty for the employment of the *Asko* was entered into on Nov. 26, 1930, under which that ship was to proceed to Leningrad, load a cargo of timber and carry it to Hull. Clause 35 of the charterparty provided as follows:

"Charterers to supply steamer with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners. Captain or steamer's agents to notify the captain of the port in due time of steamer's readiness to enter or leave the port of loading. Icebreaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting icebreaker beyond forty-eight hours after readiness to proceed, to be for charterers' account."

The *Asko* was ready to leave Leningrad on Dec. 31, 1930, but owing to detention by ice she did not reach open water until Jan. 12, 1931. It appeared that an icebreaker was ordered at 1.30 p.m. on Dec. 31, and she came and towed the *Asko* until 9 p.m. on that day and then left her in the ice. She lay there until Jan. 5, when she was towed as far as Kronstadt Roads. At that point she was outside the limits of the port of Leningrad, but she was still in the ice. On Jan. 9 a convoy was formed of a number of vessels, including the *Asko*. The convoy reached the ice edge on Jan. 12, and the *Asko* then proceeded on her voyage to Hull.

The owners argued that the charterers were under an absolute obligation to get the steamer away from the port. It was too narrow a construction of cl. 35 to say that the words "to enable her to leave the port of loading," merely meant "to get beyond its geographical boundary." They claimed demurrage and also damages for the physical injury sustained by the ship whilst detained in the ice.

The charterers contended that their duty was ended when they had taken the ship beyond the limits of the port.

The Court of Appeal held, (i) That the charterers undertook to enable, by an icebreaker, the ship to enter and leave the port of loading; (ii) that this being a fixed time charter, time lost outside the fixed lay-days was for charterers' account, which must include the time lost during which the icebreaker assistance was not provided to enable the steamer to enter or leave the port; and (iii) that the Government regulation contemplated that the ship could require the icebreaker assistance outside the port limits.

The charterers appealed.

A. T. Miller, K.C., and H. U. Willink for the charterers.

Sir Norman Raeburn, K.C., and Sir Robert Aske, K.C., for the shipowners.

The House took time for consideration.

April 16. The following opinions were read:

LORD WRIGHT (read by LORD TOMLIN).—These two appeals, though not consolidated, were the subject of a single judgment in the Court of Appeal, and I shall in this opinion deal with both cases.

It is well known that ports of the Soviet Republic are with certain exceptions icebound in the winter months, so that normally navigation is suspended; the ports, however, can be kept open to some extent for the entry and departure of vessels by the use of icebreakers. The icebreakers are subject to the control of the particular Port Authority. These appeals arise out of two charterparties, each of which contained a clause (described hereafter as the ice clause); that clause, similar in substance in both cases, though differing in each case in its precise terms, provided for the rendering to the chartered vessels of "icebreaker assistance" if that should be necessary to enable the vessel to enter or leave the port in

pursuance of the chartered voyage. The questions here involved relate to the construction of the ice clause in view of the relevant facts.

I shall shortly summarise the terms of each charterparty and the circumstances of each case.

The first appeal arises under a charterparty of the Greek steamship *Anastasia*, dated Nov. 20, 1930, made in a well-known English form at Piraeus between the shipowners and the Trade Delegation of U.S.S.R. (that is the Soviet Government) in Greece as agents for the charterers, Ugleexport Charkow; under the charter the vessel was to proceed to Mariupol and load a cargo of coal which was to be delivered at a port as specified in the charterparty. There were fixed lay-days for loading, and demurrage was to be at £25 a day. The ice clause was in the following terms:

"(1) In the event of the loading port being inaccessible by reason of ice on vessel's arrival at edge of ice, or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide icebreaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance.

"(2) Time lost by steamer waiting for icebreaker assistance when entering loading port during forty-eight hours after her arrival at the edge of ice and when leaving port during forty-eight hours after giving notice of readiness not to count in the first case as lay-days and in the second case as time on demurrage or detention.

"(3) Any detention to the steamer waiting for icebreaker assistance at the edge of ice and also when leaving port (above the time mentioned in item 2) to count in the first case as time for loading and in the second case as demurrage or detention to be paid by charterers at £25 per day or pro rata for any part of day, from which time days saved in loading shall be deducted.

"(4) In order not to miss her cancelling date, steamer must arrive at the edge of ice not later than at noon the day previous to the cancelling date, stipulated in cl. 11, and in the case of any delay through ice while on passage or entering loading port, or in giving notice of readiness the cancelling date to be extended accordingly.

"(5) Captain must follow official instructions issued by authorities for vessels conveyed by icebreaker through ice."

The material facts as found by the learned arbitrator before whom the dispute came are shortly as follows: The *Anastasia* duly arrived on Jan. 30, 1931, at the edge of the ice which then rendered the port of Mariupol inaccessible. She waited for icebreaker assistance until 2 a.m. on Feb. 7, 1931; it is not disputed that this period of waiting counted as lay-days subject to the deduction of the forty-eight hours allowed under the clause. The vessel arrived at Mariupol at 6 a.m. on March 4, 1931; the intervening time is divisible into three periods: the first is the time ending at 6.5 p.m. on Feb. 11, 1931, during which time, as the shipowners claimed and the charterers did not dispute, icebreaker assistance was given intermittently for not more than twenty-one-and-a-half hours; the second period takes matters up to 7.30 p.m. on Feb. 28, 1931, during which period no assistance was supplied to the vessel; the third period was up to her arrival at the port, during which time the icebreaker assistance was given during intermittent periods. The shipowners claimed in the arbitration demurrage and damages for detention as for breach of the conditions of the ice clause to the extent of a total delay of twenty-two-and-a-half days. A similar claim arose for delay after loading, but it is unnecessary to discuss that claim as it involves the same question.

The charterers did not contest these figures put forward by the shipowners, nor did they offer any explanation why icebreaker assistance was either absent or intermittent; their contention was that on the true construction of the ice clause they had fulfilled their obligation when by their procurement the icebreakers

arrived at the *Anastasia* at the edge of the ice; they were then, so they claimed, A under no further obligation in the matter.

The learned arbitrator thus summarises their contentions:

(1) That the icebreaker assistance contracted for by the charterparty was that of icebreakers operated by the port authority.

(2) That the only duty of the charterers was to provide the icebreaker assistance ordinarily so provided. B

(3) That the assistance given was controlled by an autocratic authority over whom the charterers had no influence or control.

(4) That the charterers' only obligation was to give icebreaker assistance at the edge of the ice and that therefore they had no further continuing obligation.

(5) That what happened subsequent to the arrival of the icebreakers at the edge of the ice was not a matter with which the charterers were concerned and was beyond their control. C

(6) That the charterers had in accordance with the general practice requested the Port Authority to provide icebreaker assistance and that they were under no further obligation.

The arbitrator described the equipment of the port in regard to icebreakers and found that the duty of keeping the port open was imposed on the Port Authority; he said that he did not find it proved that the Port Authority was a department of the Soviet Government, but he found that the charterers were "the coal-exporting section of the Soviet Government." D

He decided against the construction of the ice clause for which the charterers contended and held that they had broken their contract and were liable in damages.

The special case came before ROCHE, J., who by his judgment upheld the conclusion of the arbitrator. The Court of Appeal unanimously affirmed that judgment. E

The second appeal arises out of a charterparty dated Nov. 26, 1930, between the owners of the Danish steamship *Asko*, and Exportles of Moscow. Under the charter the steamship was to load a cargo of timber at Leningrad and deliver it at Hull; the cargo was duly loaded and delivered. The shipowners sued for a declaration that they were entitled to damages for detention and loss of time and also for damage to the steamship through being crushed in the ice, on the ground that there had been a breach of the terms of the ice clause in the charterparty, which was in the following terms: F

"Charterers to supply steamer with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners. Captain or steamer's agents to notify the captain of the port in due time of steamer's readiness to enter or leave the port of loading. Icebreaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting icebreaker beyond forty-eight hours after readiness to proceed, to be for charterers' account." G

The appellants were treated for purposes of the action as representing the charterers. H

The case was tried in the Commercial Court before ROCHE, J., before whom an agreement was reached, which in the words of the judge was as follows: I

"So far as it is a question of fact or questions of fact are involved, the parties have quite naturally sought to avoid the expense of bringing oral evidence from abroad and have asked the court to decide the questions of fact on the basis of certain logs of the steamship in question and of certain icebreakers which assisted her and upon certain certificates and written material. The evidence, though contemporary, is in parts vague, and in other parts conflicting, and the parties have agreed, so far as questions of fact are concerned, that they are willing to take my decision on a question of fact as given upon the materials which have been made available to me and not to complain of it elsewhere."

The findings of fact of the judge, thus agreed to be binding, were that the *Asko* was ready to proceed, after loading, at 12.30 p.m. on Dec. 31, and that the icebreaker *Oktober* came to her at 7.30 p.m. on that day, and time then began to count; that the steamer was assisted by an icebreaker between that time and Jan. 6 for a period of nine or ten hours and no more; that she reached Kronstadt Roads on Jan. 6 and for some three days lay there, unassisted by icebreakers, with ice beyond her preventing her from reaching the open sea; that on Jan. 9 she was formed into a convoy with some other vessels and was assisted slowly to sea, and reached open water on Jan. 12 at 12.30 p.m.; that the steamer sustained detention for want of icebreaker assistance for a period of seven days between 7.30 p.m. on Dec. 31 and 1 p.m. on Jan. 9, and for a period of one day between the latter time and 12.30 p.m. on Jan. 12, making eight days in all that the icebreakers were absent between Jan. 9 and 12, for periods unexplained, and that it looked as if damage was done to the steamer during that time, which damage would have been at any rate minimised if an icebreaker had been present, even if it had occurred at all; and that the steamer sustained damage in getting out of the port by reason of ice.

On these findings it was contended on behalf of the charterers (i) that the icebreaker assistance which the charterers contracted for was that of icebreakers supplied and controlled by the People's Commissariat of Ways and Communications, a department of the Soviet Government, which embraced the Port Authority, and that the only duty of the charterers was to provide, as they did, the icebreaker *Oktober* to come to the vessel on Dec. 31, 1930, so that they were accordingly not responsible for any subsequent delay or damage which the *Asko* sustained in her passage through the ice; (ii) that, if their obligation went beyond that, it was merely to provide icebreakers which would do their best, and that the onus was on the shipowners to prove that the icebreakers did not do so; (iii) that the obligation, whatever it was under the ice clause, ceased when the *Asko* reached the limits of the port of Leningrad, which was at Kronstadt Roads, about twelve miles from the loading berth, and did not continue till the vessel reached the edge of the ice where the open water began, which was about sixty or seventy miles further on. The judge decided against all these contentions, and made a declaration that the shipowners were entitled to recover from the charterers:

(i) Damages for detention of the vessel for eight days.

(ii) Damages in respect of any injury sustained by the vessel by reason of the prolongation of the voyage through the ice and absence of icebreaker assistance or by reason of either of such causes, including Jan. 10.

The Court of Appeal unanimously affirmed this judgment.

In both these appeals I agree with the conclusions of the tribunals below. The two forms of ice clause differ somewhat in form, but are sufficiently identical in substance to enable me to state the opinion I have formed of their meaning as applicable pro tanto in each case and so far as material for these appeals.

In the first place the charterers' obligation is in express terms to supply the steamer with icebreaker assistance to enable her to enter or leave the port of loading. That stipulation does not mean that the obligation is merely to make arrangements with the Port Authority or any other person for that supply. It is, I think, immaterial whether or not the charterers and the Port Authority can be treated as parts of one and the same juridical entity, whether the Soviet Government or any other person; as to this the evidence does not seem to me sufficient to justify my expressing any opinion; in either case the charterers have contracted to supply the assistance, and that, in my opinion, means either by themselves or by others, so that they cannot justify a failure to do so on the pretext that they had not the icebreakers under their control and could not get them supplied by those who controlled them. In that sense the obligation is absolute. The charterers assumed the obligation and the risk. It follows equally that the charterers' obligation is not limited to an obligation to do their best to supply. The language of the clause is peremptory.

Nor is the contract satisfied by the mere fact that an icebreaker does actually appear and proceed to render some assistance to the vessel; the contract is not to supply an icebreaker, leaving it to the icebreaker, when supplied, to give or not to give the appropriate assistance; the language is express that not merely an icebreaker but icebreaker assistance is to be supplied, such assistance being to enable the vessel to enter or leave the port of loading. This language clearly, as I think, defines the scope of the obligation, which extends to the supply of the icebreaker assistance until the vessel is enabled to enter or leave the port.

This construction is obviously fatal to the only contention advanced by the appellant charterers in the first appeal, which accordingly should, as I think, fail. In the second appeal there are, in addition, some further points to be considered.

First of all, I may deal with the contention that the charterers' obligation is completely performed when the vessel is enabled to proceed through the ice to the limit of the port, though she is left with a stretch of ice many miles in width before she can reach the open sea and proceed on her voyage. It is obvious that such a construction would render the ice clause of no practical value to the shipowner; the *Asko*, arrived at Kronstadt Roads, would have to wait there till the ice cleared in the spring. In my opinion, "leave the port" means leave it in such a way as to be able to proceed clear of the ice on her voyage. The vessel does not leave the port for purposes of this contract, if all that happens is that she crosses, as it were, the threshold, and is at once held up by an obstacle. I shall not further discuss this point, which seems to me devoid of substance.

The second appeal, however, also raises other questions. The obligation to render icebreaker assistance attaches at a specific time—that is, forty-eight hours after readiness; from that time until the icebreaker assistance is rendered, delay is chargeable to the charterers and constitutes an ascertainable period of delay; but once the assistance has been supplied there is no stipulation as to time. The exact character of what is meant by the icebreaker assistance is not particularised, save that it is to enable the ship to enter or leave the port free of all expense to owners. The judge has found in this case that, for a period of six days after the *Oktober* first came, the steamer had only icebreaker assistance for nine or ten hours, and that she then lay unassisted in Kronstadt Roads for three days, and was again left for some periods without icebreaker assistance between Jan. 9 and 12, 1931. The charterers did not explain why the assistance was so intermittent; in effect they contended that their obligation could not in any case be put higher than an obligation to do their best or to do what was reasonable, and that the onus lay on the shipowners to show that they had not done their best or had not done what was reasonable. This contention is erroneous; there is in the clause a positive undertaking to render icebreaker assistance, which means, *primâ facie*, assistance which is not casual or intermittent; and in order to justify a failure in that respect the charterers must show some excuse. The absence of icebreakers for such periods in the aggregate as the judge has here found is *primâ facie* a breach of the undertaking. I do not say that after the inception of the service, absence of icebreaker assistance at some period or periods may not be justified; but the words of the clause are *primâ facie* not satisfied by intermittent assistance. I have already stated my opinion that it is immaterial whether or not the icebreakers are controlled by the charterers, because their responsibility is the same in either event.

There may, however, be contingencies, such as perils of the seas, which without anyone's fault, hinder or interrupt the service, without any liability attaching to the charterers in those respects. In so hazardous and uncertain a service there can be no such thing as a normal time of getting from the loading berth to the ice edge, though *primâ facie* the service is, I think, contemplated as continuous; but in any case, I do not at present see how the withdrawal of icebreakers for the convenience of the appellant charterers themselves, or of any other charterers (whether or not they can be treated as all members of one entity), as, for instance, for the purpose of waiting to collect other ships to be convoyed, can be other than a breach. There is also discussed in this case the question whether the icebreaker

assistance should be exclusive to the individual ship, or whether the clause allows the ship to be assisted, not separately by itself, but along with others in convoy or caravan. No doubt it is not unusual for a convoy to be formed, and it may be that this is familiar to those engaged in shipping business. But the express obligation to render icebreaker assistance to the chartered vessel—that is, assistance sufficient or satisfactory for the specified purpose—involves a due regard both to her safety and her dispatch, and is paramount; hence the convoy system can only be justified so far as it can be reconciled with this paramount obligation. The fact that the vessel proceeded with others in convoy cannot be relied on as a separate excuse in order to justify a failure in fulfilment, especially if the convoy was too large or the icebreakers too few. It seems to me irrelevant that ships are bound to proceed through the ice as ordered by the harbour master or the master of the icebreaker. These regulations are in no way inconsistent with the due performance of the charterers' obligations as I conceive them.

No doubt in particular cases difficult questions may arise as to whether or not the appropriate assistance has been rendered in accordance with the charterparty; such questions will be questions of fact and can only be dealt with on their respective merits as and when they come for decision. I have no desire to anticipate or prejudge them. It is enough to say in regard to the second appeal, as I said in regard to the first, that I think it should fail.

In my opinion, both appeals should be dismissed with costs.

The other noble and learned Lords concurred.

Appeals dismissed.

Solicitors: *Pettite, Kennedy, Morgan, & Broad; Holman, Fenwick, & Willan; Wynne-Baxter & Keeble; Botterell & Roche, for Sanderson & Co., Hull.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

WORCESTERSHIRE COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL

KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Talbot, JJ.), May 1, 2, 1934]

[Reported [1934] 2 K.B. 288; 103 L.J.K.B. 460; 151 L.T. 378; 98 J.P. 347; 50 T.L.R. 430; 32 L.G.R. 213; 30 Cox, C.C. 137]

Person of Unsound Mind—Mental defective—Order of judicial authority—Defective then in an institution—Immediately previous residence another institution in area of different authority—Authority to be specified in the order—Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), s. 43 (1), s. 44 (2) (as amended by Mental Deficiency Act, 1927 (17 & 18 Geo. 5, c. 33), s. 9).

The effect of s. 44 (2A) of the Mental Deficiency Act, 1913 (which provides that where an order made by a judicial authority "is in respect of a person in an institution for persons of unsound mind, institution, approved home, or other public or charitable institution, that person shall [for the purpose of naming in the order the local authority in whose area that person resided] be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home") is that residence in "the institution" in which the defective resided at the time of the making of the order is to be excluded, but other institutional residence is not to be excluded.

At the time of an order of a judicial authority the defective named therein

resided in an institution within the area of the X. local authority. Immediately before he was received into that institution he had resided in an institution within the area of the Y. local authority.

Held: the defective should be deemed to have resided in the institution within the area of the Y. authority.

Berkshire County Council v. Reading Borough Council (1), [1921] 2 K.B. 787, applied.

Notes. The powers of the Board of Control to certify institutions were transferred to the Minister of Health by the National Health Service Act, 1946, s. 49, and Sched. 8, and the Act of 1913 was amended accordingly, and s. 44 (4) repealed, by s. 50 and Sched. 9. In particular, the word "certified" is omitted where it occurs before "institution," "institution" now means "an institution for defectives vested in the Minister," in whom local authority institutions have now been vested, and "local health authority" is substituted for "local authority" and "council." Certificates are now granted only to the small number of religious or charitable institutions not vested in the Minister. Section 43 (1), as amended, now makes "the local health authority for the area in which he resided" (to be specified in the order) "responsible only for his conveyance to the institution," but that authority is also responsible under the Act for his reception and maintenance in the institution. Determination of residence under s. 44, therefore, still retains the same importance in determining which authority has to pay for the defective. Section 69 of the Act was repealed by the Poor Law Act, 1927, s. 245 and Sched. 11.

Referred to: *L.C.C. v. Ipswich County Borough Council*, [1939] 2 K.B. 288.

As to determination of a person's place of residence for the purposes of his reception into an institution, see 21 HALSBURY'S LAWS (2nd Edn.) 499-500, para. 912. For the Mental Deficiency Act, 1913, as amended, s. 6 (3), s. 43 (1), s. 44 (2A), (3), s. 71 (1), see 17 HALSBURY'S STATUTES (2nd Edn.) 1192, 1211, 1212, 1213, 1222.

Case referred to:

- (1) *Berkshire County Council v. Reading Borough Council*, [1921] 2 K.B. 787; 90 L.J.K.B. 939; 125 L.T. 410; 85 J.P. 183; 19 L.G.R. 386; 37 T.L.R. 642, D.C.; 33 Digest 273, 1902.

Case Stated by Worcestershire justices arising out of an application under s. 44 (3) of the Mental Deficiency Act, 1913.

By the Mental Deficiency Act, 1913, s. 6 (3), a judicial authority under the Act has power to make an order declaring a person to be a mental defective, and ordering him to be sent to an institution.

By s. 43 (1), where a person is ordered to be sent to an institution, the local authority responsible for providing accommodation for that person is the council of the county or county borough in which he resided (to be specified in the order).

By the Mental Deficiency Act, 1927, s. 9, as amended:

"Section 44 of the principal Act [the Mental Deficiency Act, 1913] (which relates to the determination of residence) shall be amended by the insertion therein after sub-s. (2) of the following new sub-s. (2a): 'Where the order is made by a judicial authority and is in respect of a person in an institution for persons of unsound mind, institution, approved home, or other public or charitable institution, that person shall, for the purposes of the provisions of the last foregoing section, be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home, and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive.' "

By the Mental Deficiency Act, 1913, s. 44 (3):

"Where a council [now a 'local health authority'] are aggrieved by a decision as to the place of residence of any person, they may, within three

months after the making of the order, apply to a petty sessional court acting in and for such place as may be prescribed, and that court, on proof to its satisfaction that the person in respect of whom the order was made was resident in the area of some other council . . . may transfer the liability to that other council. . . ."

By s. 71 (1): "The expressions 'institution' and 'institution for defectives' means a state institution or certified institution."

At a court of summary jurisdiction sitting at Pershore a complaint was preferred by Thomas Alfred Lewis, petitioning officer to the committee for the care of the mentally defective appointed by the Warwickshire County Council (the respondents), under s. 44 (3) of the Mental Deficiency Act, 1913, against the Worcestershire County Council (the appellants) for that on March 16, 1933, an order was made by Sir Francis John Davies, K.C.B., a justice for Worcestershire specially appointed under the Lunacy Act, 1890, directing that Michael Townsend, a defective, should be sent to Besford Court Certified Institution, in the county of Worcester, and specifying the county of Warwick as the place in which Michael Townsend resided. The complainant claimed that the liability of the Warwickshire County Council should be transferred to the Worcestershire County Council.

Upon the hearing of the complaint the following facts were admitted:

(a) The boy, Michael Townsend, the defective, was born in Manchester on Nov. 16, 1916, the parents being Charles Townsend and Rose Ann Townsend, who was of no fixed abode in 1928, when she was last heard of.

(b) Charles Townsend, the father, was admitted to the New Cross Institution, Wednesfield (Wolverhampton Union), on June 18, 1921, and died in the institution on Feb. 2, 1922. During the period Feb. 1, 1922, to Jan. 8, 1923, the mother, Mrs. Townsend, and her four children (Michael being one of the four) were inmates of that institution.

(c) On Sept. 25, 1923, the mother, accompanied by Isaiah Hart, with whom she was cohabiting, and her four children arrived in Kidderminster from the hopfields at Ledbury and stayed in a common lodging-house until Sept. 29, 1923, on which date they left, presumably to go to Stourport. The mother deserted three of the children in Kidderminster and they went to Kidderminster Workhouse on Sept. 29, 1923. On Nov. 2, 1923, the three children were accepted by Dr. Barnardo's Homes, Birmingham, and were transferred to Father Hudson's Homes, Coleshill, on Nov. 24, 1923, because they were found to be of Roman Catholic faith. The mother was sentenced to one day's imprisonment at Kidderminster Petty Sessions on Nov. 23, 1923, and the fourth child (a girl) was removed from her care.

(d) On April 1, 1925, the defective was admitted to the Coleshill Saint Edward's Roman Catholic Elementary School. On account of his mental defect it was recommended that he be admitted to a special school for mentally defective children and he was admitted to the Besford Special School chargeable to the Warwickshire Education Committee on March 20, 1929.

(e) The chargeability of the Warwickshire Education Committee ceased on Dec. 31, 1932, the end of the school term in which the boy reached the age of sixteen.

On the part of the respondents it was contended:

(a) That Sir Francis John Davies was wrong in holding that the defective "resided," within the meaning of s. 9 of the Mental Deficiency Act, 1927, in the county of Warwick, and that the Warwickshire County Council was accordingly responsible for his maintenance.

(b) That by s. 44 of the Act of 1913 (as amended) all institutions, approved homes, or other public or charitable institutions were excluded in arriving at what was "a place of residence" within the meaning of the section.

(c) That the Coleshill Home was an institution within the meaning of the words "or other public or charitable institution" in the section.

(d) That the words "or other public or charitable institution" do not appear in

the Mental Deficiency Act, 1913, and are not governed or limited by the definition of the word "institution" in s. 71 of that Act.

(e) That the Coleshill Home was not "a place of residence" within the meaning of s. 9 of the Act of 1927.

(f) That the intention of the legislature in passing s. 9 was that the same interpretation should be put on the word "residence" as was given to it in other Acts of Parliament and that institutional residence should be excluded.

(g) That the boy's place of residence immediately before he was received into an institution was Kidderminster, within the authority of the Worcestershire County Council.

(h) That in determining "place of residence" no regard is to be paid to the length or duration of that residence, and that once a residence is proved, for however short a time, it is sufficient to bring it within s. 9.

(i) That the law in force at the time the order was made is the law governing the determination of the question of residence.

(j) That, unless there is a doubt of physical residence, no question of Poor Law settlement arises.

On the part of the appellants it was contended :

(a) That prior to the 1927 Act the defective's residence in Coleshill Home was a good residence for the purposes of the Mental Deficiency Acts.

(b) That the interpretation section of the Act of 1913 (s. 71) applies to sub-s. (2A) added to s. 44 of that Act by s. 9 of the Act of 1927.

(c) That according to that interpretation section the words "or other public or charitable institution" are to be construed as "or other public or state or certified institution" and that the ejusdem generis rule supports this interpretation.

(d) That the words "charitable institution" are governed by the words "state" and "certified" as mentioned in the interpretation section and do not include charitable institutions in the widest sense of the term.

(e) That the words in the subsection should be read in their technical and legal sense.

(f) That the Coleshill Home did not come within the meaning of the words "or other public or charitable institution," and was, therefore, the defective's place of residence immediately before he was received into the Besford Court Home.

(g) That the defective never acquired a place of residence in Kidderminster, as his stay there was only a casual and temporary one, and that the three days in a common lodging house did not constitute a residence.

(h) That s. 9 of the Act of 1927 excluded only the one institution in which the defective resided at the time the order was made.

(i) That if it had been intended to exclude all institutional residence the section would have specifically stated so.

(j) That there was a real doubt as to the defective's place of residence at the time when he was deserted by his parent, who was then a person of no fixed abode, and that the question of residence had to be decided in accordance with the Poor Law settlement.

The justices were of opinion that the contentions on the part of the respondents were correct, and held that the liability for the maintenance of the defective should be transferred from the respondents to the appellants.

The Worcestershire County Council appealed, by Case Stated, to the Divisional Court.

The question upon which the opinion of the court was desired was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law.

John F. Bourke for the appellants, the Worcestershire County Council.

A. P. Marshall for the respondents, the Warwickshire County Council.

LORD HEWART, C.J.—This is a Case stated by justices of the peace for the county of Worcester, and it arises in the following way. A complaint was pre-

red by the petitioning officer to the committee for the care of the mentally defective, appointed by the council of the county of Warwick, the respondents in this case, under the Mental Deficiency Act, 1913, s. 44 (3) against the appellants, the Worcestershire County Council, for that on March 16, 1933, an order was made by a justice for Worcestershire specially appointed under the Lunacy Act, 1890, directing that one Michael Townsend, a defective, should be sent to a certified institution, known as Besford Court Certified Institution in the county of Worcester, and specifying the county of Warwick as the place in which Michael Townsend resided. It was claimed that the liability of the respondents, the Warwickshire County Council, should be transferred to the appellants, the Worcestershire County Council, and the court of summary jurisdiction made an order so transferring the liability.

The question raised by this case is whether in so doing the justices came to a right determination in point of law.

Now the facts of the case, although at first blush they appear to be complicated, are really simple. This boy, Michael Townsend, was born in Manchester in 1916. His mother, in the year 1923, when she was last heard of, had no fixed abode. His father had been admitted to the New Cross Institution, Wednesfield, Wolverhampton Union, in Staffordshire, on June 18, 1921, and died in that institution on Feb. 2, 1922. During the period from Feb. 1, 1922, to Jan. 8, 1923, the mother and her four children, the defective being one of those four, were inmates of that institution. In those circumstances, the question arose whether the residence of this unfortunate boy in institutions was to be regarded as residence within the meaning of this Act. The contentions which were put forward on the part of the respondents are concisely stated in the first two; that the justice for Worcestershire was wrong in holding that the defective resided, within the meaning of s. 9 of the Mental Deficiency Act, 1927, in the county of Warwick and that the Warwickshire County Council was responsible for his maintenance. The reason for that contention is contained in the next paragraph: that by s. 9 of the Mental Deficiency Act, 1927, all institutions, approved homes, or other public or charitable institutions were excluded in arriving at what was "a place of residence" within the meaning of the section.

The contention of the appellants, on the other hand, was that the defective had never acquired "a place of residence" in Kidderminster, and that s. 9 of the statute excluded only the one institution in which the defective resided at the time when the order was made. The argument proceeded on the basis that, if it had been intended to exclude all institutional residence, the section would have specifically stated so.

In my opinion, the contention of the appellants, the Worcestershire County Council, was clearly right. One has to look not at other Acts of Parliament, which use different language, but at this particular Act of Parliament. The matter stands in this way: Under s. 43 of the Mental Deficiency Act, 1913, there are provisions for the ascertainment of the local authority responsible for providing accommodation in certain cases, and under s. 44 there are provisions for the determination of residence in certain cases, and that latter section of the Act of 1913 was in fact added to—the term which is used is "amended"—by s. 9 of the Mental Deficiency Act, 1927. That section provides as follows, in words which, as it seems to me, are free from ambiguity:

"Section 44 of the principal Act" [that is the Act of 1913] "(which relates to the determination of residence) shall be amended by the insertion therein after sub-s. (2) of the following new subsection."

The words "the following new subsection" are a little important, because it might appear at first blush as if these words beginning "(2A)" were a mere amendment of sub-s. (2) in s. 44 of the earlier Act. It is quite clear that they are a substantive addition. The words are:

"(2A) Where the order is made by a judicial authority and is in respect of a

person in an institution for lunatics, certified institution, approved home, or other public or charitable institution, that person shall, for the purposes of the provisions of the last foregoing section, be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home, and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive."

The argument which is urged here on behalf of these respondents, and which was urged with success in the court below, is that "the institution or home" means any institution or home, and it is quite obvious that, if that had been the meaning, nothing would have been simpler than to express it. The words are "the institution or home," and what has to be decided is where the person "in the institution" was residing immediately before he was received into "the institution." There is nothing in this subsection to say that residence in any institution shall not be counted as residence.

Our attention has been directed to various statutes in which provisions of that kind are contained. I need not refer to them. They seem to me to afford a commentary by way of contrast on this provision in this section. They make it clear that where the legislature intended that any institutional residence should be excluded, plain words were used to express that meaning. Here there are no such words, and the question really then is the simple question: Where was this defective residing before he was received into "the institution or home"? Where was he at the time when the order was made by the judicial authority?

It was laid down with perfect clearness in the year 1921, some years before the Mental Deficiency Act, 1927, became law, that residence in an institution is residence in the ordinary sense. In *Berkshire County Council v. Reading Borough Council* (1) AVORY, J., said ([1921] 2 K.B. at p. 798):

"I cannot doubt that the word 'resides' is used in the same sense in s. 69" [that is of the Act of 1913] "as it is used in s. 44, and if it is used in the same sense, then it contemplates that a person who is living in such an institution as this does reside there. I come to the conclusion, therefore, that this defective woman was residing, within the meaning of this statute, at the institution within the county of Berkshire, and that therefore the decision of the justices was right."

The other members of the court, DARLING and SALTER, JJ., were of the same opinion.

The word "resides" is after all only a longer word in statutes of this nature for the word "lives," and the simple question is: Where was the defective living before he was sent to the institution in which he was at the time when the order was made? I think it is quite obvious that the only answer to that question is, that the defective was living in the county of Warwick at that time, and it matters not that his residence there was in an institution.

I think, therefore, that this appeal succeeds, and that the order transferring the liability of the Warwickshire County Council to the Worcestershire County Council was erroneous in point of law and ought to be set aside.

AVORY, J.—I am of the same opinion, and have very little to add to the exhaustive judgment which my Lord has delivered.

The only question in this case is: Where was this defective, Michael Townsend, residing at the time when he was sent to the institution known as Besford Court Certified Institution in the county of Worcester? As soon as it is established, as it was established in *Berkshire County Council v. Reading Borough Council* (1) ([1921] 2 K.B. at p. 798), that for the purposes of these Acts of Parliament a person may be deemed to reside in a charitable institution, it becomes clear, in my opinion, that at the material time this person was residing in Father Hudson's Homes in Coleshill, Warwickshire.

I have only one other thing to add. Reference has been made during the argument to s. 69 of the Mental Deficiency Act, 1913, which provided:

"The time during which a defective is detained in an institution or resides in an approved home under this Act shall for all purposes be excluded in the computation of time mentioned in s. 1 of the Poor Removal Act, 1846, as amended by any subsequent enactment."

Section 69 only came into operation in the case of doubt as to where a person resides, it being provided, in sub-s. (4) of s. 44 of the Act of 1913, that

"in the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor."

In other words, s. 69 was only introduced into this Act in order to bring it into conformity with the Poor Removal Act, 1846, in cases where there is a doubt as to where a person resides.

In view of the decision in *Berkshire County Council v. Reading Borough Council* (1), in my opinion, this is not a case of any doubt at all. There is no room for doubt, after that decision, as to where this person was in fact residing at the material time.

I agree, therefore, with the conclusion that this appeal should be allowed.

TALBOT, J.—I am of the same opinion, and I am bound to say the case appears to me to be an exceedingly plain one.

The respondents' case and the decision of the justices rests on the proposition that residence, or being, in the home at Coleshill, where in fact this defective was first before he was admitted into the Besford School, does not make that home a place of residence within the meaning of s. 9 of the Act of 1927. That contention was supported on two grounds and, as I understand, more vigorously on the second than on the first. The first ground was that there was something in the nature of a home provided partly, at any rate, for the accommodation of boys afflicted in this way, which made being there or living there not residence. That contention is disposed of by *Berkshire County Council v. Reading Borough Council* (1) [1921] 2 K.B. at p. 798, which has been already referred to, and as to which I would only say that I am rather surprised that this matter was ever contested.

The other argument was that in a number of statutes—learned counsel went so far as to say all statutes dealing with matters of this kind—institutions of this class were excluded from the category of places in which residence was possible. It certainly cannot be assumed that that statement is correct. I notice that in point of fact, on a closely analogous problem under s. 43 (1) of the Mental Deficiency Act, 1913, which was one of the Acts construed by the court in *Berkshire County Council v. Reading Borough Council* (1), the word "reside" was quite clearly held to include living in an institution of this sort. However, supposing that it were true that in all analogous cases provision was made that residence in an institution was not to count for this purpose, that would only make the exception contained in the Act of 1927 the more conspicuous. There is in s. 9 of that Act a total absence of any such words as were read to us from several Acts by learned counsel, by which Parliament in each case made clear its intention that in that particular connection "residence" must be residence elsewhere than in an institution. The last Act which learned counsel quoted was the Children and Young Persons Act, 1933. That Act shows quite clearly that residence in an institution is "residence," as one would expect, unless there is some special legislation to say that, in a particular case, it is not. Section 90 (6) of that Act provides:

"In determining for the purpose of this section the place of residence of a child or young person, any period during which he resided in any place as an inmate of a school or other institution"

and so on. It is, therefore, perfectly correct English and perfectly good sense to say that a child does reside in a place of this kind. If Parliament wishes that the word "reside" should not have its ordinary meaning it says so, as it does in that very subsection, which goes on to say that that period of residence is to be disregarded for the purposes of that Act.

It seems to me, therefore, that there is no ground at all on which the decision of the justices in this case can be supported, and I agree with my Lords that the appeal must be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *C. H. Bird*, Worcester; *Taylor, Jelf & Co.*, for *H. M. Blenkinsop*, Warwick.

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

Re GOWER'S SETTLEMENT

[CHANCERY DIVISION (Clauson, J.), January 15, 22, 1934]

[Reported [1934] Ch. 365; 103 L.J.Ch. 164; 150 L.T. 449]

Trust—Maintenance of infant—Mortgage of interest as tenant in tail in remainder—Mortgage binding infant's issue and subsequent remaindermen—Power of court to authorise—Trustee Act, 1925 (15 & 16 Geo. 5, c. 19), s. 53. Mortgage—Entailed interest—Infant tenant in tail in remainder—Mortgage of interest binding infant's issue and subsequent incumbrancers—Power of court to authorise—Trustee Act, 1925 (15 & 16 Geo. 5, c. 19), s. 53.

Section 53 of the Trustee Act, 1925, enables the court, with a view to the application of capital or income for the maintenance, education or benefit of an infant, effectually to authorise a mortgage of property of which the infant is tenant in tail in remainder, so framed as to vest in the mortgagee, subject to the interests having priority over the infant's tenancy in tail, a security which is as effective a bar against the infant's issue and subsequent remaindermen as it would be if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act, 1833.

Notes. As to the statutory power of the court to authorise a mortgage of land of which an infant is tenant in tail in remainder, and so bar the entail, see 16 HALSBURY'S LAWS (2nd Edn.) 648, para. 1362, 23 HALSBURY'S LAWS (2nd Edn.) 246, para. 365, 27 HALSBURY'S LAWS 680, para. 1165, and *ibid.* 686, para. 1175. For the Trustee Act, 1925, s. 53, s. 68, see 26 HALSBURY'S STATUTES (2nd Edn.) 134; for the Law of Property Act, 1925, s. 171, see 20 HALSBURY'S STATUTES (2nd Edn.) 780; and for the Fines and Recoveries Act, 1833, see *ibid.* 382.

Cases referred to:

- (1) *Re Hambrough's Estate*, *Hambrough v. Hambrough*, [1909] 2 Ch. 620; 79 L.J.Ch. 19; 101 L.T. 521; 53 Sol. Jo. 770; 28 Digest 235, 915.
- (2) *Ex parte Johnson* (1747), 3 Atk. 559.
- (3) *Radcliffe v. Eccles* (1836), 1 Keen, 180; 48 E.R. 256; 38 Digest 721, 669.
- (4) *Powell v. Matthews* (1855), 1 Jur.N.S. 973; 38 Digest 721, 670.
- (5) *Re Gates*, *Gates v. Gates*, [1930] 1 Ch. 199; 99 L.J.Ch. 161; 142 L.T. 327; Digest Supp.
- (6) *Sturgis v. Morse* (1858), 3 De G. & J. 1; 44 E.R. 1169, L.J.J.; 32 Digest 516, 1747.

(7) *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549; 65 L.J.Ch. 372; 74 L.T. 346; 44 W.R. 583; 38 Digest 721, 671.

Adjourned Summons for maintenance by Erasmus Francis Gower, an infant, and his infant brother and sister, asking that the respondents, the present trustees of the will of their grandfather, who died in 1914, might be directed to raise by a mortgage of the interest of the infant Erasmus Francis Gower in certain settled lands and capital moneys certain sums for the maintenance of the three infant applicants. The infant Erasmus Francis Gower was under the said will tenant in tail in remainder expectant upon the life interest of his father of the said lands and capital moneys.

Section 53 of the Trustee Act, 1925, provides that

"Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—(a) appointing a person to convey such property . . ."

The summons came on for hearing in chambers before BENNETT, J., who adjourned it into open court.

Lightwood, for the applicants, the infants, referred to *Re Hambrough's Estate, Hambrough v. Hambrough* (1); *Ex parte Johnson* (2); *Radcliffe v. Eccles* (3); *Powell v. Matthews* (4); *Re Gates, Gates v. Gates* (5).

Beebe for the respondents, the trustees.

Cur. adv. vult.

Jan. 22. **CLAUSON, J.**—By this summons the court is asked to sanction the raising of certain moneys by a mortgage of the interest of an infant, Erasmus Francis Gower, in certain lands and capital moneys subject to a settlement. The interest of the infant is that of a tenant in tail subject to a preceding life interest. When the matter came before my brother BENNETT in chambers, it was adjourned into court in order that the bearing on the matter of s. 53 of the Trustee Act, 1925, might be considered. It is important that, if a mortgage is directed, there should be no doubt that the mortgagee will thereby obtain a security which will be a good charge, subject, of course, to the preceding life interest, upon the fee simple of the lands and upon the capital moneys, without any chance of the charge being defeated, either by future issue of the infant inheritable under the entail, or by any tenant in tail or by any tenant in tail or in fee whose estate is to take effect after the determination or in defeasance of the infant's estate tail.

It will save verbiage and will tend to clearness if I disregard the capital moneys and deal with the matter as though the settled land only were in question.

The question propounded to me can then be put in the simplest terms, thus: A.B., an infant, being tenant in tail in remainder of Blackacre with divers remainders over, can the court, by virtue of s. 53 of the Trustee Act, 1925, effectually authorise a mortgage of Blackacre (subject to the interests having priority over the infant's tenancy in tail) so framed as to vest in the mortgagee a security which will be as effective a bar against A.B.'s issue who take under the entail and subsequent remaindermen as if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act, 1833? I assume, of course, that the mortgage is to be made with a view to the application of the capital or income of the property concerned for the maintenance, education or benefit of the infant, as that is essential for the application of s. 53 to the matter in hand.

The difficulty arises in this way: if the infant had an absolute reversion in fee simple, subject only to the preceding life interest, it would be plain that the court could, under the section, appoint a person to assure the reversion, so as to give the mortgagee an effectual charge on the fee simple. The infant, however, has not an absolute reversion; he has a tenancy in tail. Can the court appoint a person to convey such interest in the fee simple as may be necessary to give the mortgagee

the desired security? It is suggested that all the court can authorise is a conveyance of "such property"; and the property—see the definition in s. 68 (11) of the Act—is, it is suggested, the estate of the infant in the land in question, which is an estate less than the fee, being merely an estate tail. Further, it may be said, the expression "convey"—see s. 68 (3)—includes the execution of every assurance for disposing of the land for the infant's estate in the land or for any less estate; and, accordingly unless the expression "convey" is given a scope wider than that which the definition states it is to include—which is, of course, perfectly possible: see the observations of FARWELL, J., in *Re Gates, Gates v. Gates* (5)—the conveyance should, it is suggested, be restricted to a conveyance of the infant's estate, and cannot extend to a conveyance of that of which the infant, if of full age, could by virtue of the Fines and Recoveries Act, 1833, s. 15, dispose, that is to say, the fee simple.

If the suggested construction is correct, it would seem that the section enables the court merely to authorise such a conveyance as the infant, if of full age, could make of his estate tail, without utilising the power of disposing of the fee simple under the power given by the Fines and Recoveries Act, 1833. The effect would be—see *Sturgis v. Morse* (6)—that the mortgage would cover only what is sometimes called a common law base fee, that is, a fee good during the infant's life but determinable by the entry of the issue in tail. It seems absurd to suppose that the legislature can have intended the section to be read so literally as to produce that result. If it is possible to construe the section so as to enable the court to give a mortgagee a title, not to such a very limited interest as that, but to such an interest as the infant, if of full age, could create under the Fines and Recoveries Act, 1833, that is, at the least, a statutory base fee, and with the proper consent, a fee simple, such a construction should obviously be adopted in preference to the alternative narrow and even absurd construction.

In my view, I am free to adopt the wider construction and to hold that the section authorises the court, in the case supposed, to appoint a person to convey Blackacre—subject to the trusts precedent over the estate tail—on the infant's behalf in as full and ample a manner as that in which the infant, by virtue of the Fines and Recoveries Act, 1833, could convey it, notwithstanding that the infant is, in a strict sense, not beneficially entitled to the fee simple interest so conveyed, but to an estate tail, being a less interest, that estate tail carrying with it, assuming the person entitled to be of full age, a statutory right to convey the larger interest.

I need not, however, speculate further on the legislature's intentions, nor need I stress what I understood to be the fact, that it has been commonly assumed by many at least of those interested in such problems, that the very purpose of s. 53 was to get over the difficulty which emerged in *Re Hambrough's Estate, Hambrough v. Hambrough* (1) in the way of the court directing an effectual mortgage of the fee by disentailing an infant's tenancy in tail.

The following considerations seem to be an ample justification for placing the wider construction on the section.

It was held as long ago as 1747 by HARDWICKE, L.C., in *Ex parte Johnson* (2) that, where the legislature authorised the court to order an infant to convey lands, an infant tenant in tail could be ordered not only to convey such estate as was in him, but to suffer a common recovery and to assure the larger estate in fee simple; and in 1836 LANGDALE, M.R., after the Fines and Recoveries Act, 1833, held that in a similar case an infant should be ordered to convey by a proper assurance under that Act, with the result of vesting in the purchaser a larger estate than the infant himself had: (*Radcliffe v. Eccles* (3)).

In 1855 WOOD, V.-C., recognised, in *Powell v. Matthews* (4), that under the terms of the Trustee Act, 1850, which, for the purpose in hand, correspond with the terms of the Trustee Act, 1893, a vesting order dealing with the estate of an infant tenant in tail operated to vest such estate as the infant could, if of full age, have conveyed under the Fines and Recoveries Act, 1833; and in *Re Montagu, Faber v. Montagu* (7) it was held, in effect, that statutory provisions entitling the

court to appoint a person to convey the land to which an infant trustee is entitled enable the court, when the title of the infant trustee is a tenancy in tail, to appoint a person to convey the land not merely for the interest of the infant—whatever the effect of that might be—but for all such estate as the infant could convey under the Fines and Recoveries Act, 1833. It is not easy to see how any other conclusion could have been reached, since the definition of “convey” in s. 50 of the Trustee Act, 1893, corresponding with that in s. 2 of the Trustee Act, 1850, seems clearly to imply that in the case of a tenant in tail an assurance operating under the Fines and Recoveries Act, though its operation of course is to enlarge the estate, is properly described as a conveyance by the tenant in tail.

Section 114 of the Law of Property Act, 1922, which is in Part IV of that Act, corresponds, with but negligible differences, with the section which I have to construe. Part IV is, by s. 127 of the Act, to be construed with the Trustee Act, 1893, and must therefore be read in the light of the definition of the word “convey” in s. 50 of that Act. It follows that, since the Trustee Act, 1893, and the Trustee Act, 1850, had been construed so as to make a disentailing assurance, or a vesting order operating as a disentailing assurance, the proper method of dealing with an infant's tenancy in tail when the infant was a trustee, so, on the enactment of s. 114, the conveyance therein contemplated of the infant's beneficial tenancy in tail must have been a conveyance by disentailing assurance, with the necessary effect of enlarging the estate conveyed into a fee simple which would, according to circumstances, be either a statutory base fee, or an absolute fee simple.

The Act of 1922, which never came into force, was, so far as s. 114 was concerned, replaced by the Trustee Act, 1925, s. 53, which I have to construe. If I am to construe the latter section as having a narrower operation than s. 114 of the Act of 1922, I can do so only on the ground that the omission, from the definition of “conveyance” in s. 68 of the Trustee Act, 1925, of the words

“including the acts to be performed by tenants in tail in accordance with the provisions of the Act for the abolition of fines and recoveries,”

operates to cut down the meaning of the word “convey” in s. 53 of the Act of 1925, as compared with its meaning in the Act of 1922. However, the omission of those words can be amply accounted for, first by the fact that the words merely include explicitly in the preceding words something which is implicit in them, and, secondly, by the fact that the outstanding formality, namely, that of enrolment, is made obsolete by the 1925 legislation.

Lastly, the language used in s. 171 of the contemporaneous Law of Property Act, 1925, shows quite clearly that the legislature treats a power to settle a lunatic's estate tail as extending to a power to put into settlement the enlarged estate created by a disentailing deed, as appears from the words “including a disentailing assurance” in s. 171 (2). I venture to think that this removes any vestige of difficulty there might otherwise be in treating a conveyance which operates to disentail as anything but a proper conveyance of an estate tail within the meaning of the section which I have to construe.

Since the matter must go back to chambers for the details to be settled, the order which I now make will therefore simply be to refer the matter back to chambers, but it will be prefaced by a statement that the judge is of opinion that the court has jurisdiction by virtue of s. 53 of the Trustee Act, 1925, with a view to the application of the capital or income of the lands and capital moneys whereof the infant Erasmus Francis Gower is tenant in tail, to appoint a person to convey and assign the said lands and capital moneys—subject to all estates or interests therein having priority over the infant's interest—in as full and ample a manner as that in which the infant could, by virtue of the Fines and Recoveries Act, 1833, convey and assign the same, if he were of full age.

Order accordingly.

Solicitors: *Reid, Sharman, & Co.*

[*Reported by J. H. G. BULLER, Esq., Barrister-at-Law.*]

McEVOY v. BELFAST BANKING CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Thankerton, and Lord MacMillan), May 1, 3, 4, 7, 8, 10, June 28, 1934]

[Reported [1935] A.C. 24; 103 L.J.P.C. 187; 151 L.T. 501; 40 Com. Cas. 1]

Bank—Deposit by father in joint names of father and son—"Payable to either or the survivor"—Payment by bank to executors of father—Acquiescence of son—Right of son as survivor to sue bank—Estoppel of son—Ratification by son. Estoppel—Election—Deposit in bank by father in joint names of father and son—"payable to either or the survivor"—Payment by bank to father's executors procured by son—Claim by son as survivor against bank. Ratification—Contract by A. with B. for B. to pay A. or C.—Rights of C.—Need for ratification by C.—Estoppel of C. from ratifying.

A bank issued a deposit receipt in the names of J.M. and J.D.M., his son, in the following form: "Belfast Banking Co., Ltd., Newry, July 20, 1921. Received from J.M., Esq., and J.D.M. (a minor), Newry, the sum of ten thousand pounds sterling for credit in deposit account, not transferable. . . . 'Payable to either or the survivor. This receipt must be produced when payment of either principal or interest is desired.' " On the previous day, July 19, the father had told the bank manager that he was mortally ill, that he wished to leave everything to his son, J.D.M., tied up until the son was twenty-five years old, and that he wished to avoid estate duty on the £10,000 and had asked the bank manager about the effect on estate duty liability of putting the £10,000 in joint names. By his will dated Aug. 10, 1921, the father appointed executors and trustees, made no express provision as to the £10,000 and directed that his business be carried on and that the residue of his property be held in trust for his son J.D.M. until he attained the age of twenty-five years, and on attaining that age for him absolutely. The father died later in 1921 when the son was fifteen years old, and the trustees surrendered the deposit receipt to the bank which, on receiving it, issued a new one in the names of the trustees. From time to time, both before and after the son became twenty-one years old, moneys from the account covered by the deposit receipt were transferred by the trustees to the current account of the business formerly carried on by the father to discharge the overdraft thereon. The son was aware of these transactions, and took part in them after he had attained the age of twenty-one. With the exception of £2,076 which was used for the purchase of some real estate, the whole £10,000 was absorbed in the business before the son attained twenty-five years of age in November, 1930. Apart from the £10,000 the father's residuary estate was small. In October, 1930, the son claimed from the bank the sum of £10,000 in respect of which the deposit receipt had been given, and in April, 1931, he brought this action for the money.

Held: the son's claim failed because (per LORDS WARRINGTON, MACMILLAN and THANKERTON, LORD ATKIN dissenting as to (i) and expressing no opinion as to (ii) and (iii))

(i) the facts above set out showed that the father's intention was that the £10,000 should be subject to the trusts of the will, and that it was put in joint names merely because of the possible effect on estate duty, and not to confer any beneficial interest on the son;

(ii) as between the son and the trustees of the will the money, therefore, belonged in equity to the trustees, and so they alone were entitled to receive it and to apply it in due course of administration;

(iii) whether or not the effect of the contract evidenced by the deposit receipt was to give the son an interest in the £10,000 as between himself and

the bank, the bank had paid the money to the persons entitled to it, and so were discharged of their liability.

(Per LORD ATKIN, LORD WARRINGTON and LORD MACMILLAN dissenting as to (i) and expressing no opinion as to (ii), (iii) and (iv), LORD THANKERTON dissenting as to (i) and (ii), but stating that had he agreed with LORD ATKIN as to (ii), he would have agreed with him as to (iii) and (iv).)

(i) the facts above set out showed that the intention of the father was to advance the son by giving him a beneficial interest in the £10,000.

(ii) the contract evidenced by the deposit receipt was made by the father, who purported to make it on behalf of himself and the son, but who did not have the actual authority of the son to make the contract on the son's behalf.

(iii) the son could, therefore, have no rights against the bank under this contract unless and until he ratified it.

(iv) ratification cannot take place after the purported principal has by words or conduct intimated to the other party that he does not intend to ratify, even if the purported principal did not then know the full extent of his rights: the only reasonable conclusion that the bank could draw from the son's conduct between his attaining his majority and October, 1930, was that he was content that the £10,000 should be applied as part of his father's estate, that he did not propose to make a claim on his own behalf, and had decided not to ratify; the son was, therefore, precluded from ratifying the contract when he purported to do so by claiming the money in October, 1930.

Per **CURLIAM**: There is a vital difference between a contract between A. and the bank to pay A. or B., and a contract between A. and B. and the bank to pay A. or B. Payment to B. would discharge the bank whether the bank contracted with A. alone or with A. and B., but B. can only sue the bank on the contract if the contract is between B. and the bank.

Notes. As to receipt on deposit account in joint names, see 2 HALSBURY'S LAWS (3rd Edn.) 174, para. 328; and as to estoppel by making a choice between two courses of conduct, see 15 HALSBURY'S LAWS (3rd Edn.) 171, para. 340.

Appeal from an order of His Majesty's Court of Appeal in Northern Ireland (MOORE, L.C.J., ANDREWS and BEST, L.JJ.), dated April 24, 1933, affirming an order of the Chancery Division (MEGAW, J.) of the High Court of Justice in Northern Ireland, dated June 22, 1932, in an action in which the appellant was plaintiff and the respondent bank were defendants.

The subject-matter of the action was a deposit receipt for £10,000, dated July 20, 1921, and numbered 65,564, which was issued by the bank at their branch bank at Newry in the names of John McEvoy, the father of the appellant, and the appellant, and was expressed to be payable to either of the parties named therein or the survivor. The appellant son survived his father and sought a declaration that he was entitled to the moneys represented by the said deposit receipt and claimed payment of the sum of £10,000 with interest thereon.

The son was born on Nov. 14, 1905. He was the only son of John McEvoy, who died on Sept. 20, 1921.

The Court of Appeal held, affirming MEGAW, J., (i) that where the transaction was tainted with fraud the court would not receive evidence of the intention so as to rebut a presumption of advancement and that the bank were not entitled to transfer the money standing in the joint deposit receipt for £10,000 at the death of the deceased depositor into the names of trustees, and (ii) (BEST, L.J., dissenting) that the moneys on the deposit receipt had been paid or applied by the bank for the use of the son.

The facts are set out in the opinion of LORD ATKIN.

The son appealed.

J. M. Whitaker, K.C., and Sir Henry A. Wynne for the son, the survivor.

Wilfrid Greene, K.C., and J. C. Macdermott for the bank.

The House took time for consideration.

June 28. **LORD ATKIN.**—The appeal in this case arises on questions arising out of the remarkable transactions affecting a deposit receipt issued by the respondent bank. The facts are fully stated in the judgments of the Courts of Northern Ireland, and I only re-state so much of them as appears necessary for my opinion. In 1921 the depositor, John McEvoy, a widower, aged over sixty, owned premises in Newry, where he carried on successfully the business of a publican, a grocer, and an undertaker. He had an only son, Joseph, then a boy of fifteen. The depositor was a customer of the bank, and for some years had a deposit account with the bank, for which he held from time to time the appropriate deposit receipt. In July, 1921, he held a deposit receipt for £10,000. In that month he found himself to be mortally ill. On July 19 he summoned the bank manager at Newry, Mr. Coleman, to his house, where there were also present his brother-in-law and Mr. Adamson. He discussed his affairs and announced that he was proposing to leave everything to his son, tied up until his son was twenty-five, and that Miss Kinney, his sister-in-law, would manage the business. The question then arose as to death duties. He wished to avoid paying duty on the £10,000 deposit receipt and asked whether, if there could be two names, it would meet the case. The bank manager was not prepared to advise him. He then gave directions that the deposit receipt should be put in the names of himself and his son, payable to either or the survivor, and it was arranged that the existing deposit receipt should be sent over to the bank the next day for that purpose. Accordingly, the next day, the brother-in-law brought the deposit receipt endorsed by the depositor. The accrued interest was paid partly in cash and partly by a transfer to current account, and in respect of the principal a new deposit receipt was issued, the form of which is apparently usual in Northern Ireland banking, and is as follows:

“Belfast Banking Co., Newry.—July 20, 1921.—£10,000.—Received from John McEvoy, Esq., and Mr. Joseph D. McEvoy (a minor), Newry, the sum of ten thousand pounds sterling for credit in deposit account, not transferable.—For the Belfast Banking Co., Ltd., W. H. COLEMAN (Manager).—Payable to either or the survivor.—This receipt must be produced when payment of either principal or interest is desired.”

There are terms of the notice and interest endorsed on the back, which for present purposes are irrelevant.

On the same date the bank opened a separate deposit account in their books in the names of “John McEvoy and Jos. D. McEvoy (a minor).”

On Aug. 19, 1921, the depositor made his will. He appointed four executors and trustees, and after giving certain legacies disposed of the residue as follows:

“All the rest of my property is to be held in trust for my son, Joseph D. L. McEvoy, until he attains the age of twenty-five years, and on his attaining said age for him absolutely, and pending his attaining said age I authorise my said business to be carried on by my sister-in-law, Alice Kinney, on such terms as my executors in their absolute discretion may arrange.”

In case his son died under the age of twenty-five, he made further dispositions.

On Sept. 13, 1921, he deposited with the bank a further £2,000, taking a deposit receipt in his own name, the amount being entered by the bank in the deposit account kept from 1907 in the name of the depositor.

On Sept. 20, 1921, the depositor died. The solicitor for the executors, Mr. Gartlao, very properly insisted that the moneys on deposit should be disclosed in the Schedule of Assets to be sworn by the executors. The executors refused, and, as Mr. Gartlao persisted, they employed another firm of solicitors, and omitted from the schedule any reference to the capital sums, though there appears under “Cash at bankers on deposit and interest thereon £66 2s. 3d.” On Dec. 16, 1921, probate was granted to the four executors, and it was noted by the bank on Dec. 20, recording “Value £2,458 7s. 9d.” On Jan. 25, 1922, the four executors endorsed both the deposit receipts, and in respect of the £10,000 receipt directed £170, the accrued interest, to be transferred to their current account, and as to the principal

sum of £10,000 opened a deposit account and obtained a new deposit receipt in their own names.

The deposit receipt of July 20, which, it will be remembered, was payable to John McEvoy or Joseph McEvoy or the survivor, was marked back and front by the bank, "Paid Jan. 25, 1922," "Re-deposited £10,000." According to the son, he saw the bank manager twice in the year 1922 and asked him why the deposit receipt was changed into the names of the trustees, and received on the first occasion the answer that it would save compound interest if so charged, and, on the second occasion, that it was changed under the will and belonged to the trustees till he was twenty-five. The bank manager denied both conversations. What the learned judge's finding was on this conflict is not clear, but he finds that the son was aware, if not before his father's death, at any rate very soon after, that his name was on the deposit receipt, that the change was made for a purpose connected with avoiding death duties, and that the executors had had the sum transferred to their names. After his father's death the son returned to school, but he left in 1923, and thereafter took a part in the business, which became more prominent as time went on. It has to be remembered that, under the terms of the will, the business was being carried on by the executors until the son attained the age of twenty-five, which he did on Nov. 14, 1930. He came of age on Nov. 14, 1926. Until Easter, 1925, the business was being managed by the depositor's sister-in-law, Miss Kinney. She left at that time and was succeeded by one Murden, who managed until May, 1927. From February, 1928, to July, 1929, the business was managed by one McParland.

In the interval the son appears to have been the only manager, and he assumed control on McParland's departure. He appears during most of the time to have kept the books, and it would appear that, as the prospective owner of the business, he was allowed by the executors considerable latitude. Whatever the cause may be, the business soon ceased to prosper. When Miss Kinney left there was an overdraft of over £2,700, which, by November, 1926, had grown to £4,000. In May, 1925, the executors had purchased a property known as Rooney's Terrace, in Newry, and drew a sum of £2,000 from the deposit account, lodging the existing deposit receipt, and taking a new one for the reduced sum. This transaction took place with the knowledge of the son, not then of age, and with his approval. It is obvious that after 1926 the bank were dissatisfied with the overdraft and were pressing the executors to reduce it. In January, 1927, they drew £1,000 from the deposit account; in October, 1927, £3,000; in October, 1928, another £3,000; and in July, 1929, the balance of £1,000. On that date the whole of the £10,000 had been spent, £8,000 of it in repaying to the bank liabilities which had been incurred to the bank by the executors in carrying on the business. It is plain that the son was aware of these drawings from the deposit account, and of the purpose for which they were required, and that he took a part in procuring the necessary signatures from the executors and lodging them with the bank. In 1930 the son, through his solicitors, claimed from the bank the sum of £10,000 under the original deposit receipt, to which the answer was made that he had known and approved throughout the manner in which the money had been dealt with. In April, 1931, the writ in the action was issued. The defence in substance raises two issues: (i) That the plaintiff son was never entitled to the £10,000; (ii) that, if he was, the bank had paid the money at his request and at his direction.

As to the first point, all the judges in Northern Ireland have decided against the bank. MEGAW, J., was of opinion that the ordinary presumption of advancement would be negatived by the circumstances of the opening of the deposit account if it were not that the object of all the parties, including the depositor, was to defraud the revenue of estate duty. Holding that the bank and the executors could not set up an unlawful purpose to negative the presumption of advancement, he concluded that the court must leave the ownership in the condition it was as between the son and the estate at the death of the depositor. The bank found themselves at the depositor's death, by their own contract, debtors not

to the trustees but to the son. Both the Lord Chief Justice and ANDREWS, L.J., adopt this view. BEST, L.J., adopts the results but I am not sure that he accepts the reason. On this view, the son on the death of his father, the depositor, became the legal owner of the money on the deposit receipt, as is found by MEGAW, J. The presumption of advancement would make him the beneficial owner as between him and the estate. The presumption, however, would be negatived were it not that the true intention of the father was to effectuate a fraud. It cannot be so negatived, and, therefore, the legal and beneficial interests were in the son.

If the presumption of advancement were fairly negatived, in the circumstances, by proof of a different intention of the father, I should find myself unable to come to the conclusion that the father's intention was to effectuate an illegal purpose. However reprehensible the conduct of the executors and of the bank manager may have been, I cannot find any evidence establishing a design by the father that his executors should commit perjury in their affidavit leading to probate. It is quite possible that the father really thought that taking out a deposit receipt in his boy's name as well as his own payable to the survivor prevented the money from passing on his death, as, indeed, would be the case but for provisions dealing with gifts and dispositions within a certain period of death. I should not, therefore, be prepared to negative the presumption of advancement on this ground.

However, in my opinion, and in this respect I appear unfortunately to differ from some of the learned judges below and from some of your Lordships, the presumption of advancement is not only not negatived by the facts but is, in fact, enhanced. The father knows, for he is told, that if the property is his when he dies estate duty will have to be paid. He therefore enters into a contract by which the bank are bound to pay the money during his life to himself or to his son, and after his death to his son. He knows that if it passes under his will death duties must be paid; it will pass under his will if it still remains his. The inference seems irresistible that he intended that it should not be his at his death, that it should not pass under his will; in other words, that the son should have a present interest in it which the son alone could enforce on the father's death. Non-advancement defeats the avowed purpose; advancement may, and, as the ill-instructed father thinks, will, effect the purpose. The presumption, which is always a strong one, is, in my submission to your Lordships, not only not negatived but is directly supported. The same reasoning applies to the suggestion that the father intended that the £10,000 should be tied up until the son attained the age of twenty-five. It seems to me clear that he elected to withdraw this protection as to the £10,000 as the price of avoiding death duties. He knew that what passed under his will paid death duties; he knew that the limitation as to twenty-five only applied to the property passing under his will. He had determined not to pay death duties.

I am, therefore, in agreement in the result, though not for the same reasons, with all the judges in Northern Ireland in their view that, on the assumption that the legal title in the debt due from the bank on the deposit account was in the son, the beneficial interest was also his.

It would become necessary, therefore, to consider how far the dealings with the account after the father's death discharged the bank. But before doing so I am compelled to notice an elaborate argument addressed to this House on behalf of the bank to the effect that the legal title never was in the son. It is said that the effect of the contract created by the deposit of £10,000 by the father in the names of himself and his son, the opening of the joint deposit account, and the giving and acceptance of the deposit receipt was the formation of a contract between the father alone and the bank. Neither the father nor the bank, it is said, purported to contract for or with the son; the son was a third party who could acquire no rights against the bank. It was as though the father had opened an account in his own name making the sums payable to himself or to his son, in which case it was said that the son would clearly have to prove an independent contract between

himself and the bank before he could sue the bank. This contention seems to me to raise the one question of general importance in the case. It involves the whole question of the legal relations created by a bank deposit in this form. The argument, if correct, appears to me inconsistent with well-established banking practice and likely to impair the confidence in deposits made in joint names. I consider it to be quite unfounded. It is, I think, significant that there appears no trace of such an argument having been put forward in the courts below. It would not have been an attractive hearing for customers or potential customers of the bank in Belfast. It seems to have been reserved for the rarer atmosphere of your Lordships' House.

The suggestion is that where A. deposits a sum of money with his bank in the names of A. and B. payable to A. or B., if B. comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B.'s or possibly that A. had acted with B.'s actual authority. For the contract, it is said, is between the bank and A. alone.

To say this is to ignore the vital difference between a contract purporting to be between A. and the bank to pay A. or B. and a contract purporting to be between A. and B. and the bank to pay A. or B. In both cases, of course, payment to B. would discharge the bank whether the bank contracted with A. alone or with A. and B. But the question is whether, in the case put, B. has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B. can sue the bank. The contract on the face of it purports to be made with A. and B., and I think with them jointly and severally. A. purports to make the contract on behalf of B. as well as himself, and the consideration supports such a contract. If A. has actually authority from B. to make such a contract, B. is a party to the contract ab initio. If he has not actual authority then, subject to the ordinary principles of ratification, B. can ratify the contract purporting to have been made on his behalf, and his ratification relates back to the original formation of the contract. If no events had happened to preclude B. from ratifying the contract on compliance with the contract conditions, including notice and production of the deposit receipt, B. would have the right to demand from the bank so much of the money as was due on the deposit account. In my view, therefore, if nothing had happened to prevent the son from ratifying the contract, he could sue the bank on the original deposit account. It would be no answer to say that the bank had paid the executors, for the contract was not to pay to the executors of either of the two names, but to pay to the survivor. I think the case is rightly put on ratification, for I can find no sufficient evidence that the father had the actual authority of the son to enter into this contract on the son's behalf.

It remains to deal with a further argument of the bank which will not bear examination. Assume, it is said, that the son had all the rights he claimed, yet the contract provides that the receipt must be produced when payment is desired, and as the son never did produce the receipt the action must fail. The fact is that the bank had themselves taken possession of the deposit receipt when they had, contrary to the terms of the contract and, on this hypothesis, wrongfully as against the son, paid the amount due on it and transferred the sum so paid to the account of the executors. At the time when they say the son ought to have produced the receipt to them they had themselves the wrongful possession of it in their strong-room. To allow the bank in those circumstances to set up a breach of the condition would be contrary to all principle.

It remains, then, to consider whether the son still had the right to ratify, as I think he first sought to do, in October, 1930, ten years after the original contract and four years after he had attained his majority. It is clear that he had from the beginning known: (i) That the contract purported to be made on his behalf; (ii) that the money had been claimed by and paid to his father's executors. I ignore any dealings with the money while the son was a minor, but in the period between November, 1926, and October, 1930, there was a series of transactions to the knowledge of the son, in which he played an active part, which were only con-

sistent with the money having formed part of the father's estate and being paid to the executors as part of the estate. It has been said that ratification must take place, if at all, within a reasonable time. I would prefer in this case to say that ratification cannot take place after the purported principal has by words or conduct intimated to the other party that he does not intend to ratify. I have come to the conclusion that the only reasonable inference that the bank would draw from the son's conduct was that he was content that the money should be applied as part of his father's estate and that he did not propose to make a claim on his own behalf. I do not think for this purpose that it is necessary that he should have known the full extent of his rights. The facts are that ratification, or no ratification, was in suspense, and that the son by his conduct gave the bank reasonably to believe that the decision was no ratification.

I come to the conclusion, therefore, that the son never acquired the right to sue the bank on the contract. It becomes unnecessary, on this view, to consider whether, if the son had acquired the right to sue, the bank could have relied on their plea of payment. I am much impressed by the view taken by BEST, L.J., on this question, but I express no final opinion. I agree that the appeal should be dismissed.

LORD WARRINGTON.—This is an appeal from an order dated April 24, 1933, of the Court of Appeal of Northern Ireland (the Lord Chief Justice of Northern Ireland and ANDREWS, L.J.; BEST, L.J., dissenting), whereby an appeal from the judgment, dated June 22, 1932, of the Chancery Division of the High Court of Justice (MEGAW, J.), dismissing the action hereinafter mentioned, was dismissed.

The action was commenced on April 27, 1931, by the son as plaintiff against the bank as defendants. By the statement of claim the son claimed, amongst other things, a declaration that he was entitled to the moneys represented by the deposit receipt of the bank for £10,000 hereinafter mentioned, an account of the interest due in respect of that sum, and payment of £10,000, together with the interest found due in respect thereof.

The substantial defences were, first, a non-admission that the son was entitled to the sum in question; secondly, payment to the executors and trustees of the depositor, the father, as the persons entitled thereto of the principal moneys and interest; and, thirdly, that such moneys were so paid with the consent and approval of the son and were paid and applied by the executors and trustees to his use and have inured for the benefit of the son. The bank, whilst denying liability, brought into court £594 11s. 2d., and said that that sum was enough to satisfy the son's claim to payment.

The first and second of the above defences raise the same issue, namely, whether the son, the present appellant, was entitled to receive for his own benefit the moneys in question, or whether the persons so entitled were the executors and trustees of his father's will, to whom the moneys had been actually paid.

The trial judge in effect decided these issues in favour of the son, and his decision on this point was accepted by the majority of the Court of Appeal, but both courts accepted the defence of consent and approval; and on that ground the trial judge gave judgment for the bank except as to the moneys paid into court, as to which he made a special order not material for the present purpose; and the Court of Appeal dismissed the son's appeal and varied the order as to the money in court.

I will now state the relevant facts as shortly as possible, and particularly those relating to the issue of title, for, if the son fails to establish his claim to the £10,000 and interest, the second issue becomes of no importance.

For some years the depositor, John McEvoy, the father, carried on a successful business as a publican, a grocer, and an undertaker at Newry. He had a banking account with the branch at Newry of the bank. At all material times William Coleman was the manager at such branch.

The appellant in 1921 was the depositor's only child and was a boy of about fifteen years of age. The depositor was a widower.

On June 1, 1921, the depositor deposited £10,000 with the bank in his own name.

was stated on the face of the receipt that it must be produced when payment of either principal or interest was desired.

In the summer of that year the depositor suffered a breakdown in health, and July he was critically ill. The son was summoned home from school to be with his father.

The bank manager on July 19 received a message from the depositor that he wanted to see him after bank hours, and went over to his house accordingly. This interview is of the utmost importance. What took place is described by the bank manager, whose evidence was accepted by the trial judge. The judge's note as follows:

"Was very ill—internal disease; he realised that he was near death—Adamson and E. Kinney [two of the four persons afterwards appointed as his executors] were with him. Had conversation—about his affairs—will—generally. Told me he was going to settle affairs—gave names of four executors. He said he was going to leave all to his son, to tie it up till he was twenty-five. That Miss Kinney [his sister-in-law] would manage business. Conversation about deposit receipt £10,000. Related to estate duty—McEvoy very careful and not anxious that estate duty should be paid—he said so—Adamson also said he would not pay estate duty at any price. They asked my opinion. I said I could not tell them. Then they said if there could be two names would it meet the case—Mr. McEvoy and Mr. Adamson also. I said I did not know, they should see their lawyer; he would be able to advise them. Agreed to send it" [presumably the proposed new deposit receipt] "over in the morning to put in two names—McEvoy gave the directions. He said put in names to self and son, payable to either or the survivor."

To my mind, the effect of this interview is clear. The suggestion of placing the deposit in the two names was simply in reference to its possible effect in regard to estate duty, and implies no departure on the part of the depositor from his expressed instruction to leave everything to his son "to tie it up till he was twenty-five." Nor do I see in the suggestion itself anything illegal. The people seem to have had a vague notion (not dispelled by the bank manager, who surely knew better) that the outward form would possibly succeed in an evasion of duty, which would not be illegal. The illegality, of which so much was made in the courts below, consisted in the deliberate and fraudulent exclusion by the executors from their accounts of the £10,000 and another deposit of £2,000 in the depositor's own name. There is no evidence that such misconduct was contemplated until after the depositor's death, and certainly he was in no way responsible for it.

On the day following the interview just described the son and his father went to the office of the bank, and the father, in his son's presence, had another interview with the bank manager. On that occasion the bank manager signed, on the deposit note for the £10,000, a statement that the £10,000 was paid that day, and the endorsement on the note contains a statement signed by the depositor that the £10,000 had been re-deposited, the interest, amounting to £56 14s. 8d., being otherwise disposed of as stated thereon. On the same day a new deposit receipt was issued over the signature of the bank manager. It was in the following terms:

"Belfast Banking Co., Ltd., Newry—July 20, 1921.—Received from John McEvoy, Esq., and Mr. Joseph McEvoy (a minor), Newry, the sum of ten thousand pounds sterling for credit in Deposit Account. Not transferable.—For the Belfast Banking Co., signed 'W. H. COLEMAN, manager.' Payable to either or the survivor. This receipt must be produced when payment of either principal or interest is desired."

I will assume that the son went with his father to the bank and was present at the interview between his father and the bank manager—though the bank manager denies that he was there—but he does not recollect what was said, and clearly took no part in the transaction. He says expressly that his father said nothing to him on the matter.

The deposit receipt was retained by the depositor and was among the effects of which the executors took possession at his death. During his life he had the absolute right to withdraw the £10,000 or any part thereof if he so pleased.

Under these circumstances he made his will on Aug. 10, 1921. By that will he appointed four executors and trustees, namely, James Adamson, Patrick McEvoy, and James and Edward Kinney. He gave, devised, and bequeathed to his said executors and trustees all his property of every kind whatsoever in trust, in the first place to pay thereout his debts and funeral and testamentary expenses and then to pay certain legacies, and he directed that all the residue and remainder of his property was to be held in trust for his son, the appellant, until he should attain the age of twenty-five years, and on his attaining that age for him absolutely; and pending his attaining that age he authorised his business to be carried on by his sister-in-law, Alice Kinney, on such terms as his executors in their absolute discretion might arrange.

The depositor died on Sept. 20, 1921, and his will was proved by all the executors on Dec. 16, 1921.

On Jan. 25, 1922, the executors endorsed the deposit receipt of July 20, 1921, and upon such endorsement the bank paid to them the sum of £10,000 and the interest thereon. On the same day the executors re-deposited the £10,000 in their own names and a deposit receipt was issued payable to them, the survivor, or survivors. This deposit receipt was not handed over to the executors, but was retained by the bank.

For the present purpose it is unnecessary to state the subsequent dealings with the moneys in question. It is enough to say that, with the exception of the sum of £2,706 invested in the purchase of certain houses which were ultimately conveyed to the son and as to which there is no dispute, the whole of the fund and interest thereon has been applied, by means of successive withdrawals, in or towards payment of the constantly increasing overdraft on the current account of the executors with the bank in relation to the business carried on by them. The successive deposit receipts were all retained by the bank.

What, then, were the rights of the son and the executors respectively in reference to the £10,000 in question?

The legal and technical effect of the contract evidenced by the deposit receipt is, I think, doubtful. Did the father purport to act as agent for his infant son so as to make the latter a party to the contract, or was the contract made with the father alone for the benefit of the son as a third party?

In my opinion, it is unnecessary to answer this question, for I think the real question is not whether the son would, as the effect in law of the contract, have been held entitled to be paid the money by the bank, but what, in the view of a Court of Equity, would be the position between him and the executors; would he be held entitled to retain the moneys, if so paid, for his own benefit, or must he hand them over to the executors to be dealt with as part of the testator's estate? The material circumstances are these: The money deposited was that of the father alone, the son was a mere volunteer. The intention of the father as to the disposition of his estate was clearly expressed at the interview of July 19. The form of the deposit receipt in no way operated to alter this intention; it was adopted for another purpose. The money was entirely at the father's disposal during his life. The will as actually made gives effect to the expressed intention of the father, and there is no evidence of any *animus donandi* except subject to the testamentary directions. The residuary personal estate, including the deposit of £2,000, but excluding the £10,000 in question, was so small that it is impossible to suppose that the father deliberately intended to withdraw so important an item as the £10,000 from the fund to be administered by the executors and trustees until the son should attain twenty-five. Finally, the illegal proceedings of the executors, so much relied on by the trial judge, were entirely irrelevant, inasmuch as the father was not in any way implicated in them. On the whole, then, I am satisfied that, if the matter had been brought before a Court of Equity, the decision would have

en in favour of the executors, namely, that they alone were entitled to receive the money and to apply it in due course of administration as directed by the father's will. Whether this result would be arrived at by way of a resulting trust, advancement being rebutted by express intention, or by a shorter road, seems to me to be irrelevant.

Most unfortunately the officers of the bank, by accepting and acting on the endorsement of the executors, chose, with, I cannot but infer, a shrewd eye to the pecuniary interests of the bank, to decide the matter for themselves without taking any care to protect the interests of the infant son. The proper course, in my opinion, would have been either to institute proceedings, making the executors and the infant by his guardian ad litem defendants and asking for directions as to the disposal of the money, or to refuse to act except under the directions of the court, leaving the executors or the infant to institute the necessary proceedings. In either case the infant would have been duly represented, he would become a ward of court, a guardian would be appointed, and due provision made for his custody, maintenance, and education, and generally for his protection. On his attaining twenty-one, which happened on Nov. 14, 1926, he would have the advantage of having been properly represented and of obtaining any necessary information as to his rights under the will. Although, however, I think the bank acted without due consideration of the infant's rights, the payments to the executors were, in my opinion, in accordance with their rights, and the irregular action of the bank cannot affect the validity thereof.

On the grounds above expressed, I am of opinion that the claim of the son to repayment by the bank fails, and that this appeal ought to be dismissed. It becomes unnecessary to examine the various dealings with the fund, or the grounds on which the courts below decided the case in the bank's favour, except to say that I see no reason to doubt the soundness of the conclusions at which they arrived.

I think the appeal should be dismissed, and, though with some regret, I think the son must pay the costs of the appeal. The directions of the Court of Appeal as to the fund in court will stand unaltered with the rest of their order.

My Lords, I am asked to say that my noble and learned friend **LORD MACMILLAN** concurs in this opinion.

LORD THANKERTON.—My Lords, according to its terms the deposit receipt for £10,000 dated July 20, 1921, would be evidence of a contract between the bank and son as well as the father; but it is only an item of evidence though an important one. In the somewhat unusual circumstances of this case I am satisfied, on the evidence as a whole, of which the deposit receipt only forms part, that the father did not purport to act as agent for his son in making the contract, so as to make the son a contracting party, but that the father alone contracted with the bank, though for the benefit of the son as a third party. This being my view of the evidence, I agree with the conclusions of my noble and learned friend **LORD WARRINGTON**. I may add that if I had taken the view that the father purported to make the son a contracting party, I should have agreed with the opinion delivered by **LORD ATKIN**.

Appeal dismissed.

Solicitors: *Herbert Z. Deane & Co., for Fisher & Fisher, Belfast; Coward, Chance & Co., for O'Hare & O'Hagan, Newry.*

[*Reported by* EDWARD J. M. CHAPLIN, Esq., *Barrister-at-Law.*]

FLOWER v. PRECHTEL

[COURT OF APPEAL (Scrutton, Greer and Slessor, L.J.J.), December 15, 1933]

[Reported 150 L.T. 491]

Executor and Administrator—Tort committed by executor—Tort committed in execution of contract made by deceased—Liability as executor—Liability of estate.

D. sold to the plaintiff a house—No. 10—together with a right of way over a strip of land 10 ft. broad to the garden of the house. D. died, and at the time of his death was under contract with the purchaser of the adjoining house—No. 11—to erect a garden fence for him and to give him a similar right of way to his garden. The plaintiff entered No. 10 shortly after the death of D. and a few days later H., a sub-contractor, on the orders of W., the builder of the houses, erected the fence at the back of No. 11 so as to constrict the right of way granted by D. to the plaintiff. The plaintiff sued the defendants, the executors of D., as executors, and by his amended statement of claim founded his action (i) in breach of covenant and (ii) in nuisance, but it was argued solely as an action of tort. The above facts being proved by the plaintiff, the defendants called no evidence, and there was no evidence of the contract of D. with W., the builder. The trial judge found that the fence was erected by W. on the instructions of the executors of D., the defendants, and gave judgment for the plaintiff. On appeal by the executors,

Held: GREER, L.J., dissenting, the appeal must be dismissed because (i) the executors were liable, as such, to carry out the contracts made by the deceased,

(ii) per SCRUTTON, L.J.: The executors had committed the tort of disturbance of the plaintiff's easement while carrying out, as executors, a contract made by the deceased, and were, therefore, liable, as executors, in tort, and this liability was not displaced on the ground that the actual disturbance had been caused by W., their independent contractor, because the act of W. which occasioned the tort was the act which W. was employed to do: *Pickard v. Smith* (1) (1861), 10 C.B.N.S. 410, applied,

(iii) per SLESSER, L.J.: The executors had committed a breach of D.'s covenant to grant the plaintiff the right of way and were, therefore, liable, as executors, for breach of D.'s contract in the plaintiff. The judgment should be upheld because this ground was pleaded, even though it had not been argued before the trial judge.

Per CURLIAM: A claim against executors for their breach of the testator's contract may be made either against them personally or direct against them as representing the estate by subrogation to the executor's right of indemnity from the estate: *Re Raybould, Raybould v. Turner* (2), [1900] 1 Ch. 199. Either way the plaintiff would be entitled to recover his damages against the estate as represented by the executors.

Notes. As to the liability of a personal representative for torts committed by himself, see 16 HALSBURY'S LAWS (3rd Edn.) 474, para. 960, and for cases on the subject see 24 DIGEST 658, 6849–6850; as to his liability on contracts by the deceased, see 16 HALSBURY'S LAWS (3rd Edn.) 465, para. 931, and 24 DIGEST 614, 6446–6455, and 618–620, 6487–6507.

Cases referred to:

(1) *Pickard v. Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, 384.

- (2) *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199; 69 L.J.Ch. 249; 82 L.T. 46; 48 W.R. 301; 24 Digest 658, 6850.
- (3) *Marshall v. Broadhurst* (1831), 1 Cr. & J. 403; 1 Tyr. 348; 9 L.J.O.S.Ex. 105; 148 E.R. 1480; 24 Digest 557, 5973.
- (4) *Edwards v. Grace* (1836), 2 M. & W. 190; 5 Dowl. 302; 2 Gale 241; 6 L.J.Ex. 68; 150 E.R. 723; 24 Digest 719, 7475.
- (5) *Aspinall v. Wake* (1833), 10 Bing. 51; 3 Moo & S. 423; 2 L.J.C.P. 227; 131 E.R. 824; 23 Digest 299, 3646.

Appeal from a decision of DU PARCQ, J., in an action between a purchaser of land and the executors of the deceased vendor.

On Oct. 20, 1931, the purchaser entered into a written agreement with the deceased vendor to purchase a plot of freehold land and the house thereon known as No. 10, Diamond Terrace, Greenwich. By the contract the purchaser was granted, in common with the vendor and others, a right of way 10 ft. broad on a strip of land at the back of the terrace leading to the garden of No. 10, which would enable the purchaser to drive a motor car from the highway along the right of way to the garage he proposed to erect in his garden. There was no provision in the contract that the vendor should erect fences at the back of No. 10 to mark the boundary of the right of way. Completion was to take place on Nov. 30, 1931. The vendor died on Nov. 15, 1931, and at that time he was under contract to several other purchasers of houses in Diamond Terrace to erect garden fences for them, and to give each of them a 10 ft. right of way each to his own garden. On Dec. 12, 1931, the plaintiff purchaser went into possession of No. 10, Diamond Terrace, without having then got his conveyance. Horton, a sub-contractor, received instructions from W., the builder of the houses in Diamond Terrace, to erect the fences of Nos. 11, 12, and 13, of the terrace. The work was started in December, 1931, and the fence behind No. 11 was finished before the end of that month. The fence of No. 11 so constricted the right of way leading to the purchaser's house at No. 10 that he was unable effectively to use the easement that had been granted to him. Probate of the vendor's will was granted to the defendants as executors on Jan. 1, 1932. On Jan. 13, 1932, the executors signed and sent for registration a transfer which acknowledged that they had received the purchaser's purchase-money, £725. The plaintiff purchaser sued the defendants as executors of the deceased vendor. The action was by the amended statement of claim founded (i) in breach of covenant and (ii) in nuisance, but it proceeded as an action only for the tort and was argued on that basis, the alleged tort being the disturbance of the purchaser's easement. The above-mentioned facts having been proved, the defendant executors called no evidence, and there was no evidence of the contract of the vendor with the builder. DU PARCQ, J., found that the fence behind No. 11, erected by Horton, the sub-contractor, on the instructions of Walford, the builder, was set up on the instructions of the defendants, Davey's executors, and he awarded the plaintiff purchaser £25 damages with costs on the High Court scale. The defendant executors appealed.

L. A. Byrne and R. C. H. Horne for the executors, the defendants.
Rewcastle for the purchaser, the plaintiff.

Cur. adv. vult.

Feb. 26.—The following judgments were read :

SCRUTTON, L.J.—In this case the plaintiff purchaser had bought a house from the deceased, a Mr. Davey, with a contract and conveyance of a right of way 10 ft. wide to the back of his garden. The house purchased was one of a terrace, in all the houses composing which the deceased vendor had the legal estate, and as vendor he had contracted to complete the building, including the back garden fences, which bounded the right of way. The fences of one at least of such houses, probably of three, were so erected as to obstruct the right of way granted to the plaintiff purchaser, who accordingly sued the defendants as executors of the

deceased vendor for damages for such obstruction, and *du PARCQ, J.*, awarded him £25 damages. The defendant executors, who called no evidence, and might have cleared up several doubtful points, now appeal.

When the vendor died, on Nov. 15, 1931, he was under contract not yet performed to the several purchasers of houses in Diamond Terrace, (i) to erect their back garden fences according to the plans in their conveyances, and (ii) to give each of them a right of way 10 ft. wide along the back garden fences. According to the evidence of Mr. Horton, the sub-contractor, who erected the fences, he got instructions from Mr. Walford, the builder, at the end of November or early in December, 1931, to erect the fences of Nos. 11, 12, and 13. That work started early in December, 1931, and was, I think, as to No. 11, finished before the end of that month. Probate of the vendor's will was granted to the defendants, his executors, on Jan. 1, 1932, but their title dated from the will and the death.

As executors they were liable to complete the vendor's contract. I agree with the view expressed in the 12th Edn. of *WILLIAMS ON EXECUTORS*, at p. 1126, and supported by *Marshall v. Broadhurst* (3), that

"every bond or covenant, or contract of the deceased (not being a contract personal to the deceased), includes them [the executors] though they are not named in the terms of it. . . . Thus if a person contracts for himself and his executors to build a house and dies the executors must go on or they will be liable in damages for not completing the work."

I do not see my way to dissent from the trial judge's view that the builder, in giving orders for the fences, was acting for the vendor's personal representatives, who were bound by contract to erect the fences. Unfortunately the fences of Nos. 11, 12, and 13, were erected so as to block the 10 ft. right of way which the vendor had contracted to supply. Of the alternative views that it was a mistake of the builders in not erecting the fences according to plans, or that it was a mistake of the vendor in contracting to erect the fences of Nos. 11, 12, and 13, in a line, which destroyed the 10 ft. right of way, I think I ought not to take the view, in the absence of evidence from the vendor's personal representatives, that the builder, who is not a party to the proceedings, disobeyed his instructions. The vendor's executors could have cleared up the question of their relations to the builder, and the plans of No. 11, and if they did not choose to do so they must not be surprised if inferences are drawn against them.

The claim against the executors for their breach of their testator's contract may be made by the person they have injured either against them personally or directly against them as representing the estate by subrogation to the executors' right of indemnity from the estate: (see *Re Raybould, Raybould v. Turner* (2)). In either point of view I think the purchaser would have been entitled to recover his damages against the estate as represented by the defendants on a claim for breach of contract. However, he did not originally claim in this way, but claimed in tort. An easement is a right of property, and a disturbance of it is a tort. The executors, in carrying out the vendor's contract, appear also to have disturbed the easement conveyed to the plaintiff purchaser, and the executors are in my opinion liable, as *du PARCQ, J.*, has decided. While a principal is frequently not liable for the wrong of negligence of an independent contractor, that rule, however, according to the judgment in *Pickard v. Smith* (1) (10 C.B.N.S. at p. 480), does not apply to

"cases in which the act which occasions the inquiry is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer and neglects its fulfilment, whereby an injury is occasioned."

The appeal must, in my opinion, be dismissed with costs.

GREER, L.J.—In this case the purchaser, the plaintiff in the action, recovered £25 damages and an order for High Court costs in an action brought against the defendants as executors, for damages for a breach of contract which he alleged

been committed by the defendants' testator, the deceased vendor. There were five defects in the way of this claim succeeding because the testator was dead at the time when it was alleged he had broken his contract. Accordingly the purchaser's advisers amended their claim alleging that either the vendor—that is say the testator—or the defendants as his executors by their agent or agents had committed a nuisance by interfering with a right of way which the plaintiff had purchased from the testator. It is obvious that when it appeared that the alleged wrongful acts were committed after the death of the testator, the defendants could not be held liable as executors, and no order should have been made for payment of the damages out of the estate of the testator. Of course, if the deceased in his lifetime had broken his contract with the purchaser, the executors could have been sued as executors for damages for breach of contract. If the contract between the purchaser and the deceased was incomplete at the date of the death of the deceased, and the executors had refused to complete it, the estate through the executors might have been held liable for damages occasioned to the purchaser by their failure to perform the balance of the contract. But no such case was made either by the pleadings or by the evidence given at the trial. No amendment was asked for at the trial to enable the purchaser to make the claim personally against the defendants, leaving them if they were so entitled to claim indemnity out of the estate. There was no plea of *plene administravit*, and therefore if a claim was made out against the defendants as executors, the form of the judgment given in this case for the levy of the money and costs out of the goods and chattels of the testator at the time of his death, and, if these were insufficient, then out of the proper goods and chattels of the defendants was the right order. It seems to me, however, that the claim made against the defendants as executors ought to have failed, as it was based on the breach of the covenant for title, and there was no evidence of any such breach. Executors cannot necessarily be ordered to specifically perform the contracts which had been entered into by their testator. They may have no assets to enable them to do so, but, of course, as I have already said, if they do not carry out the obligations of their testator, the estate through them would be liable for damages for breach of contract.

The facts of this case are peculiar. In July of 1931 the purchaser wanted to buy a house, and seeing an advertisement on certain land at Diamond Terrace in Greenwich to the effect that certain building plots were for sale by Messrs. John Davey & Co., the business name of the defendants' testator—Mr. John Davey—and finding out that a Mr. Walford was the builder, who, under some unknown arrangement, was going to build the houses, he selected plot No. 10 as the plot which he was prepared to buy with the house to be erected thereon. Then, instead of going to the vendor, he communicated with Mr. Walford, the builder. He received a letter from him, and replied offering to buy the house at £750, paying a deposit of £72 10s., and receiving a receipt sent by Messrs. John Davey & Co. as agents for and on behalf of the vendor, Mr. J. T. Walford. What the arrangement was between Davey and Walford we do not know; but it looks as if at this time Walford had agreed to buy the plots, erect houses upon them, and sell them to purchasers. However, the purchaser was wise enough to go to his solicitor, and it then appeared that the only person who could enter into a contract at this time for the sale of the plots and the houses which were to be erected thereon was the vendor, Mr. Davey, who was the freehold owner. Thereupon the vendor, on Oct. 20, 1931, entered into the usual formal agreement of sale with printed and special conditions of sale. Thereby the vendor agreed, on certain terms which are not now material, to sell to the purchaser a plot of freehold land in the borough of Greenwich in the county of London, together with the messuage and premises erected thereon and known as No. 10, Diamond Terrace. The contract granted in addition a right of way in common with the vendor and his successors in title, and all others entitled to a like right over the land coloured brown in the plan. Completion was to take place on or before Nov. 30, 1931. No evidence was given that the vendor had no right or title to grant the right of way. The purchaser's contract

contained no undertaking as between him and the vendor that the vendor would erect fences to mark the boundary of the right of way. No evidence was given of the vendor's contract with the builder. On Nov. 15, 1931, the vendor died, and the completion was necessarily delayed. On Dec. 12, 1931, No. 10, and possibly one or two of the other houses, having been completed, the purchaser went into possession of the house he had purchased without having got his conveyance. When the purchaser went into possession there was no one who could give him a receipt for the balance of the purchase money, and he paid the same into joint names not stated, but probably the names of his own solicitors and the solicitor who had been acting for the deceased vendor. When the purchaser went into possession the fences had not been erected to limit or define the brown land over which by the contract he was entitled to have a right of way of 10 ft. wide, the width being fixed so as to enable him and the other purchasers to use it for their cars to get to the back of their gardens; but afterwards, so far as appears without any instructions from anybody, the builder gave instructions to a sub-contractor, who was a maker of fences, to erect the fences to the right of way. The fences appear to have been erected in such a way that there was not provided a 10 ft. way all the way from Diamond Terrace to the back of the purchaser's premises. On Jan. 1, 1932, the will was proved, and the title of the defendant executors related back to Nov. 15, 1931, the date of the testator's death. There was, however, at that time nothing for the executors to do to implement the contract entered into by their testator except to execute the conveyance. Before the conveyance was executed a question arose as to whether the right of way had been properly defined by the fences that had been erected, and there was a meeting attended by Mr. Walford, the builder, at the locus in quo, with the representatives of the Land Registry. On Jan. 13, 1932, the executors signed and sent for registration a transfer which acknowledged that they had received the purchase money—£725. It is clear that at this time the fences erected on the instructions of the builder obstructed part of the land over which the purchaser was entitled to his right of way.

At the trial and on the hearing of the appeal, counsel, on behalf of the purchaser, disclaimed any right of action against the executors for breach of contract. They had conveyed a good title to the purchaser which was none the less a good title to the right of way because the contractor without any authority from the executors had committed a nuisance by erecting a fence which was a partial obstruction. The purchaser then relied upon a claim in tort, still against the defendants as executors. It is quite plain that in this form the action could not succeed inasmuch as the contractor was not an agent either of the deceased or of the executors, but was an independent contractor liable for any trespass, nuisance, or other tort which he may have committed.

In my opinion the judgment in the form in which it was given in the court below cannot stand, as the claim was, in so far as it was a claim for damages for tort, not a claim which could succeed against the executors as executors. In my judgment it equally fails as a claim against the executors personally, as they are not responsible for a nuisance committed by the builder who was not in fact their agent but was an independent contractor. I think this action was misconceived.

I should add that there was no claim before the court for damages for breach of covenant for quiet enjoyment, and, in the absence of such a claim, it does not seem to be right for this court to consider whether if such a claim had been made against the defendants personally or as executors it could have succeeded on the ground that the interference by the builder was an interference by a person claiming under the defendants. If this point had been raised, we might have had to consider whether it could possibly be said that a contractor putting a fence in a place where he was not employed to put it, and afterwards removing it when his attention had been called to the mistake, could be said to be a person claiming to have erected a fence under the authority of the land owner with whom he had entered into his

tract, a question of some difficulty, which as it is not raised by this case, I do not propose to answer.

In my judgment the plaintiff purchaser failed to prove his case and the judgment in his favour ought to be reversed with costs, and judgment entered for the defendant executors with costs here and below.

BLESSER, L.J.—In my judgment this appeal fails. The defendants are being treated as executors of one John Davey, deceased, and the action, which was, by amendment of the statement of claim, founded in breach of covenant and in nuisance, proceeded as an action for the tort only and was argued on that basis—the alleged tort being the disturbance of the plaintiff purchaser's easement.

This easement arose in the following way. On Oct. 20, 1931, the purchaser entered into an agreement of sale with the deceased to purchase a plot of freehold land and the house thereon known as No. 10, Diamond Terrace, Greenwich. About this there is no dispute; but the contract also gave to the purchaser a right of way in common with the vendor and others. This right of way was 10 ft. broad and would have enabled the purchaser to drive a motor car along it to his proposed garage. The vendor was also under contract at the time of his death on Nov. 15, 1931, to several other purchasers of houses in Diamond Terrace alongside of the plaintiff purchaser's house to erect back garden fences for them according to plans and to give each of them also a 10 ft. right of way.

In December, 1931, the fence of No. 11, Diamond Terrace, next to the purchasers' house, was erected by a builder called Walford. This fence of No. 11, which was finished at the end of that month, so constricted the right of way leading to the purchaser's house at No. 10, that he was unable effectively to use the easement which had been granted to him. There is no doubt that had the vendor lived, he would have been liable in an action on the covenant and for interference with the purchaser's easement by the erection of this fence, assuming that it had been put up with his authority, but, as I have said, he died on Nov. 15, 1931, before the fence of No. 11 had been erected, and hence this action is brought against his executors.

The learned judge has found that the fence which the builder erected was set up in breach of the instructions of the executors of the vendor. In so giving instructions to erect the fence of No. 11 and the other fence, they were but carrying out their duty. This is made clear in *Marshall v. Broadhurst* (3), in which, on this very question, it was said argumentatively by TINDALL, C.J. (1 Cr. & J. at p. 405):

"Suppose a party to have engaged to build a house and to have procured all the necessary materials, in the event of his death may not the executors complete the work or must they dispose of the materials at a loss to the estate?"

See WILLIAMS ON EXECUTORS, 12th Edn., at p. 1125; *Edwards v. Grace* (4); *Spinnall v. Wake* (5); and other cases to the like effect.)

I am, therefore, of opinion that in these circumstances the executors were not entitled, if not required, to complete the contract for the fence of No. 11. It was in breach of the execution of that contract that the disturbance to the purchaser's easement arose, and, as the learned judge has held that the builder in erecting the fence was acting on the instructions of the executors, I think that had the action been framed in breach of covenant brought against them on the original contract between the vendor and the purchaser as to the easement, judgment could be rightly given against them as executors so as to bind the estate; and this, in effect, is what the judgment does. I agree that if the judgment is to be regarded as only founded in tort against them as executors it would be indefensible, for such an action in tort, in any event, could only be obtained against the executors personally with a possible right to them to be indemnified out of their testator's estate: (See *Raybould v. Raybould*, *Raybould v. Turner* (2)).

Counsel for the purchaser has asked the court to permit an amendment of his claim to include damages for breach of covenant. Such an amendment, however, is unnecessary because, although the action was apparently argued on the basis of

tort, there is in the amended statement of claim an alternative claim for breach of covenant and, in my view, counsel for the purchaser, having specifically pleaded this matter in para. 5 of his amended statement of claim, is entitled to hold his judgment by whatever means he can and may properly waive the tort.

For these reasons, founding the action upon the covenant to grant an easement, which covenant the executors through their agent have broken by carrying out the contract of the deceased to erect the fences to No. 11, Diamond Terrace, I think the purchaser was entitled to succeed.

Appeal dismissed

Solicitors: *Habershon, Watts, Powell, & Robinson; Good, Good & Co.*

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

PEARSON v. GEE AND ANOTHER

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 3, 7, March 2, 1933]

[HOUSE OF LORDS (Lord Tomlin, Lord Russell and Lord Wright), March 8, 1934]

[Reported [1933] Ch. 712; 102 L.J.Ch. 257; 149 L.T. 128; 49

T.L.R. 322, C.A.; [1934] A.C. 272; 103 L.J.Ch. 151; 151

L.T. 21; 50 T.L.R. 324, H.L.]

Landlord and Tenant—Lease—Forfeiture—Forfeiture for bankruptcy—Relief—Sale of lessee's interest within one year—Conditional sale—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 146 (10) (a).

Landlord and Tenant—Lease—Mining lease—Lease of spa for getting and selling mineral waters—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 146 (9) (b), s. 205 (1) (xiv).

The effect of s. 146 (10) of the Law of Property Act, 1925 (which provides that "where a condition of forfeiture on the bankruptcy of the lessee [which by s. 205 (1) (i) of the Act includes the liquidation of a lessee company] . . . is contained in any lease . . . then (a) if the lessee's interest is sold within one year from the bankruptcy . . . this section applies to the forfeiture condition aforesaid; (b) if the lessee's interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy") is that where the lease is not sold within one year from the bankruptcy or liquidation the lessee may apply under s. 146 for relief from forfeiture at any time during that year, but not thereafter. If the application is made during the year jurisdiction of the court to grant relief does not cease merely because the application is not dealt with before the year expires.

Per LUXMOORE, J.: A lease of a spa providing for the payment of rent and royalties to be ascertained by reference to the quantity of natural [i.e., mineral] water derived from the spa and sold is not a lease of mines and minerals for the purposes of s. 146 (9) (b) of the Act, as it is not within the definition in s. 205 (1) (xiv) of a mining lease as "a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith."

In order to satisfy the requirement of s. 146 (10) (a) that "the lessee's

interest is sold within one year from the bankruptcy" any sale within the year must be an absolute sale: *Robert Ferguson & Co., Ltd. v. Ferguson* (1), [1924] I.R. 22, and *Re Henry Castle & Sons, Ltd.* (2) (1906), 94 L.T. 396, applied.

[Neither of these points was considered by the Court of Appeal or the House of Lords, which affirmed the decision of LUXMOORE, J., solely on the facts and on the first ground-set out in the above headnote. These dicta of LUXMOORE, J., therefore, remain authority for the propositions therein contained.]

Notes. As to relief against forfeiture for bankruptcy or execution, see 20 HALSBURY'S LAWS (2nd Edn.) 262, 263, para. 295. As to the meaning of "minerals," see 22 HALSBURY'S LAWS (2nd Edn.) 528-531, para. 1159. For the Law of Property Act, 1925, s. 146 (1), (2), (9) (b), (10), s. 205 (1) (i), (xiv), see 10 HALSBURY'S STATUTES (2nd Edn.) 739, 742, 748, 749, 832, 837.

Cases referred to:

- (1) *Robert Ferguson & Co., Ltd. v. Ferguson*, [1924] 1 I.R. 22; 31 Digest (Repl.) 550, *2221.
- (2) *Re Henry Castle & Sons, Ltd., Mitchell v. Henry Castle & Sons, Ltd.* (1906), 94 L.T. 396; 50 Sol. Jo. 240; 31 Digest (Repl.) 550, 6709.
- (3) *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee*, [1923] 2 Ch. 347; 92 L.J.Ch. 616; 129 L.T. 788; 31 Digest (Repl.) 564, 6849.
- (4) *Elliott v. Boynton*, [1924] 1 Ch. 236; 93 L.J.Ch. 122; 130 L.T. 497; 40 T.L.R. 180; 68 Sol. Jo. 236, C.A.; 31 Digest (Repl.) 623, 7371.
- (5) *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, 4252.
- (6) *Diment v. Roberts*, [1925] 1 K.B. 9; 93 L.J.K.B. 1038; 132 L.T. 235; 40 T.L.R. 861; 68 Sol. Jo. 842; 22 L.J.R. 742, C.A.; 31 Digest (Repl.) 691, 7821.
- (7) *Lewis v. McKay*, [1924] 2 K.B. 136; 93 L.J.K.B. 840; 131 L.T. 504; 40 T.L.R. 579; 68 Sol. Jo. 739; 22 L.G.R. 476, D.C.; 31 Digest (Repl.) 691, 7820.

Appeal by the defendant lessor from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.).

In this action, the plaintiffs, Mr. George Gee and the lessee, Braceborough Spa, Ltd., claimed against the lessor a declaration that an underlease dated Sept. 10, 1928, made between the company and the lessor, was still subsisting and on foot, and that the company were entitled to retain possession of the demised premises, and were entitled to relief against any forfeiture of the said underlease on payment of the rents and royalties thereby reserved.

The lessor counter-claimed a declaration that the underlease had been determined by her on Oct. 24, 1929, by entry on the premises, or, alternatively, on June 2, 1930, when the company went into compulsory liquidation; or, in the further alternative, that she was now entitled to determine the underlease by entry upon the premises by reason of the fact that the company had ceased to comply with the covenants therein contained, and for damages for breach of agreement, which was not pressed.

The company was incorporated in 1927, with the object of trading as spa and hotel proprietors, including the carrying on of a hydropathic establishment. By a lease dated March 3, 1928, Sir Henry Cracroft Trollope, Bart., demised certain lands and buildings known as Braceborough Spa, Lincs., to the lessor; and by an underlease dated Sept. 10, 1928, in consideration of a premium, the lessor sub-demised to the company for fifty years, less one month, from March 25, 1927, provided that the company should pay a rent or royalty of one penny per quart bottle of natural water derived from the spa, but not consumed, on the premises, and one halfpenny per gallon of such water sold in bulk, and should pay a further rent of 5 per cent. of the gross receipts (a) from natural water sold and consumed on the premises, and (b) from the using of the spa as a bathing establishment, such

rents and royalties to be paid half-yearly on March 25 and Sept. 29 in each year, and further to pay to the defendant at the expiration of each year of the term such sum as might be required to make up with the sums above-mentioned a clear annual sum of £100.

The underlease contained a power of distress and a power of re-entry if any part of the rents and royalties should be in arrears for thirty days after becoming payable, and a restriction against assigning without the consent of the lessor, which was not to be unreasonably withheld. It also provided for forfeiture on the bankruptcy or compulsory winding-up of the lessees.

The lessor contended that the underlease had been determined by re-entry on Oct. 24, 1929, for non-payment of rent.

On May 22, 1930, a petition to wind-up the company was presented, and a compulsory winding-up order was made on June 2. As from that date the lessor carried on the business of Braceborough Spa, and contended that that amounted to a re-entry under the condition for forfeiture on bankruptcy.

The plaintiff Gee, with whom the underlease had been deposited by the company as security for loans, requested the liquidator to assign the underlease to him, the lessor refused to consent to the assignment on the ground that the underlease was no longer in existence, and the plaintiff Gee and the company issued the writ in this action on Oct. 23, 1930. The action did not come on for hearing until Jan. 26, 1932.

Harold Christie and G. O. Slade for the lessee and the plaintiff Gee.

P. Gordon Bamber and R. L. Daniell for the lessor.

Cur. adv. vult.

Feb. 15, 1932. **LUXMOORE, J.**—The plaintiffs in this action seek, first, a declaration that an underlease dated Sept. 10, 1928, is still on foot and that the lessee company is entitled to retain possession of the premises comprised therein, subject to the payment of the rents and royalties thereby reserved; secondly, and in the alternative, they ask for relief from forfeiture (if any) of the underlease; and thirdly, they ask for a declaration that the lessee is at liberty to assign the premises comprised in the underlease to the plaintiff Gee without the consent of the lessor.

The lessor claims, first, that the underlease was determined by her on Oct. 24, 1929, by re-entry pursuant to the provisions thereof, and that she remained in possession of the demised premises until October, 1930, when she was unlawfully ousted from possession by the liquidator of the lessee company. She further claims that the underlease was forfeited by the lessee, because, on June 2, 1930, an order was made by the court for its compulsory winding-up. In the alternative, she claims that the premises have not been used in accordance with the covenants contained in the underlease, and that she was therefore entitled to determine the lease at the date of the issue of the writ.

The lessor counter-claims for a declaration that the underlease was determined by re-entry in October, 1929, or, in the alternative, on June 2, 1930, by the order for compulsory winding-up, or, in the further alternative, that she is now entitled to determine the underlease by re-entry because the lessee has failed to comply with the provisions of the underlease, that the underlease has ceased to exist, and for ancillary relief.

The action was brought in these circumstances. The lessor at the date of the grant of the underlease was lessee of certain lands and buildings at Braceborough, in the county of Lincoln, known as Braceborough Spa. Whether she held the lease for her own benefit or as trustee for her mother, or for any other person or company, does not appear, and is probably immaterial so far as this action is concerned. I do not propose to say anything more about it, except that the circumstances relating to the grant of the underlease and the conduct of the lessor and her mother and the other persons responsible for the formation of the lessee company and the management of its affairs in relation to the premises certainly give rise to grave doubt as to the beneficial ownership of the lease.

On Sept. 10, 1928, the lessor executed in favour of the lessee company an underlease of Braceborough Spa for the term of fifty years, less one month from March 25, 1927. The demise was expressed to be made in consideration of £5,000. The property is described in the underlease in these terms :

"All those pieces or parcels of land situated at Braceborough in the County of Lincoln, with the cottages and buildings erected thereon and known as Braceborough Spa, which said hereditaments and premises are delineated and coloured pink on the plan drawn on a lease dated March 3, 1928, and made between Sir Henry Cracroft Trollope, Bart., of the one part and the lessor of the other part and which premises are to be occupied and used by the lessees in connection with their business of sale and distribution of the natural waters that rise on the hereditaments hereby demised, but excluding for the personal use of the said Sir Henry Cracroft Trollope but not further or otherwise water for his own medicinal requirements, and together with all other the premises demised by the said lease."

The parcels in the lease are described in the following words :

"All those pieces or parcels of land situated at Braceborough in the County of Lincoln with the cottages and buildings erected thereon and known as Braceborough Spa and containing by admeasurement seven-and-a-half acres be the same little more or less, which said hereditaments and premises are delineated on the plan annexed hereto and thereon coloured pink (and are to be occupied and used in connection with the business of sale and distribution of the natural waters that rise on the hereditaments hereby demised but excluding for the personal use of the lessor" [that is, Sir Henry Cracroft Trollope] "but not further or otherwise water for his own medicinal requirements) and together with a right of way for all purposes to and from the public highway along the road or route as now used for the purpose of access to and from the hereditaments hereby demised."

The lessee company was incorporated on June 30, 1927. Its directors were Mrs. Turquand, the mother of the lessor, and a gentleman named Kellow. The main object was to carry on the business of spa and hotel proprietors, and the underlease referred to was obtained with a view to carrying out this object. The demised premises included a building which was in fact used and carried on as an hotel and hydropathic establishment. The underlease contained the following covenant, to which it is material to refer : Clause 3.

"The lessees shall pay to the lessor by way of rent or royalties a sum at the rate of one penny on every quart bottle of the natural water derived by the lessees during the term hereby granted from the hereditaments hereby demised as may be sold by the lessees and not consumed on the hereditaments hereby demised, and also one halfpenny on every gallon of water supplied and sold in bulk."

Clause 4 :

"The lessees shall pay to the lessor by way of further rent such a sum as represents five per cent. of the gross receipts by the lessees from (a) natural waters sold and consumed on the premises hereby demised, and (b) the using of the premises hereby demised or any part thereof as a bathing establishment."

Clause 5 :

"The said yearly rents or royalties are to be paid by equal half-yearly payments on the 25th day of March and the 29th day of September in each year, the first payment to be deemed to have become due and payable as on the 29th day of September, 1927."

Clause 6 is in the following terms :

"The lessees hereby for themselves their successors and assigns covenant with the lessor that the lessees"

—then follow a number of covenants, set out in the following clauses. The material clauses are as follows: Clause 7:

"Will pay to the lessor the said rents or royalties hereinbefore reserved on the days and in the manner hereinbefore appointed for payment thereof clear of all deductions (except taxes imposed by statute upon landlords notwithstanding any contract to the contrary) and also will pay to the lessor at the expiration of each year of the said term such sum (if any) as may be required to make up with the sums paid during that year in respect of rent and royalties as aforesaid the clear annual sum of one hundred pounds."

Clause 10:

"Will within twenty-one days after the expiration of each half-year of the said term furnish the lessor or her agent for the time being with the correct and proper account in writing of all sales of natural water and of all receipts from the sources specified in cl. 4 herein during such half-year and will afford all reasonable facilities to the lessor or her agent including access to the lessees' books for checking the accuracy of any such accounts as aforesaid."

Clause 11 limits the selling price of the water, and cl. 12 contains the usual covenant against assignment, underletting, or parting with possession without the previous consent in writing of the lessor for the time being, with the common provision that such consent shall not be unreasonably or arbitrarily withheld. Clause 14 contains the lessor's covenant for quiet enjoyment. Clause 15 confers a special power of distress, while cl. 16 contains the proviso for re-entry. It is in these terms:

"If any part of the rents and royalties hereby reserved shall be unpaid for thirty days after becoming payable (whether formally demanded or not) or if the lessees shall at any time during the term hereby granted cease to use the demised premises for the sale distribution or other use of the said natural water for a period of twelve successive calendar months (such cessation not being due to accident labour distress or any unavoidable occurrence) or if an assignee not being a corporation whilst the demised premises or any part thereof shall remain vested in him shall become bankrupt or, in the case of the lessees or of an assignee being a limited company, shall whilst the demised premises or any part thereof remain vested in them go into liquidation other than voluntary for the purpose of reconstruction or amalgamation or if a receiver shall be appointed or if any covenant on the lessees' part herein contained shall not be performed or observed then and in any of the said cases it shall be lawful for the lessor at any time thereafter upon the demised premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessees' covenants herein contained."

It will be observed that the right to re-enter for non-payment of rent and royalties arises only if such rents and royalties, or any part thereof, remain unpaid for thirty days after becoming payable; that is, thirty days after March 25 or Sept. 29, as the case may be, and that the year for the purpose of the ascertainment of any sum required to bring the rent and royalties up to the minimum rent of £100 per annum runs from March 26 in one year to March 25 in the next, and consequently the only payment due to be made on Sept. 29 in any year is in respect of the rent and royalties accrued due since the preceding March 25. The thirty days allowed for payment of what falls due on Sept. 29 cannot expire before Oct. 29 in the same year, and therefore no right of re-entry can arise under the proviso for re-entry before Oct. 29 in any year, unless there is an arrear of rent and royalties outstanding on the previous March 25 of the same year.

The material facts on the question of re-entry are these. [His Lordship considered these facts and concluded:] I hold that there was no re-entry in fact before

June 1. It appears, however, that the lessor did in fact carry on the business as from June 1, and this is relied on as a re-entry under the proviso for re-entry.

By s. 146 of the Law of Property Act, 1925, it is provided that a right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves a notice on the lessee. This notice must comply with the particular requirements set out in the section. It is admitted that no notice of any kind was in fact served on the lessee as a step leading up to the lessor's re-entry on June 1, 1930; but it was argued that the section has no application to the underlease, because such underlease falls within one or other of the exceptions set out and provided for by sub-s. (9) of the same section. Subsection (9) is in these terms:

"This section does not apply to a condition for forfeiture on the bankruptcy of the lessee . . . if contained in a lease of—(a) Agricultural or pastoral land; (b) Mines or minerals; (c) A house used or intended to be used as a public-house or beer shop; (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him."

It was argued that the underlease to the company came either under subhead (b) or subhead (e).

A mining lease is defined in s. 205 (1) (xiv) of the Act as meaning

"a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith."

It is true that the lease provides for the payment of rent and royalties, which are to be ascertained by reference to the quantity of natural water derived from the premises and sold. It also provides for the payment of royalties on the gross receipts of the company from user of the premises as a bathing establishment, while the lease itself is of land and buildings.

In my judgment, it is impossible to bring the underlease within the definition of "mining lease" contained in the Act. I think it is equally impossible to describe the underlease as being of

"property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property."

Indeed, no evidence was deduced on behalf of the lessor on which any such argument could be based, and, so far as I can judge from a consideration of the nature of the property comprised in the underlease, there is nothing to suggest that the qualifications of the tenant are of any particular importance. I hold that the underlease is one to which s. 146 applies, and consequently that there was no valid re-entry on June 1, 1930.

On June 2, 1930, an order was made for the compulsory winding-up of the plaintiff company upon a petition presented on May 22, 1930. The commencement of the winding-up was, therefore, May 22, 1930. By s. 205 (1) (i) of the Law of Property Act, 1925, bankruptcy in relation to a corporation means the winding-up thereof. The liquidator of the company, after looking into the matter, entered into possession of the property comprised in the underlease in October, 1930. As there had at this time been no valid re-entry by the lessor he was entitled to do this, and the lessor cannot complain in respect of what has been done.

The case, however, does not end here, for it is argued on behalf of the lessor that s. 146 has no application to the present case, because the requirements of sub-s. (10) of the section have not been fulfilled. This subsection provides that, where a lease contains a condition of forfeiture on bankruptcy (and this, by virtue

of s. 205 (1) (i), includes winding-up in the case of a limited company), the provisions of the section shall only apply in two alternative cases. The first is if the lessee's interest is sold within one year from the bankruptcy or the winding-up, and the second is that, if the lessee's interest is not sold before the expiration of that year, the section is only to apply to the forfeiture condition during the first year from the date of the bankruptcy or winding-up. This subsection does not abrogate the lessor's right to re-enter within the year, but provides that a valid notice must be served before the lease can be forfeited: (see *Civil Service Co-operative Society, Ltd. v. McGrigor's Trustee* (3) ([1923] 2 Ch. at pp. 354 and 355)). If the lessee's interest is sold within the year, the section applies without any restriction as to time, so as to enable the purchaser's title to be confirmed by an order giving relief. If the lessee's interest is not sold within the year, then the trustee in bankruptcy or the liquidator has one year from the commencement of the bankruptcy or the winding-up within which to apply for relief.

In the present case it was claimed that the liquidator of the lessee company had in fact sold the lessee's interest to the plaintiff Gee within the time limited. The sale relied on is contained in an agreement dated June 1, 1931, and made between the lessee company in compulsory liquidation of the first part, the liquidator of the second part, and the plaintiff Gee of the third part. It contains a number of recitals. I need not refer to all of them; the material recitals are as follow:

"Whereas before the making of the said order for the compulsory liquidation of the company the said G. Harwood [the lessor: Harwood was her maiden name] purported to determine the term of the said underlease by re-entry for non-payment of rent, And whereas the creditor and the company have commenced an action against the said G. Harwood for a declaration that the said underlease is still subsisting and in the alternative that the court will grant relief to the creditor and the company from the before-mentioned purported forfeiture, And whereas at the date of the order for compulsory liquidation of the company the company was indebted to the creditor in the sum of £6,985 16s. 4d. and it has been agreed between the creditor and the company and the liquidator that in consideration of the creditor withdrawing his proof for the said debt the company and the liquidator will enter into the agreements hereinafter contained."

Then follows an assignment of

"all those their respective rights and interests to and in the before-mentioned action now pending to obtain relief from the said purported forfeiture of the underlease and the right to prosecute the same. And the liquidator hereby declares that he has obtained the sanction of the Board of Trade and the principal creditors of the company to the said assignment and to the carrying out of the other arrangements herein referred to. And the liquidator hereby agrees that he will in all respects render to the creditor all necessary information and assistance in his power as liquidator of the company for the purpose of prosecuting the action to a successful conclusion. (2) In further consideration of the creditor withdrawing his proof of debt against the company and entering into the agreements on his part hereinafter contained the company and the liquidator hereby agree that they will, subject to the consent of the said G. Harwood being obtained, or in the event of its being unreasonably withheld without the consent of the said G. Harwood, procure the assignment by the company to the creditor of the residue of the said term created by the said underlease together with all the benefit thereof. (3) In consideration of the premises the creditor has by an instrument bearing even date herewith entered into an agreement with the liquidator to indemnify him against any costs charges, expenses and liabilities which may be incurred in the prosecution of the before-mentioned action now pending to obtain relief from the said purported forfeiture of the underlease. (4) In further consideration of the premises the creditor hereby agrees with the liquidator that he will withdraw

his proof in the liquidation of the company upon the underlease being effectually assigned to him and that he will use his best endeavours to sell the property comprised in the underlease as soon as reasonably convenient and will pay to the liquidator a sum equal to one-sixth of the proceeds of sale after deduction thereout of the creditor's solicitor and client costs and actual disbursements incidental to the investigation of the position and of and incidental to the said action and sale, including any costs of the defendant to the said action ordered to be paid by the creditor or any sum of money or costs properly paid upon any compromise entered into between the creditor and the defendant and any rent paid or ordered to be paid by him as a condition of obtaining the relief asked for in the said action."

I do not think this document can properly be described as an unconditional agreement to sell the lessee company's interest in the underlease. It is really an agreement which provides for the future conduct of the litigation pending between the lessee company and the lessor at the expense of the plaintiff Gee, and on terms, which recognise, in the event of success, a continued interest in favour of the liquidator in the premises comprised in the underlease. It is, I think, plain that, in order to satisfy the requirements of the subsection, any sale within the year must be an absolute sale: (see *Robert Ferguson & Co., Ltd. v. Ferguson* (1); and *Re Henry Castle & Sons, Ltd.* (2)). Assuming, however, that I am wrong in the view I have expressed of the agreement to which I have referred, that agreement was not made until June 1, 1931, and as the compulsory winding-up order was made upon a petition presented on May 22, 1930, which is therefore the date of the commencement of the winding-up, the sale agreement was not made within one year from the winding-up, and the case therefore cannot be brought under sub-head (a) of sub-s. (10).

It is, therefore, necessary to consider the further question: Has the liquidator applied for relief from the forfeiture condition within one year from the winding-up so as to bring the case within sub-head (1) (b) of the subsection? The writ was issued on Oct. 23, 1930, and by it the lessee company by its liquidator asks in the alternative for relief from forfeiture of the underlease. The year from the winding-up did not expire until May 21, 1931, and therefore the application was in time. The fact that the action did not come on for hearing until long after this date had expired is, I think, immaterial. I hold that the case falls within sub-s. (10) (b) and that the provisions of s. 146 apply to the case. In my judgment the lessee company is entitled to a declaration that the underlease was not determined by re-entry either on Oct. 24, 1929, or on April 24, 1930, or on June 2, 1930, and that the lessee company by its liquidator is entitled to be relieved from any forfeiture which has occurred since June 2, 1930. So far as Mr. Gee is concerned, it seems to me that he has no right of action. I will consider the terms on which the relief is to be allowed when the actual position with regard to the rent and royalties down to the present time has been ascertained.

The lessor must pay the costs of the lessee company of the action down to the date of this order.

The lessor appealed.

Alexander Grant, K.C., and *P. Gordon Bamber* for the lessor.

W. H. Upjohn, K.C., and *Harold Christie* for the plaintiff Gee and the company, the lessee.

Cur. adv. vult.

March 2. **LORD HANWORTH, M.R.**—On Sept. 10, 1928, the lessor granted an underlease to Braceborough Spa, Ltd., a company whose registered office was in Hanover Square and who were called the lessees. The lease contained a power whereby, if the rents or royalties were unpaid for thirty days or if the premises were not used for twelve months, or if the company should go into liquidation other than voluntarily, then and in any of those cases it should be

"lawful for the lessor at any time thereafter upon the demised premises or any part thereof in the name of the whole to re-enter, and thereupon this demise shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessees' covenants herein contained."

That clause is a well-known clause. It varies in some small particulars from many others that are known, but I think that the interpretation which was put upon it by counsel for the plaintiff Gee and the lessee in his argument, that thereupon this demise shall absolutely determine, indicates that it is one of those cases in which some act has to be done in order to show that the landlord has elected to determine the existing demise, the effect of *Elliott v. Boynton* (4), and the other cases there cited, such as *Jones v. Carter* (5), being that, if an action is brought, there must be an affirmative act which definitely shows, by the issue of a writ or in some other way, that the landlord was determined to enforce the rights given to him under the power of re-entry.

The action was commenced on Oct. 23, 1930, and it was commenced by the lessee. The plaintiffs sought in the action a declaration that the underlease, that is, the underlease of Sept. 10, 1928, was still subsisting and that the company was entitled to retain possession and, in the alternative, relief from any forfeiture of the underlease on payment of the rents or royalties. By the defence and, again, by the counter-claim, the defendant lessor sought to say that the underlease was not in existence, that it was determined in October of 1929 or on June 2, and she prayed an order that it should be declared that the underlease was determined, an order that the premises be immediately delivered to the defendants, an account, and she made the usual claim for consequential relief. There was a defence to that counter-claim.

The learned judge came to a conclusion upon the matter, and declared that the underlease "was not determined by re-entry either on or before June 2, 1930, and is still subsisting," and ordered

"that the plaintiff company be relieved from any forfeiture of the said underlease incurred by reason of the liquidation of the plaintiff company"

on certain terms which the learned judge imposed.

From that decision an appeal is taken to this court. First of all, it is said that there was a re-entry on the premises by Miss Harwood, whom I will call the landlord. [His Lordship considered the facts relied on to constitute such re-entry, concluded that there had been no such re-entry, and continued:]

Then comes the question as to whether the lessee company are entitled to relief from the forfeiture which has occurred. In the Conveyancing Act, 1881, there was not the relief given in respect of a re-entry or forfeiture in case of forfeiture for non-payment of rent; but by s. 2 (2) of the Conveyancing Act, 1892, it is provided that sub-s. (6) of s. 14 of the Act of 1881

"is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year";

in other words, affirmatively there is a right to relief from forfeiture brought within s. 14 of the Act of 1881 under circumstances limited in time as expressed in sub-s. (2). When s. 146 of the Law of Property Act, 1925, was passed, the limitation or the condition about the limit of a year and the possibility of a sale within a year was set out in two sub-clauses. I need not read sub-s. (10); but I think it is easier to understand the subsection if one considers what is its purpose, and if one transposes sub-clauses (a) and (b). It may often happen that in the case of a liquidation, the company may be in possession of a lease which is of saleable value. It may not be easy to disentangle the position of the company or to ascertain the rights within a short time; still less may it be possible to effect a sale within a short time, and, as I read it, the purpose of the section is this: To give a twelve months' period during which there can be an application made for relief,

and, therefore, in the case where there is a sale effected (it may be towards the end of the twelve months' period) that the liquidator should not find himself brought up against a time limit which would imperil the success of the realisation of the assets of which he is possessed; in other words, I think that RUSSELL, J., rightly interpreted the section in *Civil Service Co-operative Society v. McGrigor's Trustees* (3) ([1923] 2 Ch. at p. 354) in his judgment. I will not repeat the words, but there they stand, and to my mind that is the correct interpretation. There is this affirmative right during the period of twelve months, and, if there is a sale, there is a further period during which that right to relief can still be obtained by the liquidator; but it is also clear that that relief must be obtained within the year, before the expiration of the year.

What is that year? Where does it date from? The words of sub-s. (2) are:

"Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief."

In the present case it appears to me that, taking the construction which was suggested by counsel for the lessor, that this right to apply is given only in the case where the lessor is proceeding by action or otherwise, to be the right interpretation of the section, and assuming that the right of the lessee to apply is limited to the cases where the lessor has proceeded, as suggested, in the term, the lessor in this case was proceeding by what may be called methods other than by action to enforce such right of re-entry or forfeiture, and from the facts which I have stated, I think that as from a date in June—preferably I should say from June 6 onwards—she was attempting to enforce her right or claim to re-entry and to forfeiture.

That being so, the right arose on the part of the lessee in an action brought by himself to apply to the court for relief. In the present case during the running period of twelve months from the liquidation, namely, on Oct. 23, the lessee did by an action apply to the court for relief.

Then it is said that the relief must be not only applied for, but must be granted within the time limit of twelve months. I do not so hold. I think that once the steps have been taken, the reasoning which is to be found in *Diment v. Roberts* (6) in the Court of Appeal, as well as in the judgment delivered by SWIFT, J., on behalf of the Divisional Court, applies in the present case, and that the observations made in the several judgments in that case apply to the present case. I take the words which were quoted from my own judgment ([1925] 1 K.B. at p. 11):

"It is impossible to suppose that the legislature intended to leave the tenant to the chance of his right to recover falling within the area of a very busy court, or to be determined by the changes or chances of the court's business. I think the object of the Act was to maintain the right of the tenant or mortgagor."

The same observations and the same reasoning apply to the present case. All that could be done or ought to be done by the lessee had been done by Oct. 23, and within the limit of twelve months.

Then it is said: Even so, it is hard upon the landlord that such a matter should be left open and indeterminate during the months that may elapse or in the present case during the very considerable time that has elapsed before the matter came before LUXMOORE, J., for determination. There is weight in that observation; but the difficulties which arise from the delay can really be met, and are intended to be met, by the wide discretion given to the learned judge as to the terms on which there should be relief given. Let it be remembered that the basis on which relief is being given is that there is still an existing lease, but one in respect of which there has been the danger of forfeiture and determination. It is not hard upon the landlord if that lease is held to continue, for all that has happened is that he has not, by the facts that have occurred, secured the right to enforce a forfeiture and, if the relationship is to be deemed to continue or does

continue as between the landlord and the tenant, it is not difficult to adjust the rights that have arisen to the landlord or, it may be, to the tenant by dealing with the terms on which relief should be given. The difficulties which may arise by treating the relief as open and to be given *nunc pro tunc* from the date of the writ, although raising possible hardships, are such as can be fully met by the terms on which relief is given.

For these reasons, in addition to those which have been given by LUXMOORE, J., himself, I have come to the conclusion that the judgment is right and that the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. [His Lordship considered the facts relied upon to constitute a re-entry, and continued:] I think the finding of fact by the learned judge, that there was no re-entry before the winding-up, was not only justified but, in the circumstances, inevitable.

That leaves only the question of law which has been raised under s. 146 (10) of the Law of Property Act of 1925. That subsection reproduces in substance what was effected by s. 2 (2) of the Conveyancing Act, 1892. Without reading sub-s. (10) again, I think that the true effect of it is that it gives the liquidator of a company which has been ordered to be wound-up one year within which to deal with leasehold property of the company.

During that year he is entitled to rely upon sub-ss. (1) and (2) of s. 146; that is to say, before the landlord can enforce the forfeiture he has to serve a notice on the company under sub-s. (1), and the liquidator, under sub-s. (2) has the privilege of applying to the court for relief. If there is a sale, then that sale enables the liquidator to pass on the benefit of s. 146 to the purchaser generally. The purchaser then has the benefit of the section permanently and, therefore, the landlord cannot enforce a forfeiture without giving notice under sub-s. (1), and the purchaser has the right to come for relief under sub-s. (2) any time after he has purchased.

It is said in this case: Be it so; but the liquidator must get that relief, if the section applies, within the first year, unless there is a sale. In the present case I am assuming that there was no sale within the first year. The application, however, under sub-s. (2) was made within a year from the winding-up, and, in my judgment, on the authority of the cases cited by counsel for the lessee (*Lewis v. McKay* (7), and *Diment v. Roberts* (8)), it is sufficient for the person seeking relief to claim that relief by proceedings commenced within the year and, therefore, the proceedings in this action which was commenced on Oct. 24 were instituted well within the year, and were in time to obtain relief.

The last point that was made was that, although the liquidator is entitled to obtain relief within the year, the court can only grant him relief during that year; that is to say, that the court is powerless under sub-s. (2) to grant any relief beyond the year, unless the property is sold within the year. I can find nothing to limit the right of the court to grant relief in that way. The court may grant relief under sub-s. (2) when a proper application for such relief is made to the court on such terms as it thinks fit. As I have already stated, under sub-s. (10) for one year the liquidator is entitled to take advantage of sub-s. (2), and, when he does take advantage of that, the court has power to grant relief against forfeiture by reason of the liquidation of the company on such terms as it thinks fit. It is not fettered to granting relief for the remainder of the year, but can grant it on any terms it thinks fit. Counsel for the lessor said: That is an impossible position, because the court never grants relief by ordering a fresh lease to be executed to a trustee in bankruptcy or to a liquidator. That is true; but it may very well be that there are other circumstances where, for instance, a liquidator or a trustee finds a solvent person—it may be one of the creditors of the concern—who is willing to become responsible for the rent and covenants in a fresh lease for the benefit of the assets in the winding-up without having purchased or without the liquidator having sold to him the benefit of the lease. Of course, every case would

depend on its own circumstances. I am only concerned to express my disagreement with the view urged upon us that the court is confined to granting relief for one year only in such a case as we have here, where there has been no sale of the property.

For these additional reasons, I agree that this appeal fails and ought to be dismissed with costs.

ROMER, L.J.—I agree, and have very little to add. It is perfectly plain that there was no re-entry here by the lessor before June 1. [His Lordship considered the facts which supported this finding, and continued:]

It only remains to deal with s. 146. It seems to me perfectly plain that, reading clauses (a) and (b) of sub-s. (10) of that section together, during the first year of the liquidation s. 146 applies and the lessee has the protection afforded by s. 146. Whether that protection continues after the year depends upon whether or not the liquidator has disposed of the leasehold premises in the meantime.

It was said by counsel for the lessor that, where a liquidator applies during the first year, the court can only grant relief over the first year; that is to say, the court can only grant relief against the landlord re-entering during that first year. I do not so read the section. Subsection (10) does not say that relief shall be given only during the first year, but that the section shall apply during the first year. Once the section applies, complete protection can be afforded to the lessee, of course. Here proceedings were started by the lessee in October, 1930, well within the year after the commencement of the liquidation. It is said that the landlord was not at that time proceeding by action or otherwise to enforce the forfeiture. Whether it is necessary to show that as a condition precedent to any action on the part of the lessee it is not necessary to determine, because the proceedings other than by action, which were commenced at the end of May, were being pursued by the lessor and ably pursued, though ineffectually, right down to the time when the liquidator very properly, as I think, turned her out of possession.

That being so, all that the learned judge had to do was to consider on what terms he should grant relief, because I agree with the other members of the court that, the writ having been issued within the year, the judge's powers are not limited by the fact that he was unable to hear the action and make the order within the year. He had to consider what terms he should impose as a condition for relieving against the forfeiture. He has, as it seems to me, imposed very proper conditions in the circumstances. Of course the landlord has to be protected as well as the tenant. Where a liquidator applies at the beginning of the liquidation because the landlord is threatening then and there to re-enter, the court will surely afford the fullest protection to the liquidator, even though the liquidator is not at that moment in a position to say, I have such and such a purchaser ready to have it. What conditions the court would impose in such circumstances it is not necessary to consider, but they would be proper conditions to protect the liquidator against a forfeiture of the asset which he would naturally be seeking to dispose of within the year. It is said by counsel for the lessor, Supposing that the liquidator comes on the last day of the year, what then? If a liquidator who had not succeeded in selling a property and had made no attempt to sell within the year, was to come on the 364th day and ask for relief against forfeiture, I know what I should do and what any other judge would do. The landlord would be in such a case thoroughly protected by the discretion of the judge not only as to imposing conditions but as to dealing with the matter generally.

The lessor appealed.

P. Gordon Bamber and Roy L. Daniell for the lessor.

W. H. Upjohn, K.C., and Harold Christie, K.C., for the plaintiff Gee and the company, the lessee, were not called upon to argue.

LORD TOMLIN.—This is an appeal by a lessor against an order of the Court of Appeal affirming a judgment of *Luxmoore, J.*, under which he granted to the lessee relief against forfeiture, under s. 146 of the Law of Property Act, 1925, in respect

of a property comprised in an underlease. The appeal is based, in effect, on two grounds. It is an appeal against the findings of fact of the learned judge, and it is an appeal on a question as to the construction of the section.

So far as the facts are concerned, the appeal is a hopeless appeal. The appellant lessor alleged that she had re-entered upon the premises under the power of entry in the lease, before the respondent company, the lessee, had been compulsorily wound-up. The order to wind-up the company was made on June 2, 1930, upon a petition presented on May 22, and the lessor sought to show that she had been in possession before the commencement of the liquidation. In fact, the learned judge found and the Court of Appeal affirmed the finding, that she had conspired with one Kellow, who was the secretary of the company, to concoct a number of letters with a view of producing the impression that she had entered into possession when she had done nothing of the kind. She and her witness Kellow were both disbelieved by the judge, and the witness for the other side on the material issues in this regard, a man of the name of Holmes, was believed. The Court of Appeal reached the conclusion that the learned judge had arrived on the facts at the right result. In the circumstances of this case it is hopeless to ask this House to reverse that decision; nothing of a cardinal nature was shown to us to have been overlooked or misapplied. Indeed, but for the point of law, with which I will deal next, it would be difficult to say that this appeal was a proper appeal to bring before this House at all.

The point of law arises on s. 146 of the Law of Property Act, 1925. Under sub-s. (1) of that section:

"A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice,"

and under sub-s. (2):

"Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief."

Then under sub-s. (10):

"Where a condition of forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest is contained in any lease, other than a lease" [of certain excepted classes,] "then: (a) if the lessee's interest is sold within one year from the bankruptcy or taking in execution, this section applies to the forfeiture condition aforesaid; (b) if the lessee's interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy or taking in execution."

It is accepted in the present case that, after the winding-up order the lessor did enter into physical possession of the property and was seeking to assert her right as landlord to re-enter; and the liquidator eventually, in October, 1930, turned her out and commenced an action for relief. In that action she presented a counter-claim asking for certain relief, which, for the moment, it is not material to consider. That action and counter-claim in fact were not heard until after the expiration of the year from the commencement of the liquidation, that is to say, they were not heard until after May 22, 1931.

The point which is made on behalf of the lessor upon the section is that upon the true construction of the section, although at the time when the action was launched it was open to the lessee to apply for relief, yet, inasmuch as the lessee's interest was not sold within one year from May 22, 1930, the power to grant relief under the section expired on May 22, 1931, with the result that when the matter came before the learned judge he had no jurisdiction to grant the relief which he gave.

That is the way in which the case is presented: it turns on the language which has been employed in the section. If that be the true effect of the section, it would appear that if an application for relief were made within a year and were within the year granted, but before the expiration of the year the lessee's interest were not sold, the order which had already been made would apparently become void. In my opinion it is impossible to put upon the section the meaning which it is sought to attribute to it. It seems reasonably plain that what sub-s. (10) of s. 146 does is to provide that where in any lease, with the exception of the excepted leases, there is a condition of forfeiture on bankruptcy (and under s. 205 "bankruptcy" includes, in the case of a company, liquidation), then if the lessee's interest is sold within one year, the section continues to apply both in and after the year; but if the lessee's interest is not sold before the expiration of the year, at the expiration of the year it is no longer possible for the lessee to apply for relief. But during the year the section operates, and, if the application is made during the year, the jurisdiction of the court to deal with the application does not cease because the application is not dealt with before the year expires.

That seems to be consistent with the language of the section and to give it a reasonable meaning, and I think that that is the true meaning of the section. A number of other points have been raised before your Lordships' House, but they were either points which had not been taken in the lessor's case or points for which no solid foundation could be shown. I invite your Lordships to dismiss the appeal with costs.

LORD RUSSELL.—I concur and have nothing to add.

LORD WRIGHT.—I also concur.

Appeal dismissed.

Solicitors: Woodham Smith & Borradaile; Stafford Clark & Co., for Ironside & Co., Leicester.

[Reported by A. W. CHASTER, Esq., and GEOFFREY P. LANGWORTHY, Esq.,
Barristers-at-Law.]

MONTAGUE BURTON, LTD. v. INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Slessor and Romer, L.JJ.), July 8, 4, 1934]

[HOUSE OF LORDS (Lord Hailsham, L.C., Lord Blanesburgh, Lord Russell of Killowen, Lord Macmillan and Lord Roche), February 4, 6, 1936]

[Reported 152 L.T. 8, C.A.; 105 L.J.K.B. 236, 154 L.T. 355;
20 Tax Cas. 48, H.L.]

Surtax—Company—Undistributed profits—Failure to distribute reasonable part of income—Expenditure on current requirements exceeding profit—Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21 (1).

A private limited company, in which M.B. owned substantially the whole of the issued ordinary share capital, adopted a policy of expansion, increasing its turnover from £452,808 in 1922 to £3,876,135 in 1929. Capital expenditure was incurred mainly in respect of the purchase and improvement of

shop properties, and large sums were applied in increasing stocks. The shop properties were purchased by M.B. with funds provided by the company on loan. Rents were charged to the company by M.B., and were credited to his loan account. As at March 31, 1929, M.B. was indebted to the company to the extent of £1,051,188. During the year ending March 31, 1929, the company expended on current requirements of its business amounts far in excess of the net profits for the year, which amounted to £371,328. Direct expenditure on fixed assets during that year amounted to £220,043, and increase in stock to £306,960. On Feb. 27, 1929, a new company incorporated for the purpose entered into an agreement with the company for the purchase of the company's business, and after completion of the purchase on March 31, 1929, the liabilities of the company amounted to £7,850 and taxation liabilities, while its assets comprised investments of £100, the debt of £1,051,188 due from M.B., shares in the new company to the nominal value of £1,253,786, £43,919 in cash and £200,000 as a reserve for taxation. The sum to the credit of the company's profit and loss account was £1,643,235. On April 12, 1929, the company declared a dividend of 100 per cent. on the ordinary shares for the year ended March 31, 1929 (£45,000 gross, and £36,000 net) which was satisfied by the payment of £3,000 in cash and by setting off £33,000 against the amount shown in the company's accounts as owing by M.B. By a resolution passed on April 20, 1929, and confirmed on May 6, 1929, the company went into voluntary liquidation. The special commissioners made a direction under the Finance Act, 1922, s. 21 (1), that for the purposes of assessment to surtax the actual income from all sources of the company should, for the year ending March 31, 1929, be deemed to be the income of the members and the amount thereof apportioned among them. It was conceded that the company could legally have made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid.

Held (by the Court of Appeal): the question whether the company had, during the relevant period, distributed a reasonable part of its income within s. 21 (1) was one of fact for the commissioners and the Board of Referees, and there was evidence on which they could properly reach the conclusion that no such distribution had been made.

Held (on appeal to the House of Lords): there being ample evidence to support the Board of Referees' findings of fact, it was not open to the House to review those findings.

Notes. The Finance Act, 1922, s. 21, was replaced by the Income Tax Act, 1952, s. 245.

Considered: *A. & J. Mucklow, Ltd. v. I.R. Comrs.*, [1954] 2 All E.R. 508. Referred to: *John White's Trust, Ltd. v. I.R. Comrs.* (1937), 21 Tax Cas. 391; *Thomas Fattorini (Lancashire), Ltd. v. I.R. Comrs.*, [1942] 1 All E.R. 619; *Wurzal v. Dowker*, [1953] 2 All E.R. 93.

For the Income Tax Act, 1952, s. 245, see 31 HALSBURY'S STATUTES (2nd Edn.) 332.

Appeal by the taxpayer, Montague Burton, Ltd. (in liquidation), against an order dated Dec. 19, 1933, of FINLAY, J., made on a Case Stated by the Board of Referees, pursuant to the Finance Act, 1922, Sched. I, para. 2, for the opinion of the High Court of Justice.

1. At a meeting of the Board of Referees, held on Feb. 8, 1933, for the purpose of re-hearing appeals under para. 2 of Sched. I to the Finance Act, 1922, the members of the said board present at the said meeting, re-heard an appeal by Montague Burton, Ltd. (in liquidation), hereinafter called "the company," whose registered office is at Hudson Road Mills, Leeds, against a direction made by the Commissioners for the Special Purposes of the Income Tax Acts under s. 21 of

the Finance Act, 1922, whereby they directed that for the purposes of assessment to surtax the actual income from all sources of the company should, for the year ended March 31, 1929, be deemed to be the income of the members, and the amount thereof apportioned among them.

2. The company, being aggrieved by the said direction, appealed against the same to the said Special Commissioners who, on the hearing thereof did, on May 11, 1932, determine that the said direction be confirmed.

3. The company, being dissatisfied with the said determination, required the said appeal to be re-heard by the Board of Referees, and they re-heard the same accordingly.

4. On the said re-hearing no oral evidence was called before them, but the following facts were admitted:

(i) The company was incorporated on Feb. 22, 1917, for the purpose of acquiring the business of clothing manufacture and bespoke tailoring then being carried on by Montague Maurice Burton. The said business had been commenced in 1901 by Mr. Burton (now Sir Montague Burton) with a capital of £100, and at the time of the incorporation of the company the premises used for the purposes of the business consisted of a small clothing factory in Leeds, and a number of shops situated chiefly in the industrial districts of the West Riding of Yorkshire and of the North-East Coast.

(ii) The nominal capital of the company was £50,000 divided into 48,000 ordinary shares of £1 each, and 2,000 10 per cent. cumulative preference shares of £1 each. At all times material to this appeal the issued capital was 45,002 ordinary shares and 2,000 preference shares held as follows:

Ordinary shares:

M. M. Burton	...	...	...	...	...	...	41,251
Sophia Amelia Burton (wife of M. M. Burton)	...	...	...	...	...	...	1
Henry Holding, Ltd. (hereinafter referred to)	...	...	...	...	...	...	3,750
							45,002

Preference shares (having no voting rights):

Alfred William Wansborough	...	...	...	...	...	...	1,000
Joseph Richard Cooper	...	...	...	...	...	...	1,000
							2,000

The directors of the company at all material times were Mr. Burton (governing director, receiving a salary of £10,000 per annum), Mrs. Burton, and Mr. Wansborough.

(iii) From the outset the company adopted and continually followed a policy of development and expansion, both of its factory capacity, and of the number, size, and attractiveness of its shops. The expansion of the company's business from March 31, 1922, to March 31, 1929, is shown by the following table:

March 31	Value of Assets employed in business including loans to Mr. Burton as hereinafter mentioned.	Shops open.	Direct employees	Turnover for year.	Net profit as per accounts.
1922	£452,808	107	2,550	£1,059,637	£55,489
1923	£678,600	148	2,943	£1,319,897	£105,675
1924	£1,023,759	172	3,513	£1,422,372	£97,675
1925	£1,406,350	197	4,142	£1,683,802	£102,195
1926	£1,588,645	214	4,551	£1,970,534	£253,743
1927	£1,911,749	229	5,190	£2,096,424	£290,102
1928	£2,825,100	263	6,643	£2,630,679	£440,123
1929	£3,876,135	301	7,855	£2,824,292	£371,323

The expansion of the business has continued since it was purchased by the new company. On March 31, 1931, the number of shops was 362, and the number of direct employees 10,081.

(iv) The capital expenditure of the company was incurred mainly in the purchase, alteration, and improvement of shop properties in all parts of the British Isles, and the provision of fixtures and plant. Large sums were also applied in increasing stocks. A

(v) The said capital was provided by: (a) using the company's profits, (b) obtaining extended credit, (c) obtaining the maximum amount of accommodation from the company's bankers, (d) raising mortgages on properties. B

(vi) Where shop properties required for the purposes of the company's business could be satisfactorily obtained on short leases (approximately twenty-one years or less) the leases were taken in the name of the company. No value was put on these short leases in the company's balance sheets. In most cases, however, the shop properties required for the purposes of the company's business could be more economically and advantageously acquired by purchasing the freehold or taking a long lease, and at all times material to this appeal the great majority of the properties occupied by the company were properties acquired in this way. In C
October, 1928, the freehold and long leasehold properties were valued by Messrs. Hillier, Parker, May and Rowden at £3,946,540. The amount of capital required to carry out this policy was provided by means of mortgages on the properties acquired, and the acquisition of freeholds and long leaseholds for the purposes of D
the company's business was carried out in the manner described in the following sub-paragraphs.

(vii) Prior to April 28, 1927, the shop properties occupied by the company (other than those held on short leases) were bought or acquired on long lease by Mr. Burton, to whom the company advanced by way of loan the amounts required to satisfy the purchase consideration therefor, less amounts left on mortgage by the vendors. The sums so advanced were duly debited to Mr. Burton in the company's E
books as loans. Amounts required to meet current outgoings in respect of the said properties were also advanced by the company to Mr. Burton, and debited to him as loans. Rents were charged by Mr. Burton to the company for the use of the shop premises belonging to him, and were credited to his loan account. The company's accounts show that Mr. Burton was indebted to the company to the F
extent of £997,245 on March 31, 1928 (after crediting £33,001 in respect of a dividend on his ordinary shares in the company for the year ended March 31, 1926), and to the extent of £1,051,188 on March 31, 1929. Substantially the whole of the said indebtedness resulted from advances made by the company to Mr. Burton to enable him to meet the above-mentioned expenditure on properties acquired and used for the company's business, and did not represent money advanced to Mr. G
Burton for his private purposes.

(viii) In cases where no part of the purchase price of any of the said properties, purchased as aforesaid by Mr. Burton, was left on mortgage by the vendor, Mr. Burton paid the whole of the purchase price by means of moneys advanced to him by the company for the purchase, as set out above. Mr. Burton personally raised mortgages on such properties as soon as possible after completion of the purchase, H
and paid the proceeds of such mortgages into a personal deposit account in his own name at the company's bank. This deposit account was not incorporated in the company's accounts as an asset of the company. The company's overdraft was guaranteed by Mr. Burton personally, and the bank had a charge over the said deposit account in support of Mr. Burton's guarantee. The sum to the credit of the said deposit account on March 31, 1929, amounted to £496,594, 8s. 2d. I

(ix) After April 28, 1927, no further properties were acquired by Mr. Burton, except that a number of purchases, of which completion was then pending, were completed by him.

(x) From April 28, 1927, onwards, freehold and long leasehold properties acquired for the purposes of the company's business were purchased in the following manner. On March 31, 1927, a company was incorporated under the name of Henry Holding, Ltd., of which Mr. Burton by himself or his nominees was the sole ordinary shareholder; and on April 28, 1927, another company was incorporated

under the name of Key Estates, Ltd. Henry Holding, Ltd., took up (and held until February, 1929) the whole of the issued capital of Key Estates, Ltd., except twelve shares, and acquired from Mr. Burton the 3,750 ordinary shares in Montague Burton, Ltd., referred to in para. 4 (ii) hereof.

(xi) After April 28, 1927, freehold and long leasehold properties acquired for the purposes of the company's business were purchased by Key Estates, Ltd., in the same manner as had been formerly adopted by Mr. Burton.

(xii) The moneys required to pay for these properties were advanced by the company to Henry Holding, Ltd., and by Henry Holding, Ltd., to Key Estates, Ltd.

(xiii) The company credited Key Estates, Ltd., with rents for the properties acquired by Key Estates, Ltd., and occupied by the company.

(xiv) The company's advances made to enable these properties to be purchased amounted, on March 31, 1928, to £469,584, and on March 31, 1929, to £836,199 then owing to the company by Key Estates, Ltd.

(xv) Expenditure on alterations and improvements to shops occupied by the company, and on plant and fixtures, was made by the company itself. . . .

(xvi) . . .

(xvii) The company's balance sheets and trading and profit and loss accounts show the sums expended by the company for current requirements, and for the maintenance and development of the business. During the four years from April 1, 1924, to March 31, 1928, the net profits earned were £1,086,164, and the value of the assets employed in the business was increased by £1,801,341. During these four years the bank overdraft increased by £514,018, namely, from £255,069 to £769,087.

During the year ended March 31, 1929, the company expended on the current requirements of its business and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year :

The net profit of that year was	...	...	...	...	£971,328
Direct expenditure on fixed assets during the year				£220,043	
Increase in stock	...	...	...	£306,960	
Increase in book debts	...	...	£115,643		
Less decrease in cash...	...	...	£12,168		
				£103,475	
					£680,478

During the same year further sums were advanced :

To Mr. Burton	...	...	...	£53,945
To Henry Holding, Ltd.	...	...	...	£366,614

The increase in the advances to Mr. Burton (from £997,254 to £1,051,188) was a net increase after crediting him with rents and with £66,003 in respect of dividends, on his ordinary shares for the years ended March 31, 1927, and March 31, 1928, declared during this year. All sums debited to Mr. Burton as advances were advances made by the company to Mr. Burton to enable him to meet liabilities in respect of properties which had been purchased by him for the purposes of the company's business as hereinbefore set out. The bank overdraft was increased during the year by £573,507 (from £769,087 to £1,342,594), while sundry creditors and bills payable increased by £196,404.

(xviii) During the year 1928 the question arose of providing permanent capital for the business, and in January, 1929, a scheme was agreed on for the formation of a new public company, and the purchase by it of the company's business and assets, and of the properties which had been acquired by Mr. Burton as hereinbefore set out. For the purpose of the scheme an arrangement was made with

Messrs. Myers & Co., an issuing house, to underwrite an issue of shares in the new company.

(xix) As preliminary steps in the carrying out of the above plan, the company early in February, 1929, acquired from Henry Holding, Ltd., all its shares in Key Estates, Ltd., namely: 25,000 ordinary shares of £1 each, and 15,000 preference shares of £1 each, at par, the price being satisfied by set-off against the debt of Henry Holding, Ltd., to the company; and the whole balance of the debt of Henry Holding, Ltd., to the company was taken over by Key Estates, Ltd.

(xx) On Feb. 27, 1929, a new company called Montague Burton (the Tailor of Taste), Ltd. (hereinafter called "the new company") was incorporated. The name of the new company was shortly afterwards changed to Montague Burton, Ltd.

(xxi) On Feb. 27, 1929, the new company entered into two agreements:

(a) An agreement between the new company and Mr. Burton whereby the new company agreed to purchase (subject to the mortgages thereon) all the properties occupied by the company, and which had been purchased by Mr. Burton as aforesaid, the consideration being the issue to him by the new company of 1,492,428 ordinary shares of 10s. each, credited as fully paid up.

(b) An agreement between the company, Mr. Burton and the new company, whereby the new company (inter alia) agreed to purchase the business of the company as at March 31, 1928 (the last date to which the company's accounts had then been made up), all the assets of the company (including the net profits earned from April 1, 1928, onwards) except the debt owing to the company by Mr. Burton (which stood at £1,051,188 as at March 31, 1929) and a sum of £200,000 referred to below.

(xxii) As to the consideration for the sale by the company under the agreement mentioned in sub-para. (xxi) (b) hereof the new company agreed:

(a) To issue to the company 2,507,572 ordinary shares of 10s. each, credited as fully paid up.

(b) To pay to the company a net sum of £48,918 in cash.

(c) To take over all liabilities of the company, including the bank overdraft, excepting a debt of £7,849 owing by the company to Henry Holding, Ltd., and excepting any liability of the company to taxation in respect of any profits earned by the old company down to the date of the agreement. It was also agreed that the company should retain a sum of £200,000 to enable it to discharge this liability, this sum being based on an estimate of the company's liability.

(xxiii) In the agreement mentioned in sub-para. (xxi) (b) hereof Mr. Burton guaranteed to the new company:

(a) That the balance of net profits of the company as from April 1, 1928, included in the sale, after deducting the £200,000 above referred to, should be not less than £250,000, and undertook to make good to the new company any deficiency.

(b) That the assets of the company included in the sale were not of less value than they were estimated by Messrs. Price, Waterhouse & Co. for the purposes of the certificate given by them.

(xxiv) Completion of the purchases by the new company under the agreements mentioned in sub-para. (xxi) hereof was to take place, and did take place, on March 31, 1929.

(xxv) The income of the company for the purposes of the direction appealed against is only the income attributable to the period from April 1, 1928, to Feb. 27, 1929.

(xxvi) All proceeds of mortgages made by Mr. Burton after March 31, 1928, amounting to £93,459, were paid over by Mr. Burton to the new company.

(xxvii) After the completion of the sale of the company's business to the new company on March 31, 1929, the company had no liabilities except £7,850 due to Henry Holding, Ltd.—taxation liabilities (for which £200,000 was reserved by

the said vending agreement), and the expenses of winding-up; while the company's assets consisted of the following items:

Investments	...	...	...	...	...	...	...	£100
Due from Sir Montague Burton	...	...	...	...	...	...	...	£1,051,188
Due from new company:								
(a) Shares in same (nominal)	...	...	...	...	...	...	...	£1,253,786
(b) Cash	...	...	...	...	...	...	...	£43,919
(c) To meet taxation liability	...	...	...	...	...	...	...	£200,000
								£1,497,705
								£2,548,998

The sum to the credit of the company's profit and loss account immediately after the sale was £1,643,235.

(xxviii) On April 12, 1929, the company declared a dividend of 100 per cent. on the ordinary shares for the year ended March 31, 1929 (£45,000 gross, £36,000 net), which was satisfied by the payment of £3,000 in cash to Henry Holding, Ltd., and by setting off £33,000 against the amount shown in the company's accounts as owing by Mr. Burton to the company. It was conceded on behalf of the company before the commissioners that the company could have legally made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid.

(xxix) By resolution passed on April 20, 1929, and confirmed on May 6 then following, the company went into voluntary liquidation. The development and expansion of the business have continued, since it was transferred to the new company, along the same lines as before.

5. It was contended on behalf of the company:

(a) That the whole of the company's actual income for the year ended March 31, 1929, not distributed to its members, was expended by the company during the said year on the current requirements of its business, and on other requirements necessary or advisable for the maintenance and development of that business, and no part thereof was income which it was reasonable for the company to distribute to its members for the purposes of the Finance Act, 1922, s. 21.

(b) That, the said income having been so expended, the fact that the company sold its business and went into liquidation was irrelevant.

(c) That the company distributed to its members a reasonable part of its income for the said year having regard to the current requirements of its business, and other requirements necessary or advisable for the maintenance and development of its business.

(d) That under the Finance Act, 1922, s. 21, and the proviso thereto, there was no ground in law or in fact on which the direction appealed against could be sustained.

6. It was contended on behalf of the inland revenue commissioners (inter alia):

(a) That the fact that receipts of the business were during the year used in the business did not affect the profits which had arisen from the business at the end of the year, and as the company had power to distribute these profits and had assets available wherewith to make a distribution of them, the provisions of s. 21 of the Finance Act, 1922, applied.

(b) That the company had not within a reasonable time after the end of the year ended March 31, 1929, distributed a reasonable part of its actual income from all sources within the meaning of s. 21 of the Finance Act, 1922, and that the direction appealed against, as stated in para. 2 hereof, was correct, and should be affirmed.

7. The members of the said board, present at the said re-hearing, having heard both the company and the inland revenue commissioners by their duly appointed representatives on the merits of the said appeal, and having dealt with the case, determined that the above-mentioned direction should be affirmed.

8. Immediately on the determination of the appeal the company declared its dissatisfaction therewith as being erroneous in point of law, and in due course required the board to state a Case for the opinion of the High Court of Justice, pursuant to the Finance Act, 1922, Sched. I, para. 2.

9. The sole question of law for the opinion of the court was whether there was evidence upon which the board could come to the determination set out in para. 7 hereof.

The Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21, provides:

"With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to April 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purpose of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for the purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members. Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid the commissioners shall have regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business. . . . (6) This section shall apply to any company: (a) which has, since April 5, 1914, been registered under the Companies Acts, 1908 to 1917; and (b) in which the number of shareholders computed as hereinafter provided is not more than fifty; and (c) which has not issued any of its shares as a result of a public invitation to subscribe for shares; and (d) which is under the control of not more than five persons. . . ."

FINLAY, J., dismissed the company's appeal.

July 3, 1934. The company appealed to the Court of Appeal.

Wilfrid Greene, K.C., and F. Grant for the company.

The Attorney-General (Sir Thomas Inskip, K.C.), The Solicitor-General (Sir Donald Somervell, K.C.), and R. P. Hills, for the Crown, were not called upon.

LORD HANWORTH, M.R.—This case raises what must always be a difficult question, and it is not made less difficult by the somewhat loose expressions which are to be found in the relevant sections of the Acts of Parliament which deal with the problem.

The case arises in this way. A claim was made that for the purposes of assessment to surtax the actual income from all sources of the company, Montague Burton, Ltd. (in liquidation), should for the year ended March 31, 1929, be deemed to be the income of the members of the company, and the amount thereof apportioned among them, those being the appropriate words taken from the Finance Act, 1922, s. 21 (1).

The proceedings that followed on that were these. The company appealed to the Special Commissioners, and on May 11, 1932, they determined that the direction so made should be confirmed. On that the company again, still being not unnaturally dissatisfied with that confirmation, required the appeal to be re-heard by the board of referees, and it was re-heard accordingly. On the re-hearing no oral evidence was called, but the facts which are set out in the Case Stated were placed before the board of referees by reference to the documents, the balance-sheets and the accounts of the company; and the board, having heard the represen-

atives of both parties, determined that the above-named direction should be confirmed. FINLAY, J., dismissed an appeal from the board of referees. From that there is an appeal taken to this court. Incidentally, it may perhaps be wise to recall the fact that in the case of a Case Stated by the board of referees, similarly to the Case which is stated by the commissioners, the decision as to fact of the commissioners and the board of referees is expressly to be deemed to be final and conclusive. All that can be referred to this court is a question of law.

The question that is raised is whether or not the commissioners, as confirmed by the board of referees, have rightly applied s. 21 (1), and whether in the present case it is, upon the facts, one in which an assessment can be made, because there had been what I may call for short an insufficient distribution of dividend.

Section 21 (1) opens with these words :

“With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows.”

At the outset, therefore, it has to be made plain that, *primâ facie*, there is a withholding from distribution of the income of the company, it being predicated that if income has been earned by a company, that income would be distributed in the case of a company which is formed for the purpose of carrying on business. But when that condition is, *primâ facie*, fulfilled, we then have to apply sub-s. (1), which has two parts. It has the part which is contained in the first paragraph, and it is followed by a proviso. Here it may be convenient to say that for the purposes of this case it is unnecessary to deal with the addition which is made to sub-s. (1) by the Finance Act, 1927, s. 31 (1).

I now turn to the facts of this case which have been presented to us in the Case Stated. Montague Burton, Ltd., is a company which is remarkable for the advance and success in the enterprise undertaken by it. The nominal capital of the company was £50,000, divided into 48,000 ordinary shares of £1 each, and 2,000 10 per cent. cumulative preference shares of £1 each. The shares were in effect all held by Mr. M. M. Burton, for he held 41,251 shares in the company, his wife held one share, and a holding company, Henry Holding, Ltd., held 3,750 shares, those shares in Henry Holding, Ltd., belonging to Mr. M. M. Burton, with the result that the totality of the holding of shares was in the hands of Mr. Burton. The company has advanced in the most remarkable way. In 1922 the value of the assets employed in the business was £452,808; they had 107 shops open, and they had 2,550 direct employees. In 1929 those three figures had advanced to: assets £3,876,135, shops open 301, and the direct employees 7,855; in other words, in those seven years the shops open were threefold, or practically threefold, what they had been seven years before. The direct employees were more than threefold, and the impressiveness of the advance of assets from £452,000 to £3,876,000 is revealed by the mere statement of these remarkable figures. Equally, the turn-overs for the following years are significant to the same extent.

The way in which the capital was provided was this: (a) by using the company's profits; (b) obtaining extended credit; (c) obtaining the maximum amount of accommodation from the company's bankers; and (d) from raising mortgages on properties. It may be stated, and it ought to be stated, I think, that throughout it is quite obvious that Mr. Burton has placed not only his own zeal and energy but all his resources to the service of the company; and in that way, by putting more money and more money back into the company, he has accomplished a very remarkable result.

By February, 1929, or thereabouts, it became plain that it would be wise to form a new public company; and on Feb. 27, 1929, a new company called Montague Burton, Ltd., was incorporated; and on Feb. 27 the new company entered into two agreements, one an agreement between the new company and Mr. Burton whereby the new company agreed to purchase, subject to the mortgages thereon, all the properties occupied by the company and which had been purchased by Mr.

Burton as aforesaid, the consideration being the issue to him by the new company of £1,492,428 ordinary shares of 10s. each credited as fully paid up, and (b) an agreement between the company and Mr. Burton and the new company, whereby the new company agreed to purchase the business of the company as at March 31, 1928, which was the date at which the company's last account had been made up, and all the assets including the net profits earned from April 1, 1928, onwards, except the debt owing to the company by Mr. Burton which at that time stood at over £1,000,000 and the sum of £200,000 which is referred to later on in the agreement. The completion of the purchase by the new company under the agreements I have referred to was to take place, and did take place, on March 31, 1929, which was the last day of the accounting year of the company; and the income that we have got to deal with is the income of the company which is attributable to the period from April 1, 1928, which was the last date at which the accounts had been made up, and Feb. 27, when the agreements with the new company were entered into. At that date, Feb. 27, there was a large profit earned, but Feb. 27 was a few days more than a month before the ordinary conclusion of the financial year of the company, and what we have got to consider is the income which had been earned during that period of eleven months.

We are told in the Case that

"During the year ending March 31, 1929 [the full accounting period] the company expended on the current requirements of its business, and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year."

The whole of the net profit of the twelve months was £371,328; the direct expenditure on fixed assets during the year was £220,043; the increase of stock was £306,960; the increase in book debts was £115,643, less a decrease of £12,168, which meant a net sum of £103,475. So that in the matter of the direct expenditure on fixed assets, increase in stock and increase in book debts, there was an accretion during those twelve months of £630,478. It will be noted that there was this net profit in this period down to the end of the year of £371,328. I am not sure that we have got the exact figure stated to Feb. 27, but it does not matter for this purpose. It is quite obvious that in the eleven months there was a large net profit which ultimately when the further month was added reached this figure of £371,328. In fact what was done during that year was that there was a payment of 100 per cent. made on the 45,000 shares which were held by Mr. Burton, but no more. That exhausted a certain sum, but it still left a sum which on the figures I have stated would appear *prima facie* to justify the commissioners taking the view that the opening words of s. 21 were complied with, and that there was a withholding from distribution of income of a company which might or which would otherwise be distributed if the purpose was to make what might be called a normal distribution of the assets of the business of the company. It is said, however, fairly enough, that the mere fact that profit is not distributed but is put back into the company, does not necessarily indicate that income has been withheld from distribution with a view to the avoidance of the payment of supertax. It must be to a large extent a question of degree. The question which arises is one of degree on the figures, and if it is a question of degree, then it is a question of fact, and we cannot say otherwise than that there was evidence on which the commissioners and the board of referees could hold that the facts were such as to justify the application of the considerations which are to be found in the later portion of s. 21 by reason of the fact that in their opinion the earlier portion of the opening words of s. 21 had been complied with. These later portions of s. 21 provide as follows:

"Where it appears to the Special Commissioners that any company to which this section applies has not . . . distributed to its members . . . a reasonable part of its actual income from all sources for the said year or other period, the commissioners may 'serve a notice for the purpose of the assessment and collection of income.'"

Then comes the proviso :

"Provided that in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

It is said by counsel on behalf of the company with great force that even if the Special Commissioners had evidence on which the application of s. 21 was justifiable, yet the facts as found in the Case indicate that what the company has been doing here has been carrying on its business in a manner consonant with its previous history and transactions; that it has first of all provided for the current requirements of the business, and it has also provided for such requirements as may be necessary or advisable for the maintenance and development of that business; and that that question whether it is wise to develop the business, and how it is to be developed, and how it is to be maintained, and what is necessary or advisable for these propositions, are matters which must remain in the hands of the directors, and cannot be overridden by the supervision, it might be said the hasty supervision, of some person acting on behalf of the public revenue. All that is true, and there is no doubt that the company can excuse itself by pointing to the current requirements of the company's business, and the requirements which are necessary or advisable for the maintenance and development of that business, and it can pro tanto cut down what might still be deemed to be available for the purpose of dividend. But those words do not to my mind cancel out or negative the fact that the company has not distributed a reasonable part of its income. All these points must be questions of degree, and so questions of fact. It may be that the company can point to the requirements which they hold to be necessary or advisable for the development of the business and pro tanto justify that a smaller distribution was only possible, or it may be that a smaller sum is left to which the section can be applied; but those words in the proviso do not cut out or negative wholly the considerations which are to be taken into account under the main portion of the subsection.

I therefore turn now to consider, bearing that proviso in mind, whether there is evidence on which the board of referees could reach the conclusion that they have reached. It will be noted that they have stated that these large sums indicated requirements which were advisable for the maintenance and development of the business, but that still leaves the fact that there was this net profit for the year of £371,000, which I take, for convenience of reference, as being the figure under consideration in this case. But side by side with para. 17 and the fact that there is this net profit it must not be overlooked that para. 28 says this :

"It was conceded on behalf of the company before us that the company could have legally made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid."

I read those words, and particularly the use of the word "legally," as indicating that there has been no such depletion of capital as would render it impossible to make a distribution of dividend, or that there was a necessity for the replacement of capital before any such dividend could have been distributed. I think "legally" does not really add much to what I think is the interpretation of the paragraph, that there was available for distribution a sum out of which a dividend could have been paid. I turn, therefore, to see whether there is evidence of that fact, and whether or not the £371,000 was a net profit which had not been exhausted by the payment of dividends; and when I look at the balance-sheet as at March 31, 1929, it is revealed that there was this net profit of £371,328, to which has to be added the balance brought forward from last year, which is £1,362,110, and there was payment of this dividend at the rate of 100 per cent. which exhausted a certain

portion of that balance. In all, it exhausted the sums which are on the other side, which total £90,204.

When those have been taken out of the united sum of the balance brought down and the net profit earned, depleted by the elimination of the sum paid as dividend, it still left the sum of £1,643,235, which was the balance carried forward; and when one looks at the balance-sheet, one finds that in the liabilities there is credited to the item profit and loss account, balance as per account, this sum of £1,643,235. There it is; it is a balance to the profit and loss account. It appears to me quite impossible to say that the attribution of the sums as they were attributed according to the statement made in para. 17 answered the question that has to be answered when the inquiry is made under s. 21 of the Act of 1922. It appears to me that those figures clearly indicate that it is a matter of degree, a matter of discretion, and therefore a matter of fact, and that while one may pay some tribute to the caution with which this company has been managed, and the way in which what are called conservative principles in the matter of distribution of dividend have been adopted, there was abundant evidence on which the commissioners and the board of referees could come to a conclusion that s. 21 did apply, and that fulfilling the terms of the proviso, and giving full effect to the direction that the commissioners are to have regard to the matters to which I have called attention—having regard to those matters, there still remains a sum in respect of which the operative part of sub-s. (1) could be applied, and that it was a case in which the commissioners have had a right, and consequently a duty to fulfil in bringing s. 21 into operation upon the materials before them in this case.

For these reasons I have come to the conclusion that this appeal fails, and must be dismissed with the usual consequences as to costs.

SLESSER, L.J.—I agree.

ROMER, L.J.—I agree. The only question of law submitted for the opinion of this court is whether there was evidence on which the board of referees could come to the determination which is referred to in para. 7 of the special Case. That determination is there described as follows:

“We, the members of the said board, having heard both the company and the Commissioners of Inland Revenue by their duly appointed representatives upon the merits of the said appeal, and having dealt with the case, determined that the above-mentioned direction” [that is, the direction given by the commissioners] “should be affirmed.”

In my opinion, there was ample evidence on which the board of referees could come to the determination that they did; and I go further and say that in my opinion on the facts of the case they could not properly have arrived at any other determination.

The case of the appellant company is this: They say that during the financial year which is in question in the case they spent out of income a sum largely in excess of the net profits that they earned by their trading during that year, and that therefore the commissioners had no right to give any such direction as they purported to give under s. 21 (1) in relation to that income. In other words, that the income having been spent on current requirements of the company's business, and requirements that were necessary or advisable for the maintenance and development of that business, it is taken for ever out of the operation of the subsection, and that no direction could thenceforward be given by the commissioners in relation to it. I disagree with the premises, and if the premises could be accepted, I disagree with the result that is said to flow from them. In the first place, it is not possible for this company, any more than it is possible for any company that has such large financial commitments as this one, to say that any particular item of expenditure is derived from any particular item of incomings, whether of a capital or revenue nature. Take the present case. This company was in the fortunate position of having very good credit with its bank, and at the

beginning of the year in question had an overdraft of £769,087. During that year it increased that overdraft by no less than £573,507. When, therefore, an item of expenditure was authorised by the directors, which was necessary for the current requirements of the company—necessary or advisable for the maintenance and development of its business—one may be quite sure that that expenditure was met by drawing a cheque on the company's bankers, and so increasing the overdraft. In other words, the expenditure was, of course, made out of borrowed money, but even assuming that the company could show that during the year in question it kept a separate account of revenue receipts and revenue payments, and all revenue receipts were paid into a separate banking account, and all revenue payments were made by cheques drawn on that separate banking account, so that they could say, and say truly, that the money spent on these requirements was drawn out of money received on revenue account, it still does not follow that in the end those expenses are going to be thrown on revenue. At most, it can be said that the money has been temporarily taken out of revenue, and it is for the directors to determine at the time when they have to consider the question of what they will do with their profits whether the sum so temporarily taken out of revenue is to be permanently allocated to revenue so as to capitalise the payments—that part of the revenue—or is to be taken out of capital assets. I ventured to give a simple example during the argument of the case, and I will venture to repeat it. A company with a capital of £1,000 spends that money on acquiring a factory, and on that factory, and by means of that factory, during the year it earns £500 net profit. During the year it spends £500 on adding to the machinery or what not of the factory. That £500, of course, has been paid out of the sums received on revenue account, because in that simple case no other sum during the year has been received by the company. At the end of the year the directors have to consider whether they will distribute the £500 profit as dividend among the shareholders or not. That they can distribute it as dividend notwithstanding that they have increased the value of their capital asset by £500 must be admitted. The problem before the directors at the time in question is this: "Shall we distribute this £500 as dividend, borrowing £500 from the bank for the purpose, or shall we devote that £500 to meeting the necessary business requirements of the company?" If they adopt the former alternative, the £500 will be borrowed either from the bank or on mortgage of the factory, and will be distributed, and the balance-sheet at the beginning of the following year will have on the assets side, "Factory, £1,500," and on the liability side, "Capital, £1,000, £500 overdraft," or "£500 due to the mortgagee," as the case may be, contrasted with the balance-sheet as at the end of the preceding year which would have had the same items on the assets side, but on the liability side it would have had £1,000 capital and £500 profit. If in such a case as that the commissioners had considered the question whether that £500 should or should not in reason have been distributed as dividend among the shareholders, they are directed by the proviso to the section to take into consideration the necessary requirements of the company—the current requirements of the company's business, and such other requirements as may be necessary or advisable for the maintenance of that business; and in an ordinary case the directors having acted bona fide, one cannot doubt but that the commissioners would accept the decision of the directors that it was right, instead of distributing the £500 as profit, to capitalise it for the purpose of meeting the current and other requirements of the business of the company. But I see nothing in the section which prevents the commissioners from investigating the question whether in truth and in fact the £500 was necessary to meet the current requirements of the business.

Let me apply that to the present case. During the year in question, as found in the special Case, £630,478 was spent on the necessary business requirements of the company; but, of course, as each item of expenditure was incurred the directors did not call a board meeting for the purpose of ascertaining finally whether that sum should be allocated eventually to revenue or capital.

As I have pointed out, that question does not arise until the directors have to

consider what profit they have made during the year. At the time when the part of the expenditure was incurred it might be and very likely was so that no realisable profit was in the hands of the company at all. The company cannot tell until the end of the financial year what its profit is, and until that time comes, it cannot reasonably determine how much of that profit ought to be applied to the necessary requirements of the company's business instead of being distributed as dividend. As I say, it has been found that the expenditure was an expenditure on the requirements of the company's business, but the point of time that has to be considered is not the point of time at which the expenditure was incurred, but the time when the directors had to determine on a distribution of the whole, or a part or none of the realised profit during the year as dividend; because by the section the commissioners have to consider whether a reasonable part of the income has been distributed by way of dividend. In a case where no dividend is declared at all, that point of time (the time at which the commissioners have to consider the question) is a reasonable time after the expiration of the financial year. Where the directors have declared a dividend, the time at which the question has to be considered by the commissioners is the time at which the directors did declare the dividend, and then the commissioners have to determine whether at that time they declared a reasonable dividend or not, that is to say, whether they distributed a reasonable amount of the profits or not.

In this case, as we know, the company declared a dividend on April 12, 1929. They declared a dividend, as the Master of the Rolls has pointed out, of 100 per cent., exhausting some £45,000 of the £371,000-odd profit that they had made during the year. The question the commissioners have to put to themselves is: Why on April 12, 1929, was not a larger sum declared as dividend? What is the answer to that? I have not heard one. At that time the company had no liabilities to speak of. There was a possible liability in respect of income tax, but to meet that the company had retained £200,000 out of the assets transferred to the new company; so that the company had practically no liabilities or only a small liability of £7,000. There was standing to the credit of its profit and loss account a sum of over £1,000,000 at that time, of which £371,000 represented the profit for the year in question. Why was not more of that £371,000 distributed as dividend? The company had no business whose requirements had to be considered; the business had been sold to a new company. There were no business requirements that the directors could take into consideration, or that the commissioners would have to take into consideration. The only reason why the whole £371,000 was not distributed as profit—and it is admitted that it could have been legally; the assets were there out of which it could have been paid—was either that the directors of whom Sir Montague Burton is one did not like to call on him to pay up the debt which he owed the company, and which had been excluded from the sale to the new company, or for some reason or another they did not like to have the dividend set off against that sum. But that is not a good reason for not having distributed the whole £371,000 in dividend. When you arrive, as I think one must arrive, at the conclusion that the time at which it has to be considered whether the dividend is reasonable or not is the time when the dividend is declared, and that that is the time at which you have to look at the necessary and advisable requirements of the company, it seems to me to follow that there was no reason why the £371,000 should not have been distributed as dividend in this case, and that the direction of the commissioners was properly given.

For these reasons it appears to me that this appeal fails with the consequences that the Master of the Rolls has indicated.

Feb. 6, 1936. The company appealed to the House of Lords.

Sir William Jowitt, K.C., Cyril Radcliffe, K.C., and F. Grant for the company.
The Attorney-General (Sir Thomas Inskip, K.C.), The Solicitor-General (Sir D. B. Somervell, K.C.), and R. P. Hills, for the Crown, were not called upon.

LORD HAILSHAM, L.C.—This is an appeal from an order of the Court of

Appeal affirming a decision of FINLAY. J. FINLAY, J., had answered in the affirmative a question put to him by the Board of Referees, whether there was evidence upon which that board could come to the determination which they actually reached confirming a direction of the Special Commissioners as to the proper method of dealing with the income of the appellant company under provisions of the Finance Act, 1922.

From the Case stated by the Board of Referees we find that the company was formed in the year 1917 to take over a business of the manufacture of clothing and tailoring which was previously carried on by Sir Montague Burton, then Mr. Burton. At the time when the company was formed in 1917 the capital was £5,002, there were creditors to the amount of £13,510, there was an overdraft of about £9,500, and in that year there was a total profit of £2,025. During the next twelve years the company prospered exceedingly, and continued to grow in a very remarkable manner. In the year 1929 we find that the issued capital had grown to £47,002, the creditors had increased to £630,436, there were £212,867 of bills payable, there was an overdraft of £1,342,595, and there was a balance standing at the credit of profit and loss account of £1,643,235.

It appears that the method adopted for financing the business consisted partly of borrowing money from the bank and partly of lending money to Mr. Burton, who then bought long leasehold or freehold premises which were suitable for the shops which the company desired to acquire, and let the shops so acquired to the company. In the case of short leaseholds only, the company itself seems to have acquired the premises; in the other cases they lent money to Mr. Burton, Mr. Burton bought the premises and let them to the company, and the company then spent sums of money in equipping them for the purposes of its business.

In February, 1929, the directors of the company determined to sell their business to a public company. Accordingly agreements were entered into between the new company and the company and between Mr. Burton and the new company, whereby the shops of the company were transferred to the new company; the company was to be treated as having carried on business since April 1, 1928, for the benefit of the new company, and the company retained as one of its assets the debt owing to it by Sir Montague Burton. That arrangement having been come to in February, 1929, the sales and purchases were carried through to completion on March 31, 1929, and in accordance with the scheme which had been decided upon the company was put into liquidation by resolutions of April 20 and May 6, 1929. During the year ended March 31, 1929, the actual profit earned by the company was some £371,000. During that year the company had continued to expand, and during that year £220,043 had been spent on fixed assets, £306,960 had been spent in increasing the stock, the book debts and cash had increased by £103,475, and the loans to Mr. Burton had increased by nearly £54,000.

In addition, it appears that since 1927 the system of buying premises by Mr. Burton with money advanced by the company had been altered. Two new companies had been formed known as Henry Holding, Ltd., and Key Estates, Ltd., Mr. Burton holding all the shares in Henry Holding, Ltd., and Henry Holding, Ltd., owning all the shares in Key Estates, Ltd. The system of acquiring premises had been modified so that during those two years the respondent company lent the money necessary for the purchase of the premises to Henry Holding, Ltd., who apparently financed Key Estates, Ltd., so that that company could become the owner of the shops in which the business was to be carried on.

In those circumstances the commissioners of income tax have reached the conclusion that the company's business had been so carried on as to bring it within the purview of s. 21 of the Finance Act, 1922. It is admitted that the company is a company to which the provisions of that statute are applicable, that is to say, that it answers the definition of sub-s. (6) of that section in that substantially the whole capital and control of the company were vested at all material times in Mr. Burton.

By s. 21 it is provided :

"With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to April 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members: Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the commissioners shall have regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

Then there are other provisions with which we are not concerned as to the distribution of the burden thus imposed.

Pursuant to that section, the commissioners of income tax have determined that this company had not distributed "a reasonable part of its actual income" for the year ended March 31, 1929. There seems in the case to be some little confusion between that date and the date of Feb. 27, 1929, when the agreement for sale was entered into, but the point is irrelevant for the matter which your Lordships are now considering.

From that decision of the commissioners of income tax there was an appeal to the Special Commissioners. They affirmed their direction. There was then an appeal to the Board of Referees, who confirmed the decision of the commissioners, and, as I stated at the beginning of this opinion, the only question which is open to the determination of the court as found in the Case stated by the Board of Referees, is whether there was evidence upon which the Board of Referees could reach that conclusion.

It is argued on behalf of the company that inasmuch as the whole of the sums which were earned by the company, or a sum at least as large as the whole of the sums earned by the company, in any year were expended in the maintenance or development of the business, the section is not applicable. Reliance is placed upon the findings of fact in the Case Stated. The particular findings which are relied upon are to be found in sub-para. (xvii) of para. 4 of the Case Stated :

"During the year ended March 31, 1929, the company expended on the current requirements of its business and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year,"

and then figures are set out which support that conclusion.

Counsel for the company took the point that on its true construction the statute meant that in any case in which the commissioners found that sums equal to the total income of the company for any year had in fact been spent on requirements necessary or advisable for the maintenance and development of the business of the company, then the section did not operate. I do not so understand the section. As I read the section, the direction in the proviso is that one of the relevant factors to which attention must be paid by the commissioners and by the Board of Referees is the fact that the income, or sums equivalent to the income, have been spent on

requirements necessary or advisable for the maintenance and development of the business; but I do not read the proviso as meaning that wherever that happens, then whatever the facts are the commissioners are bound to hold that the requirements of s. 21 have not been complied with.

In the present case it is obvious that if the company had so desired, it could have paid by way of dividend the sums which in fact it lent to Mr. Burton (as he then was), and the only differences which would have been occasioned by that course of business would have been first of all that the company would not have been entitled to receive interest on the money so paid, and secondly that if the money had been paid by way of dividend there would have been a supertax liability on Sir Montague Burton, and the amount of the dividend which would have been available in his hands to buy new premises would have been correspondingly diminished. But I cannot think that the fact that the company chose to carry on its business in that particular way is one which can be disregarded, or which compels the Board of Referees to reach the conclusion for which the company contends.

There is also in the present case a point which is very well put, if I may say so, in the judgment delivered by ROMER, L.J., in the Court of Appeal. At the end of the year ended March 31. 1929, the position was that the company had sold its whole business to the new company; it required no sums for the maintenance or development of the business which it had so transferred; it had an available asset of £1,000,000 in a debt owing from Mr. Burton; and there was no reason—at any rate no reason which seems in any way conclusive—why it should not have declared a dividend, which admittedly it could legally have done, and satisfied the dividend, of course, by writing off a corresponding proportion of the debt owing to it by Sir Montague Burton.

I began my opinion by pointing out that the only question to be determined was whether there was evidence on which the Board of Referees could have reached the conclusion which they did reach. If there was such evidence, then it is not open to this House to review their findings of fact; and in my judgment there was ample evidence. It can only be suggested that they were wrong on the basis that the proviso does not mean merely that the commissioners are to have regard to the facts therein stated, but that they are to treat those facts as in every case conclusive, and that is a meaning which I cannot possibly put upon the language of the statute.

For these reasons, I think that this appeal fails, and I move your Lordships that it be dismissed.

LORD BLANESBURGH.—I am of the same opinion.

LORD RUSSELL.—I also agree that this appeal fails, and I am content to rely upon the judgment of ROMER, L.J., in the Court of Appeal as expressing the reasoning upon which my opinion is founded.

LORD MACMILLAN.—I also agree.

LORD ROCHE.—I agree.

Appeal dismissed.

Solicitors: Maxwell, Batley & Co., for Simpson, Curtis, & Burrill, Leeds;
Solicitor of Inland Revenue.

[Reported by G. P. LANGWORTHY, Esq., and E. J. M. CHAPLIN, Esq.,
Barristers-at-Law.]



